IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 41OF 2012
[High Court Criminal Case No. HAC 28 of 2011]

BETWEEN	**:**	**THE STATE**
		Appellant
AND	**:**	**JAMALU DIN**
		Respondent
Coram	**:**	**Prematilaka, JA** **Fernando, JA** **Nawana, JA**
Counsel	**:**	**Ms. Madanavosa. P for the Appellant** **Respondent absent and unrepresented**
Date of Hearing	**:**	**10 September 2019**
Date of Judgment	**:**	**03 October 2019**

JUDGMENT

Prematilaka, JA

[1] This appeal arises from the sentence following conviction of the appellant on one count of attempted rape contrary to section 208 of the Penal Code.

[2] The Amended Information dated 05 March 2012 alleged that the appellant on 05 January 2011 at Nadi in the Western Division had attempted to insert his penis into the mouth of P (name withheld) who was 12 years old. The appellant had been produced before the Magistrates Court on 27 January 2011 and he had appeared in the High Court on 18

February 2011. He had been originally charged with having committed rape and the appellant had pleaded not guilty to the charge. The charge had been reduced to attempted rape 05 March 2012 but the appellant had still pleaded not guilty but on 03 May 2012 having consulted his counsel, he had pleaded guilty and admitted the summary of facts filed by the prosecution.

[3] The learned High Court Judge had sentenced the appellant to 03 years imprisonment and suspended it for 07 years. A fine of $2000.00 had also been imposed on the appellant with a default term of 06 months and 20 days of imprisonment on the sole count of attempted rape contrary to section 208 of the Penal Code. The appellant had paid the fine fully.

[4] The State had filed a timely Notice of Appeal seeking leave to appeal against the sentence pursuant to section 21(2) (c) of the Court of Appeal Act. Altogether 03 grounds of appeal had been urged. On 29 January 2016, the single Judge had granted leave to appeal in general against the sentence without referring to each ground separately.

[5] The grounds of appeal are as follows

> *'1. That the learned Sentencing Judge erred in law in failing to consider lack of remorse as an aggravating factor as is required pursuant to the provision at Section 4(2) (g) of the Sentencing and Penalties Decree, 2009.*
>
> *2. That the learned Sentencing Judge erred in principle in giving undue weight to the factors pleaded in mitigation.*
>
> *3. That the learned Sentencing Judge erred in principle in failing to adequately consider the seriousness of the offence committed; the grave breach of trust; lack of remorse; and the need to protect public confidence in the sentencing process when arriving at his decision to suspend the sentence.'*

Preliminary observations

[6] The State had not been able to notify the respondent of the date of hearing as directed by this court on 19 July 2019 as he could not be located at his last address at J.P. Maharaj Street, Nakasi and for the same reason the State had also not been able to serve the copy records on him. Even his neighbours at Nakasi had not been able to offer any help to

contact him. Neither had he been contactable at the address given in the caution interview namely Islamic Education Centre at Sabeto. All attempts to contact him over the telephone numbers provided by him too had failed.

[7] The respondent had appeared before this Court in person on 04 April 2019. Thereafter, the Court of Appeal registry had made contact with him on 09 July 2019 over the phone (2150080) followed by a fax massage (8813168) on 17 July and informed him of the next call over date of 19 July, and the respondent had confirmed that he would be present on that day. Nevertheless, he had been absent on 19 July where the hearing of the appeal had been fixed at 11.30 a.m. on 10 September 2019. The registry had again made three unsuccessful attempts to contact the respondent at 8.45 a.m. on 10 September 2019 to inform him of the date of hearing.

[8] In the above circumstances, it appeared to this Court that no useful purpose would be served by allowing more time to make further attempts to contact the respondent and accordingly, the appeal was taken up for hearing in his absence.

Facts in brief

[9] The victim had been a 12 year old boy at the time of the incident which had occurred in a religious institution called Sabeto Muslim School League Mosque where the victim had been a boarder and expected to learn the Holy Koran/Quran and other tenets of Islam. The respondent had been one of the instructors. According to the summary of facts admitted by the respondent, he had taken the victim along with four more students home after a trip to Lautoka town and while the other students were playing soccer he had grabbed the victim, who was feeding chicken, around his waist from behind, turned him around and kissed him on the lips. The victim had managed to turn his head away but the respondent had forced the victim to go down on his knees. He had then unzipped his trousers and tried to force open and penetrate the victim's mouth with his penis. The victim had resisted and escaped to return to the boarding house. He had immediately complained to another person at the institution and then to his mother over the phone. The next morning the victim's parents had confronted the respondent with the allegation. The respondent had been apologetic and pleaded with the parents not to report the matter

to the police. The parents had withdrawn their son from the institution and filed a complaint with the police.

