

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 18 of 2020
[In the High Court at Suva Case No. HAC 274 of 2019]

BETWEEN : **AVYASH MANI GOUNDEN**

AND : **STATE** *Appellant*
Respondent

Coram : **Prematilaka, ARJA**

Counsel : **Mr. M. Yunus for the Appellant**
: **Mr. L. J. Burney for the Respondent**

Date of Hearing : **06 October 2021**

Date of Ruling : **08 October 2021**

RULING

[1] The appellant (41) had been indicted in the High Court at Suva with one count of rape of an eight year old girl contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009 and one count of sexual assault contrary to section 210 (1) (a) of the Crimes Act of 2009 of the same victim committed at Waituri, Nausori in the Eastern Division on 14 July 2019.

[2] The information read as follows:

'COUNT ONE

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (b) and 3 of the Crimes Act 2009.*

Particulars of Offence

AVYASH MANI GOUNDEN, on the 14th day of July, 2019 at Waituri, Nausori, in the Eastern Division, penetrated the vulva of ASHLYN ASHLINI PRASAD, a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

AVYASH MANI GOUNDEN on the 14th day of July 2019 at Waituri, Nausori, in the Eastern Division, unlawfully and indecently assaulted ASHLYN ASHLINI PRASAD, a child under the age of 13 years, by touching her vagina.'

- [3] At the end of the summing-up the assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors' opinion, convicted the appellant and sentenced him on 05 March 2020 to an aggregate imprisonment of 14 years with a non-parole period of 12 years (13 years and 10 months after deducting the remand period with a non-parole period of 11 years and 10 months).
- [4] The appellant through his lawyers had appealed against conviction and sentence in a timely manner followed by amended grounds of appeal and written submissions on 06 May 2020. The state had tendered its written submissions on 11 March 2021. Both counsel in writing had agreed to have a ruling on written submissions.
- [5] In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test in a timely appeal for leave to appeal against conviction and sentence is 'reasonable prospect of success' [see Caucu v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Waqasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) in order to distinguish

arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudhry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

- [6] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011) and they are whether the sentencing judge had:

- (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.*

- [7] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

Conviction

Ground 1

THAT the Learned Trial Judge erred was privy to the facts of the case when full disclosures were given to him prior to the trial, thus the Appellants right to fair trial and his right to be trial by an independent and impartial tribunal has been breached and therefore the conviction is unsafe and unreasonable.

Ground 2

THAT the Learned Trial Judge erred in law when he failed to properly apply section 231 (1) of the Criminal Procedure Act 2009, whilst considering the no case to answer submission by the Appellant and failed to give written reasons for refusing the application for no case to answer.

Ground 3

THAT the Learned Trial Judge erred in law and in fact when he failed to hold a no case to answer in respect of the offence of rape despite there being no

evidence of penetration of the vulva by tongue, one of the major elements of the offence charged.

Ground 4

THAT the Learned Trial Judge erred in law and in fact when he failed to hold a no case to answer in respect of the offence of sexual assault despite there being no evidence of touching of the vagina, one of the vital elements of the offence charged.

Ground 5

THAT the Learned Trial Judge erred in law and in fact when he completely failed to properly guide the assessors on how to approach and weigh the evidence of uncharged acts, that is the evidence of the complainant when she said that ‘the accused sucked her ‘tutu’ with his mouth and it went deep inside.

Ground 6

THAT the Learned Trial Judge erred in law and in fact when in his failed to direct the assessors and himself that the evidence of the mother of the complainant must be completely disregarded since there was evidence that her evidence touching the root of the offence charged was hearsay evidence.

Ground 7

THAT the Learned Trial Judge erred in law and in fact when in his judgment he held that the evidence of recent complaint strength the consistency of account given by the complainant, despite there being material inconsistency in the Complainants evidence in court and what she told to the class teacher and the mother after the incident.

Ground 8

THAT the Learned Trial Judge erred in law and in fact when in his judgment he has failed to provide the reasons why he did not believe the sworn evidence of the Appellant.

Ground 9

THAT the Learned Trial Judge erred in law and in fact when he failed to consider the sworn evidence of the Defence witness because he found her to be evasive when asked about the nature of the cartoon the complainant was watching a non-issue in the matter. He failed to consider that the defence witness was watching another program in her father’s mobile thus it was impossible for her to answer the counsel about the nature of the cartoon the complainant was watching.

Ground 10

THAT the Learned Trial Judge erred in law and in fact when in his judgment he held that 'the evidence of the complainant establishes that the accused had penetrated her vulva with his mouth or tongue, despite there being no shred of evidence adduced by the prosecution in regards to penetration of the vulva by the tongue.

