IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0080 of 2015
(High Court HAC 192 of 2011)

BETWEEN : **THE STATE**

Appellant

AND : **SAKIUSA VOLATUI**

Respondent

Coram : **Calanchini, P**
Chandra, JA
Goundar, JA

Counsel : **Mr. L J Burney for the Appellant**
Ms. S Nasedra for the Respondent

Date of Hearing : **2 July , 2018**

Date of Judgment : **4 October, 2018**

JUDGMENT

Calanchini, P

[1] I have read in draft from the judgment of Chandra JA and agree that in this case the appeal should be dismissed.

Chandra, JA

[2] This is an appeal by the State against the sentence imposed on the Appellant by the High Court on the basis that the sentence was unduly lenient.

[3] The Respondent was charged with one count of rape contrary to section 207(2)(b) of the Crimes Act, 2009.

[4] He pleaded guilty on the eve of the trial, was convicted, and on 15 June 2015, he was sentenced to 5 years' imprisonment without any non-parole period.

[5] The State sought leave to appeal against sentence on the following grounds:

> *"1. That the learned sentencing judge erred in law when he failed to fix a non-parole period when sentencing the respondent.*
> *2. That the learned sentencing judge erred in principle when he allowed excessive discount to the mitigating as per the circumstances of the case.*
> *3. That the learned sentencing judge erred in principle when he failed to give a sentence within the tariff in such cases which led to the sentence being manifestly lenient considering the circumstances of the case."*

[6] A single Judge of the Court of Appeal granted leave to the State to appeal against the sentence.

[7] The brief summary of facts as extracted from the summary of facts agreed to by the Respondent is as follows:

> *"On 20th August 2011, at about 1 p.m. the victim aged 4 years old, had been going to his cousin's place when he heard the Respondent calling him into his house. The victim had gone inside the bedroom where the Respondent had pulled down the victims' pants and told him to turn his back towards him and then the Respondent had*

insured his finger inserted inside the victim's anus and pushed in and out two to three times. The victim had felt pain and had started to cry. Around the same time on hearing his grandmother calling out for him, the Respondent had taken out his finger from the victim's anus and had begun to blow his anus in order to relieve the pain. The Respondent had asked to victim to stop crying and had asked him if he wanted to have juice or ice block, but the victim had not answered whereupon the Respondent had opened the door and the victim had gone back to his house. When the victim's mother was bathing him on that day, he had told his mother what the Respondent had done to him. Thereupon the victim's mother had reported the matter to the Police. Medical examination of the victim had revealed that there was laceration at 12 o'clock position of the anal opening. The Respondent when arrested and interviewed had admitted committing the offence."

[8] The principles on which the sentence can be interfered with by an Appellate Court have been set out in the decision in **Bae v. The State** [1999] FJCA 21 ; AAU 15 of 1998, 26 February 1999. The Court stated:

> *"It is well established law that before this Court can disturb the sentence; the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. The error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v. The King**) [1936] HCA 40; (1936) 55 C.L.R 499)."*

[9] According to **Bae** what has to be seen is whether the learned High Court Judge erred in sentencing the Respondent. The Appellant has submitted the following matters in relation to the grounds of appeal:

1. Departing from the established tariff.
2. Nature of penetration.
3. Relevance of motive.
4. Victim impact report.

5. Extreme youth of the offender

6. Non-imposition of a non-parole period.

Departure from established tariff

[10] The established tariff for child rape is 10 to 16 years imprisonment as set out in **Anand Abhay Raj v State** [2014] FJSC 12; CAV003.2014 (20 August 2014). The learned trial Judge referred to the established tariff set in **Anand Abhay Raj** explored the possibility of considering whether in taking into account the special circumstances of the case and referred to section 11(1) of the Constitution of Fiji which provides:

> *"Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhuman, degrading or disproportionately severe treatment or punishment ...."*

And emphasized on the phrase "disproportionately severe treatment or punishment".

[11] The learned trial Judge appears to have considered the sentencing of the Respondent on the basis of the established tariff being disproportionate when considering the circumstances of the case.