[10] I shall now proceed to consider the grounds of appeal.

01st ground of appeal

'That the learned Sentencing Judge erred in law in failing to consider lack of remorse as an aggravating factor as is required pursuant to the provision at Section 4(2)(g) of the Sentencing and Penalties Decree, 2009.'

[11] The learned High Court Judge had considered the following as aggravating factors in the sentencing order dated 21 May 2012 and lack of remorse was not one of them.

a. The victim was helpless boy aged 12 years;
b. Severe breach of trust, of Teacher and student relationship;
c. Because of your conduct the child has to move to another school;
d. You betrayed the position of a Teacher who teaches Islam.

[12] Section 4(2)(g) of the Sentencing and Penalties Decree, 2009 states that in sentencing offenders a court must have regard to the conduct of the offender during the trial as an indication of remorse or the lack of remorse.

Plea of guilty and remorse

[13] Every accused clothed with the presumption of innocence has the right to plead not guilty and to require the prosecution to prove his or her guilt beyond a reasonable doubt. Yet, a guilty plea amounts to an admission of the essential elements of the offence(s) with which he or she is charged (vide **R. v. Cairns** [2013] EWCA Crim 467, at para. 4). The courts have recognized that a plea of guilt by an offender is generally considered a factor capable of reducing the harshness of a punishment to be imposed by a sentencing court. In **R. v. Caley & Others (guilty pleas)**, [2012] EWCA Crim 2821, at para. 1, the court described it as *"the long established practice in sentencing which recognizes that a distinction should ordinarily be drawn between a defendant who admits guilt and one who does not.'* The effect of recognizing the role of a guilty plea in sentencing means, with respect to the accused who is convicted after pleading not guilty, that the leniency

which might otherwise be available to such an accused is unavailable. This is not however an aggravating factor or a penalty for not pleading guilty. In **R. v. A.(K.)** (1999), 137 C.C.C. (3d) 554 (Ont. C.A.), at p. 570 it was held that '*…an increased sentence is not justified because the accused has pleaded not guilty'* and in **R. v. Jamieson** [1997] O.J. No. 1111 (C.A.), at para. 2 it was said '*a plea of not guilty [is] not [an] aggravating facto[r].'*

[14] There is no presumptive implication merely arising from an offender's decision to plead guilty that he or she is in fact genuinely remorseful. Indeed, there may be only a weak correlation between a plea of guilty and genuine remorse for committing a criminal offence. **R. v. Caley** (supra) it was held

> *'… a plea of guilty may of course be an indication of remorse for the offence, but it may not be and the two things are not the same. A defendant may indeed regret his offence, and, beyond that, it may be clear that he wishes to avoid doing it again. Equally, however, he may plead guilty not because he regrets committing the crime but simply because he does not see a way of avoiding the consequences …… it accords with elementary instincts of justice to recognise the difference between two defendants, one of whom is defiant and requires the public to prove every dot and comma of the case against him and the other of whom accepts his guilt.'*

[15] There is no mitigation or remorse when an accused puts the complainant through the misery, fear, and embarrassment of having to go through the trial, give evidence, repeat and relive those painful vile moments again and be cross-examined and himself does not give evidence and no credit in the sentence would be awarded for any alleged remorse (vide **Drotini v The State** AAU0001 of 2005S:24 March 2006 [2006] FJCA 26 and **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12). Remorse has also been considered as an expression of accepting responsibility by an accused for his conduct and seeking forgiveness from the victim without accepting responsibility has not been treated as a genuine acknowledgement of contrition. By not accepting any responsibility for the crime, an accused deprives himself of credit that is given to offenders who express remorse (vide **State v Takiveikata** HAC005 of 2004**:** 4 March 2011 [2011] FJHC 134).

[16] In **Taqa v State** AAU0042 of 2007: 26 June 2009 [2009] FJCA 11 admitting the offence to the police and pleading guilty at the first reasonable opportunity were considered as showing genuine remorse.