Ground 11

THAT the Learned Trial Judge erred in law and in fact when in his judgment he held that 'I do not find the inconsistencies between the evidence given by Ms. Devi, and her statement to the police is materially important to the main issue in this dispute' whilst the inconsistencies were very much evident and were touching the root of the matter.

Ground 12

THAT the Learned Trial Judge erred in law and in fact when he failed to direct the assessors on how to approach circumstantial evidence, on the issue of penetration by mouth or tongue and touching of the vagina or genitalia by hand or finger.

Ground 13

THAT the Learned Trial Judge erred in law when he allowed the State Prosecutor to conduct the competency inquiry of the child witness to establish her understanding of the nature of oath, which is in contravention of section 10 of the Juvenile Act [Cap 56] thus the Appellants right to fair trial was infringed.

[8] The trial judge in the judgment had set out the respective cases of the prosecution and defense as follows:

5. The prosecution alleges the accused had gone to the bedroom when the complainant and his little son were in it. He then removed the pajama of the complainant and penetrated the vulva of the complainant with his tongue. Moreover, the accused had touched the vagina of the complainant.

6. The defence denies the allegation. The accused claimed that he only went to the bedroom because of the little boy's cry. He went with his wife and then pampered the boy for a while.

[9] The appellant had given evidence and denied having engaged in any sexual activity with the victim and in cross-examination suggested that the victim's mother had coached the daughter to make a false allegation.

01st ground of appeal

[10] This ground of appeal is based on the hypothetical and unwarranted assumption that the trial judge may not have been impartial because he had been provided with the disclosures served on the defence prior to the trial and the judge having read the same may have already formed an opinion against the appellant.

[11] It has been the long-established practice in Fiji to provide the trial judges with all the disclosures given to the defence by the prosecution and this case is not an exception. In fact, more often than not when appeal records are prepared for the Court of Appeal hearing the same disclosures are included by the counsel for the appellants. The fact that the trial judges or the Court of Appeal justices become privy to the disclosures does not mean that they are read or influenced by them. The ultimate decision is based on the evidence at the trial. In any event, a trained judicial mind is quite capable of separating the wheat from the chaff.

[12] The same counsel at the trial had not seen anything untoward in providing the trial judge with disclosures and not objected or made an application for recusal for apparent bias. This ground of appeal is misconceived and has no merit at all.

02nd, 03rd, 04th and 10th grounds of appeal

[13] The appellant's complaint under the above grounds of appeal is focused on the trial judge having called for the defence or his decision that the appellant had a case to answer and then whether the alleged penetration was by mouth or the tongue. The appellant's contention is that the trial judge had failed to give reasons for refusing the application for no case to answer and called for the defence in respect of the offence of rape despite there being no evidence of penetration of the vulva by tongue and in respect of the offence of sexual assault despite there being no evidence of touching of the vagina.

[14] The law does not make it mandatory that a trial judge should give written reasons for refusing a 'no case to answer' application though he would obviously give reasons if he allows it.

[15] The evidence of the victim as highlighted at paragraphs 25-27 shows that there was sufficient evidence in respect of both counts for the trial judge to have called for the defence at the end of the prosecution case.

25. The first witness of the prosecution is the complainant. She is eight years old girl. On the evening of the 14th of July 2019, she had gone to the accused place with his father. There were two to three visitors at the accused's home. She was sitting in the living room with her father. After a while, she got her father's mobile phone and started to watch the cartoon on it. While she was watching the cartoon, she received a call from her mother. Her mother asked her, "Is everything okay." The complainant had responded, saying, "yes." Her mother then finished the conversation, informing the complainant that she will pick her from the school on the afternoon of Monday.

26. In a while, the accused asked the complainant to go to the room and play with the young boy. The accused has two daughters and one young son. The complainant then went to the room and laid down on the bed. She continued watching the cartoon. None of the daughters of the accused was present in the room. The small boy then told the accused to do something. The accused then started to touch the genitals of the complainant. She used the word "tutu" The complainant said the "tutu" used in the washroom. You have seen the complainant pointed out the place where the accused touched and then sucked using a toy bear.

27. The complainant was wearing a t-shirt and pajama. The accused lift her pajama up to her knee. After touching the genitals of the complainant, the accused went down and started to suck the genitals of the complainant. He used his mouth. When he sucked, it went a little deep inside. The wife of the accused then walked into the room. The accused suddenly got up and lifted the pajama of the complainant. He started to talk to the little boy.