[12] The learned trial Judge in setting out his reasons for departing from the established tariff stated that it was a case where the Respondent had done was penetration of the anus of the victim with his pointing finger. That in a rape case of penile penetration, the act speaks for itself and mentality of the perpetrator can easily be understood. That when the penetrating object is something other than the penis, it is not easy to comprehend what type of mentality the perpetrator possessed at the time of offending, thereby traversing the distinction between penile rape and other types of rape such as digital rape.

[13] It is clear that in Fiji there is no distinction drawn between penile rape or digital rape as stated by Madigan J in **State v Ken** (2014) HAC 53 of 2014 :

> *"This court does not accept Mr. Paka's attempt to distinguish those cases on the basis that they were penile rapes while instant case is a case of digital rape., There is no distinction in the legislation, and therefore no distinction in sentence, nor should there be. An uninvited invasive sexual assault on a person be he/she a child or adult is a trauma of the most serious kind, and no distinction can be made in sentence be it a penis, finger or an object."*

[14] The manner in which learned trial Judge proceeded to consider the nature of rape was therefore a misconception as there is no distinction between penile rape or digital rape.

[15] The learned trial Judge also considered the motive of the Respondent in his judgment. He stated that the Respondent was apparently angered by the actions of the victim and posed the question as to whether there should be a differential treatment when a person is activated by lust as against a person activated by anger.

[16] Although it would appear that there is a difference in the motive of a person activated by lust and a person activated by anger, the question at hand is the result of such activity. The activity resulted in the commission of a sexual offence, namely rape. It is often said in sexual offences cases, rape is rape, no matter how it is committed. In such circumstances the motive of the perpetrator would not be a relevant factor in the process of sentencing. In fact in this case, taking into consideration that the victim was 4 years old and what had angered the Respondent was that he was awoken from his sleep should be considered very much against him, when children of such age are generally known to be of innocent mischievous dispositions, and that the Respondent should have acted with much restraint when he apparently was familiar with the victim, who was a child in the neighborhood. Therefore the learned trail had erred in taking into account the motive of the Respondent in the sentencing process.

[17] The learned trial Judge also commented on the absence of a victim impact report as being an indication that victim's natural upbringing has not been considerably impaired. This was an erroneous assumption by the learned trial Judge as there was no evidence as regards the effect of the Respondent's act on the upbringing of the child victim. Usually such victims live with such trauma which would impact on their lives and as Nawana J stated in **State v Anthony** [2010] HAC 151 "this kind of immoral act on a little girl of MB's standing is bound to yield adverse results and psychological trauma the effect of which is difficult to foresee and assess even by psychologists or sociologists".

[18] The learned trial Judge had referred to the fact that the Respondent would not have been given a custodial sentences if he had been 3 months younger at the time of offending.

[19] The Respondent was 18 years of age at the time of offending and it would have been unfortunate that it was only three months since reaching that age, however he would be treated as an 18 year old person for purposes of the law and would have to be sentenced as an adult.

[20] The learned trial Judge cited Section 4(1) (a) of the Sentencing and Penalties Act, 2009 to the effect that one of the purposes for which sentencing may be imposed by court is to punish the offenders to an extent and in a manner which is just in all the circumstances. He also cited the decision in **Kasim v. State** (1994) FJCA 25; AAU 0021 i93s (27 May 1994) which was a pre-2009 decision and at a time when the starting point was considered as 7 years. He had emphasized on the following statement in the said judgment of the Court of Appeal as being the pragmatic approach that a trial judge should take in sentencing rape offenders:

> *".....We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point."*

[21] To strengthen his sentencing process in the case the learned trial Judge had also cited two decisions of the High Court, **State v. Nayate Vatu** [2015] FJHC 263; HAC 231.2011(23 April 2015) and **State v. Seniqai** (2011) FJHC; HAC 010.2011 (8th July 2011).

[22] In the **Seniqai** case which was a decision prior to the Supreme Court decision in **Anand Abhay Raj**, Goundar J had sentenced an 18 year old rape accused for 5 years of imprisonment without fixing a non-parole period taking into account his youth.