> *'The appellant showed genuine remorse by admitting the offence to the police and by pleading guilty at the first reasonable opportunity. He not only saved the court time and the resources but relieved the complainant from giving evidence of sexual nature which would have been a distasteful experience for her. The appellant was a person of previous good character and came from a disadvantaged background. We take the view that the discount of two years did not sufficiently account for these mitigating factors.' (emphasis added)*

[17] On the other hand Section 4(2)(f) of the Sentencing and Penalties Decree, 2009 requires the court to have regard as to whether the offender pleaded guilty to the offence and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so. Among other things, the reduction of sentence on account of an early guilty plea has been justified on the basis that is a reward for keeping the machinery of justice moving and the cost of administering the criminal justice system down. In **R. v. Beier** [1995] O.J. No. 2552 (C.A.), at para. 2 it was held that the guilty pleas *'saved the state a tremendous expenditure of resources'* and in **R. v. Johnson and Tremayne** [1970] 4 C.C.C. 64 (Ont. C.A.), at p. 67 it was said that the accused *'pleaded guilty and thus saved the community a great deal of expense'.* Saving (i) the justice system the time and expense of a trial, (ii) an enormous amount of time and money in terms of police and court resources in bringing this matter to trial (iii) considerable cost (iv) victims and witnesses from concern about having to give evidence (v) in preparation of trial-ready evidence by the Crown and in practice (vi) in the assembly and service of evidence have all been held to be justifications for credit given to an early plea of guilty (see **R. v. Doucette** 2015 PECA 5, and ***Caley*)**.

[18] In **R v DeHam** [1967] 3 All E. R 618 it was held that *'It is undoubtedly right that a confession of guilt should tell in favour of an accused person for that is clearly in the public interest.'* However, in my view it is not desirable to prescribe as a hard and fast rule a precise or mathematical formula or quantum of credit such as one-third or a percentage of 20 – 30 that should be given to a plea of guilty though some consistency is called for. In **R. v. Faulds** (1995), 20 O.R. (3d) 13 (C.A.), at p 17 the court stated *'[t]he*

effect of a guilty plea in setting the appropriate sentence will vary with the circumstances of each case'.

[19] It is possible to take into account clear remorse as a separate and additional factor in sentencing but remorse cannot not be divorced entirely from the question of plea (vide **R. v. Barbey (Bradely William)** [2008] 2 Cr. App. R.(S) 37). In **R v Rahuel Delucca** [2010] EWCA Crim 710; **R. v. Murray**; **R. v. Stubbings** [2010] Crim. L. R. 584, CA the importance of judges looking at the sentencing in the round, and reflecting remorse or lack of it in the sentence was emphasised and it was explained that this can be done either by factoring it into the allowance made for personal mitigation or by refusing to increase the discount for a guilty plea. ***Taqa*** is an example where remorse, early plea of guilty and previous good character were considered together in the matter of sentence.

[20] Therefore, section 4(2)(g) of the Sentencing and Penalties Decree, 2009 does not permit or require lack of remorse *per se* on the part of an accused to be treated as an aggravating factor in sentencing offenders. What it requires is for the court to have regard to the conduct of the accused during the trial either indicating remorse or lack of it. Obviously any conduct amounting to a genuine expression of remorse deserves some credit as a mitigating factor in the mater of sentence. However, what conduct would be considered as an act of remorse and what sort of credit such remorse would attract would vary from case to case. No mathematical formula should be prescribed in that regard. It is not possible; nor is it logical to make an exhaustive list of acts of remorse either. Thus, while genuine remorse in the form of a mitigating factor would attract some discount or credit in reducing the final sentence, in my view lack of remorse *ipso facto* should not be taken as an aggravating factor to enhance the sentence.

[21] Therefore, there is no merit in the first ground of appeal.

02nd ground of appeal

'That the learned Sentencing Judge erred in principle in giving undue weight to the factors pleaded in mitigation.

[22] The learned trial Judge had considered the following as mitigating factors.

a. The appellant is a 01st offender;

b. The appellant pleaded guilty;
c. The appellant is married with 03 children;
d. The appellant is the sole bread winner of your family;
e. The appellant has just obtained PSV licence and started working as taxi driver.

[23] The learned High Court Judge having considered that the tariff for attempted rape is from 12 months imprisonment to 05 years imprisonment (vide **Aunima v State** [2001] FJLawRp 50; [2001] 1 FLR 213 (27 June 2001); HAC0033J of 2001s: 27 June 2001 [2001] FJHC 105) had taken 03 years as the starting point. He had added 04 years for the aggravating factors and reduced 04 years for the mitigating factors arriving at the ultimate sentence of 03 years imprisonment.

[24] Clearly the second [(b)] and third [(d)] aggravating factors set out in paragraph 11 above are similar and overlap with each other and there is double counting of aggravating factors. Therefore, the appellant should not have suffered more than he deserved by the addition of 04 years to the sentence on account of aggravating factors.

