

**IN THE COURT OF APPEAL**  
**ON APPEAL FROM THE HIGH COURT**

**Criminal Appeal No: AAU 0105 of 2011**  
**(High Court Case No: HAC 001 of 2011)**

**BETWEEN** : **ALFAZ KHAN**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Basnayake JA**  
**Jayamanne JA**  
**P. Fernando JA**

**Counsel** : **Ms. T. Leweni for the Appellant**  
**Mr. S. Vodokisolomone for the Respondent**

**Date of Hearing** : **5 February 2016**

**Date of Judgment** : **26 February 2016**

**JUDGMENT**

**Basnayake JA**

[1] This is an appeal by the appellant against the sentence imposed by the learned Judge of High Court on 4 October 2011 (pgs 43-53 of the Record of High Court (RHC). The appellant was charged with four counts of sexual assault contrary to section 210 (1) (a) and rape contrary to section 207 (1) (2) (c) of the Crimes Decree No. 44 of 2009. The

offences were committed against three young boys aged 7, 8 and 11 years. The appellant pleaded guilty to all the charges and was sentenced to a total term of 10 years imprisonment with a non-parole period of 8 years. The appellant appealed against the conviction and the sentence (Notice filed on 24 October 2011). By an amended notice of appeal the appellant limited his appeal to the sentence. This notice contained four grounds. The Court of Appeal in a Ruling (dated 2 June 2014 (pgs. 38-42) allowed only a single ground. Submissions too have been made only on this solitary ground.

### **Submissions of the learned counsel for the appellant**

- [2] The single ground relates to the failure of the trial judge to take into account the appellant's previous good character. At the time of committing these offences in November 2010, the appellant was twenty nine years of age and unmarried. The learned counsel submitted that in mitigation the attention of the court had been drawn to the good character of the appellant stating that the accused is a first offender and has never been in trouble with the law (written submissions dated 14 September 2011 at pg. 177). However no attention was paid by the learned judge and no discount was given on account of the previous good character.
- [3] The learned counsel relied on the following authorities in support of her submissions, namely;
- i. **Sateki Fifita v The State** [2010] FJCA 21;AAU 0024.2009 (2 June 2010) where the Court of Appeal reduced a sentence to 15 months from 2 ½ years. The court held that, "where there is evidence of good character, that good character may operate to reduce the sentence which would otherwise have been imposed". In that case the learned Magistrate had reduced six months on account of guilty plea and mitigating circumstances (not specified) and no discount was specifically allocated for good character.

- ii. **Isoa Saqanaivalu v The State** (Criminal Appeal No. AAU 0093 of 2010 (3 December 2015) a seven years imprisonment with a minimum term of 5 ½ years on a guilty plea for manslaughter was reduced to 6 years without a non-parole period for the reason that the appellant had spent a substantial term of his sentence. One reason for the reduction was the non consideration of good behaviour of the appellant by the trial judge.
- iii. **Laisiasa Koroivuki v The State** [2013] FJCA 15; AAU 0018.2010 (5 March 2013) a sentence of 5 years and 11 months was reduced to 3 ½ years with a non-parole period of 2 ½ years. One of the grounds for the reduction was the failure of the trial judge to consider the good character of the appellant.

[4] In sentencing an offender the court must have regard to the offender's previous good character (Section 4 (2) (i) of the Sentencing and Penalties Decree 2009). Considering the above authorities and the law, the learned counsel for the respondent too conceded in his written submissions that this appeal should be allowed and some concession should be made on account of the previous good character.

#### **The sentence of the learned Judge**

[5] The learned Judge commenced his sentence at 4 years each on the first four offences of unlawful and indecent assault. On the charge of rape the starting point was 12 years. Considering the tender years of the children and repeated acts of the crime another 2 years was added to make the sentence 14 years. On the mitigating factors a reduction of 4 years was made thus making the sentence 10 years.

#### **The Facts of the case**

[6] The children involved were 7, 8 and 11 years of age at the time. They lived in the neighbourhood. And thus the appellant was known. The offences took place in the house

of the appellant. The boys had come to the appellant's house on invitation. In the house the appellant had massaged the backs of the victims and in return got his back massaged. Thereafter the victims were asked to lie down on bed. The appellant laid over them and kissed them. The appellant also had shown some of the victims his erected penis and got some of them to lick it. In addition to the above activities the appellant got a 7 year old boy to suck his penis and in turn the appellant had sucked the penis of the boy. The appellant had remunerated them to keep it a secret.

#### **The sentence prescribed by law**

- [7] The sentence prescribed under section 210 of the Crimes Decree for the offence of sexual assault is 10 years. The sentence prescribed under section 207 for rape is life imprisonment.

#### **Anand Abhay Raj v The State [2014] FJSC 12; CAV 0003.2014 (20 August 2014)**

- [8] This is an interesting case decided by the Supreme Court. His Lordship the Chief Justice (with two Justices concurring) reiterated the tariff for rape of a child as between 10 and 16 years of imprisonment. This calculation was after perusing several previous judgments (**Mutch v State** (Cr. App. AAU 0060/99), **Mani v State** (Cr. App. No. HAA0053/2002L), **State v Saitava** (Cr. Case No. HAC 10/07), **State v Tony** (Cr. App. No. HAA 003/08)). The High Court judgment that was under consideration by the Supreme Court was delivered on 7 June 2010. The appellant in that case was sentenced to a term of 16 years imprisonment on rape charge with a non parole period of 12 years and 3 years on the charge of sexual assault. His Lordship had endorsed **State v AV** [2009] FJHC 24; HAC 192.2008 (21 February 2009) where it has been said "*Rape is the most serious form of sexual assaults on children...Sexual offenders must be deterred from committing this kind of offences.*"
- [9] His Lordship also approved the starting point at 12 years and held that, "No criticism can be made of the starting point selected. It was within the tariff". His Lordship also endorsed the statement of the Court of Appeal that "Rape of juveniles (under the age of

18 years) must attract a sentence of at least 10 years and the accepted range of sentence is between 10 and 16 years”.

[10] It becomes clear now that the learned Judge in the case under review had given a sentence at the lowest end of the tariff. Admittedly the learned Judge had not given a specific discount for the previous good conduct. However the learned Judge had reduced 4 years on account of the following factors, namely:

- Age
- Unmarried
- Remorseful
- Pleaded guilty
- Period in remand
- The appellant himself was subjected to abuse in childhood.

[11] I am of the view that the period of 4 years on account of the said factors is excessive and would reduce it to 3 years instead. I would consider a reduction of a period of one year for the previous good behaviour. The learned counsel for the appellant could not show reason why the appellant should have been given a sentence lower than the lowest end of the tariff. The learned High Court Judge was in fact more generous by imposing a non parole period of 8 years imprisonment.

[11] Due to the reasons given above I am of the view that this appeal on the sentence should be dismissed.

**Jayamanne JA**

[12] I agree with the reasons and conclusion of Basnayake JA

**P. Fernando JA**

[13] I too agree with the reasons and the conclusion of Basnayake JA

**The Order of the Court is:**

*Appeal against sentence is dismissed.*



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**Hon. Mr. Justice E. Basnayake**  
**JUSTICE OF APPEAL**

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**Hon. Mr. Justice S. Jayamanne**  
**JUSTICE OF APPEAL**

A handwritten signature in blue ink, appearing to be "P. Fernando".

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**Hon. Mr. Justice P. Fernando**  
**JUSTICE OF APPEAL**