[23] In **Nayate Vatu**, Madigan J sentenced a 21 year old for seven years imprisonment for two counts of juvenile rape with a non-parole period of five years. Madigan J in the sentencing judgment had stated

> *"... I am aware that this final sentence of seven years is below the tariff for rape of a child and it is in no way meant to distort the tariff already recognized by the Supreme Court. It is a lenient sentence in recognition of the youth of the accused and his remorseful plea of guilty saving the child from giving evidence."*

[24] In the present case, the learned trial Judge concluded by stating that the purpose of the sentence is to denounce the offence of rape and that he was not fixing a non-parole period due to his youth and clean record.

[25] In arriving at the final sentence of 5 years, the learned trial judge chose a starting point of 10 years, added2 years for the aggravating factors, then deducted two years for the mitigating factors of clean record, his duty to family, and his obvious remorse. For his extreme youth coupled with his potential for rehabilitation and his plea of guilty saving the child from giving evidence and being cross-examined, he deducted a further five years, resulting in a sentence of 5 years imprisonment.

[26] It was submitted on behalf of the State, that the learned trial Judge did double counting in arriving at the final sentence in that he had included his clean record and extreme youth in the mitigation as well as for not imposing a non-parole period. This process therefore of double counting amounts to an error in the sentencing process.

[27] It is quite apparent that the learned trial Judge was bent on imposing a sentence below the established tariff. In a situation of this nature the question that comes up for consideration is whether the final sentence should always be within the established tariff or should the process of sentencing take into account the established tariff, apply it when choosing the starting point and then do the necessary adjustments in arriving at the final sentence.

[28] In the present case, the learned trial Judge used the established tariff in choosing the starting point and chose the lower end of 10 years and made the adjustments for the aggravating and mitigating factors. However, as shown above, there was double counting in arriving at the final sentence specially in not fixing a non-parole period. It was an instance of recognizing the established tariff and working out a final sentence which was below the tariff. The learned trial Judge also gave reasons for arriving at the final sentence. Would this process that was adopted distort the established tariff?

[29] It is the submission of the State that the learned trial Judge erred in imposing an unduly lenient sentence in all the circumstances of the case.

[30] There would be no distortion of the established tariff if the sentencing Judge recognizes and makes use of the tariff to start the sentencing process and applies the correct criteria regarding the aggravating and mitigating factors in arriving at the final sentence. In such an exercise, the final sentence may sometimes go below or above the established tariff. In the present case as shown above some of the matters considered by the learned trial Judge

would not be applicable, such as the absence of the victim impact report, motive and nature of penetration. Further there has been double counting when not imposing a non-parole period.

[31] However, the offending had taken place in August 2011, and he was convicted and sentenced on his pleading guilty on 15 August 2015. A period of 4 years had passed by during which time the Respondent would have had the mental anguish of facing a conviction having admitted the offence in his caution interview and assisting the Police in the investigation. Thereafter he had been incarcerated and has been so for about three years. These are factors which weigh in favour of the Respondent and would deter this Court from interfering with the sentence even though certain errors have been seen in the sentencing judgment which has been discussed above.

[32] At the time of offending the Respondent had been just past 3 months of his 18th birthday. If he had been under 18 he would have received a maximum of 2 years imprisonment. In such a situation having just got over his 18th birthday to face a five years term of imprisonment. The Respondent who would now be 26 years has lost the prime of his life as a youth. This would necessitate a situation where some leniency in sentencing had to be shown, even though he had to be convicted as an adult. In England, in **R v. Milberry** and Others [2003] 2 Cr. App. R.(S) 142 it was accepted that sentences on young offenders would be appreciably shorter than for older offenders. Therefore a sentence of 5 years without the imposition of a non-parole period would be considered as being justifiable in the circumstances of the case.

[33] Taking into account all the circumstances of the case it would meet the ends of justice if the sentence of 5 years imposed by the learned trial Judge be allowed to stand.

Goundar, JA

[34] I agree.

Orders of Court:

The Appeal of the Appellant is dismissed.

Hon. Justice William D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Justice Suresh Chandra
JUSTICE OF APPEAL

Hon. Justice Daniel Goundar
JUSTICE OF APPEAL