[25] At the same time third [(c)], forth [(d)] and fifth [(e)] mitigating factors set out in paragraph 22 above cannot be considered as mitigating the sentence as they relate to the appellant's personal circumstances. The Supreme Court in **Raj v State** CAV0003 of 2014:20 August 2014 [2014] FJSC 12) indorsed the following remarks made in **Raj v State** AAU0038 of 2010: 5 March 2014 [2014] FJCA 18 by the Court of Appeal

> *'[18] .... we do not consider that allowance should have been made for family circumstances. To that extent the appellant was afforded leniency that he did not deserve.'*

> *'[20] Legitimate aspects of mitigation will include a clear record, proven remorse, mental disorder but not family circumstances because the perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit.'*

[26] Therefore, it is clear that the appellant had been given leniency by way of 04 years of reduction from the sentence on account of his personal circumstances that he did not deserve.

[27] Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

(Vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936) 55 CLR 499 as adopted in **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21)

[28] Therefore, as complained by the State the learned High Court Judge had clearly allowed extraneous or irrelevant matters to guide or affect him in both aggravating and mitigating circumstances and therefore erred in principle in giving undue weight to the factors pleaded in mitigation. However, considering all the circumstances I am of the view, as the Court of Appeal remarked in ***Drotini,*** that though the facts of this case may have (as opposed to 'should have') merited a sentence of over 03 years I do not consider the sentence imposed so manifestly lenient that I should interfere as quantum alone can rarely be a ground for the intervention of this Court (see the SC decision in ***Raj***). Similarly the appellate court would not interfere with the sentence because it is at a high level but not so excessive as to justify its reduction [vide **Buli v State** [2001] FJLawRp 43; [2001] 1 FLR 202 (24 May 2001].

[29] Therefore, I would uphold the State's complaint regarding the sentence based on the second ground of appeal but would not act under section 23(3) of the Court of Appeal Act to quash the sentence imposed on the appellant and pass any other sentence.

03rd ground of appeal

> '*That the learned Sentencing Judge erred in principle in failing to adequately consider the seriousness of the offence committed; the grave breach of trust; lack of remorse; and the need to protect public confidence in the sentencing process when arriving at his decision to suspend the sentence.'*

[30] In suspending the sentence of 03 years of imprisonment for seven years the learned High Court Judge had said in the sentencing order as follows

'Considering all your mitigating circumstances especially your young children I suspend your sentence for a period of 7 years. If you commit any offence within the operational period you will be serving this sentence together with the punishment in the subsequent offence.'

[31] Section 26 (1) of the Sentencing and Penalties Act states on suspended sentences of imprisonment that:

'On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.'

[32] The Court of Appeal in **State v Chand** AAU0027U of 2000S: 1 March 2002 [2002] FJCA 50 *in extenso* dealt with the application of suspended sentences and useful guidelines drawing helpful guidance from **R v. Petersen** [1994] 2 NZLR 533. It is worthwhile quoting the observations one again lest they may have been forgotten with the passage of time.

"The principal purpose of [the relevant section] was to encourage rehabilitation and to provide the Courts with an effective means of achieving that end by holding a prison sentence over an offender's head. It was available in cases of moderately serious offending but where it was thought there was a sufficient opportunity for reform, and the need to deter others was not paramount. The legislature had given it teeth by providing that the length of the sentence of imprisonment was fixed at the time the suspended sentence was imposed, that it was to correspond in length to the term that would have been imposed in the absence of power to suspend, and that the Court before whom the offender appeared on further conviction was to order the suspended sentence to take effect, unless of the opinion it would be unjust to do so. So, there was a presumption that upon further offending punishable by imprisonment the term previously fixed would have to be served (see p.537 line 4).

The Court's first duty was to consider what would be the appropriate immediate custodial sentence, pass that and then consider whether there were grounds for suspending it. The Court must not pass a longer custodial sentence than it would otherwise do because it was suspended. Equally, it would be wrong for the Court to decide on the shorter sentence than appropriate in order to take advantage of the suspended sentence regime (see p.538 line 47, p.539 line 5). R V. Mah-Wing (1983) 5 Cr App R (S) 347 followed.

The final question to be determined was whether immediate imprisonment was required or whether a suspended sentence could be given. If, at the previous stages of the inquiry, the Court had applied the correct approach, all factors

relevant to the sentence were likely to have been taken into account already; the sentencer must either give double weight to some factors, or search for new ones which would justify suspension although irrelevant to the other issues already considered. Like most sentencing, what was required here was an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation (see p.539 line 8, p.539 line 37).(emphasis added)

[33] The Court of Appeal specifically quoted the following passages from ***Petersen*** as to the factors needing to be weighed in choosing immediate imprisonment or suspended. They are broadly related either to the accused or the offence and call for a holistic approach on the part of the sentencing judge.

"Thomas at pp. 245-247 lists certain categories of cases with which suspended sentences have become associated, although not limited to them. We do not propose to repeat those in detail since broadly all can be analysed as relating either to the circumstances of the offender or alternatively the offending. In the former category may be the youth of the offender, although this does not mean the sentence is necessarily unsuitable for an older person. Another indicator may be a previous good record, or (notwithstanding the existence of a previous record, even one of some substance) a long period of free of criminal activity. The need for rehabilitation and the offender's likely response to the sentence must be considered. It is clear that the sentence is intended to have a strong deterrent effect upon the offender; if the latter is regarded as incapable of responding to a deterrent the sentence should not be imposed. As to the circumstances of the particular case, notwithstanding the gravity of the offence, as such, there may be a diminished culpability, arising through lack of premeditation, the presence of provocation, or coercion by a co-offender. Cooperation with the authorities can be another relevant consideration. All the factors mentioned are by way of example only and are not intended as an exhaustive or even a comprehensive list. The factors may overlap and more than one may be required to justify the suspension of the sentence in any particular case. Finally, any countervailing circumstances have to be considered. For example, in a particular case the sentence may be regarded as failing to protect the public adequately.

In concluding our consideration of the principles, we wish to add this. Understandably, the form of the legislation requires the sentencer to pass through a series of statutory gates, before reaching the point of availability of a suspended sentence. Subject to that however, like most sentencing what is required in the end is an application of commonsense judgment, in which the sentencer must stand off and decide whether the imposition of a suspended sentence would be consonant with the objectives of the new legislation. In many instances an initial broad look of this kind will eliminate the possibility of a suspended sentence as an appropriate response." (emphasis added)

[34] However, when ***Chand*** was decided Sentencing and Penalties Act had not been promulgated. Therefore, the primary source that should be resorted to in finding the principles on sentencing including suspended sentences is the Sentencing and Penalties Act. Since the Sentencing and Penalties Act does not contain any specific provisions as to the factors that need to be considered in suspending an immediate sentence of imprisonment, the guidelines provided in ***Chand*** and and ***Petersen*** along with a large body of judicial precedence in Fiji could be appropriately and judiciously used to mete out a punishment which is just in all the circumstances.

[35] Unfortunately, the learned High Court Judge had not taken into account the relevant provisions in section 4 of the Sentencing and Penalties Act or any of the guidelines provided by previous decisions in suspending the 03 years imprisonment imposed on the respondent. He had only taken into account the mitigating factors some of which could not have been legitimately considered as mitigating the severity of the offence in suspending the sentence for 07 years.

[36] In my view, given all the circumstances including the fact that there had been planning and premeditation on the part of the respondent in committing the offence which, if not for the fact that the victim managed to escape, could have become rape and that there is need for deterrence, a custodial sentence of 03 or more years without suspension is called for. A survey of previous judicial decisions shows that suspended sentences in sexual offences involving children and juveniles (under the age of 18 years) should not be *prima facie* considered unless there are special circumstances to justify a suspension of the custodial sentence.

[37] Therefore, I hold that the third ground of appeal should succeed. Accordingly I quash the suspension of the sentence of 03 years imprisonment for 07 years but affirm the sentence of 03 years imprisonment on the respondent.

[38] However, more than 07 years have passed since the date of the sentence namely 21 May 2012. The respondent has completed the full term of the suspension by 21 May 2019. In the circumstances I am not inclined to make the 03 years imprisonment operative at this stage as the period of suspension has lapsed and this Court has not been informed of any

instance of the appellant having committed any other offence during that time. In these circumstances, the State also does not seek to enforce the 03 years imprisonment.

Fernando, JA

[39] I agree with reasons and conclusions of Prematilaka JA.

Nawana, JA

[40] I agree.

The Orders of the Court are:

1. *Appeal against sentence is allowed.*
2. *Suspension of the sentence for 07 years is quashed.*
3. *Sentence of 03 years imprisonment is affirmed but shall not be operative.*

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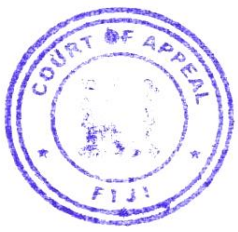
Hon. Justice C. Prematilaka
JUSTICE OF APPEAL



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Hon. Justice A. Fernando
JUSTICE OF APPEAL

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Hon. Justice P. Nawana
JUSTICE OF APPEAL