[16] It is obvious from the above evidence that the appellant had not only touched the victim's vagina but he had also used his tongue to penetrate the vulva or the vagina, for what can go inside is the tongue which cannot be separated from his mouth. The fact that the child victim had not specifically referred to the tongue going inside but referred only to the mouth is entirely understandable given her age. The first count refers to the vulva and any slight penetration of vulva is sufficient; whether by mouth

or tongue or both. It would not make any difference. In any event, the appellant had denied committing any sexual act on the victim.

[17] In Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) the Court of Appeal accepted the difficulties of child victims in describing the exact sexual acts they experience to mathematical precision and stated as follows:

[13] *Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*

[14] *Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.*

[15] *Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if*

not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence.

[18] The trial judge had stated in the judgment on the same as follows:

10. 'The complainant precisely said the accused licked her "tutu" and it went a little deep. I find that evidence is sufficient to establish the penetration of vulva with the mouth or the tongue. The particulars of the offence said the accused had penetrated the vulva of the complainant with his tongue. I do not find the word of the tongue or the mouth is materially important in this matter. The evidence of the complainant establishes that the accused had penetrated her vulva with his mouth or tongue.

[19] Thus, these three grounds of appeal have no reasonable prospect of success in appeal.

05th ground of appeal

[20] The trial judge was not under a duty to guide the assessors on how to approach and weigh the evidence of 'uncharged acts' as there was no evidence led on an uncharged act. The victims' evidence as pointed out before was on the two acts relating to the two counts in the indictment.

[21] This ground of appeal has no reasonable prospect of success.

06th ground of appeal

[22] The appellant complains that the trial judge had failed to direct the assessors and himself that the evidence of the mother of the complainant was hearsay. What the victim had told her mother was not hearsay and could be treated as recent compliant evidence but not what the teacher had told the mother. What the victim had told the teacher was also not hearsay. The trial judge had properly alerted the assessors to this aspect of the evidence in the summing-up and the judge had directed himself according to what he had stated in the summing-up.

66. *'You may recall Ms. Devi said in her cross-examination that the head teacher told her everything about this alleged incident and not the complainant. However, she explained in her evidence in chief, that the complainant explained her the incident when she asked about it. If you find the complainant told Ms. Devi, about the incident, then you can consider the evidence of Ms. Devi as evidence of recent complaint. On the other hand, if you find the head teacher told Ms. Devi, about the incident, then you must not consider her evidence as evidence of recent complaint. Then Ms. Devi's evidence becomes hearsay, and you must not consider it.*

[23] There is no merit in this ground of appeal.

07th and 11th grounds of appeal

[24] The appellant argues that the trial judge had erred in his judgment regarding material inconsistency in the complainant's evidence in court and what she told to her class teacher and the mother after the incident. Further, the trial judge had allegedly ignored the inconsistencies between the evidence given by the mother, Devi and her statement to the police.

[25] In **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) the Court of Appeal sets down the law on inconsistencies as follows:

*'[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they **inconsistencies** or omissions both go to the credibility of the witnesses (see **R. v O'Neill** [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR 753, 1983 SCR (3) 280).'*

[26] **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) the Court of Appeal further stated:

'[35].....Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue

importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;"

[27] The trial judge had considered but at paragraph 11 of the judgment did not find the inconsistencies between the evidence given by the mother Devi and her statement to the police to be materially important to the main issues in this dispute. The appellant has failed to highlight such material inconsistencies between the victim's account in court and her statements to the teacher and the mother either. Nor had the judge observed such infirmities (see paragraph 16 of the judgment) in her evidence.

[28] There is no reasonable prospect of success in this ground of appeal.

08th ground of appeal

[29] What could be identified as common ground arising from several past judicial pronouncements is that when the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide **Mohammed v State** [2014] FJSC 2; CAV02.2013 (27 February 2014), **Kaiyum v State** [2014] FJCA 35; AAU0071.2012 (14 March 2014), **Chandra v State** [2015] FJSC 32; CAV21.2015 (10 December 2015), **Kumar v State** [2018] FJCA 136; AAU103.2016 (30 August 2018) and **Fraser v State** AAU 128 of 2014 (05 May 2021)].

[30] The trial judge's judgment substantially conforms to the above principles of law relating to his agreement with the assessors. There is no merit in this ground of appeal.

09th ground of appeal

[31] The trial judge had given reasons as to why he rejected the evidence of the appellant's daughter in the judgment. This stance is consistent with the position of the trial judge at a trial with assessors *i.e.* in Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only to offer their opinions, based on their views of the facts and it is the judge who ultimately decides whether the accused is guilty or not [vide **Rokonabete v State** [2006] FJCA 85; AAU0048.2005S (22 March 2006), **Noa Maya v. The State** [2015] FJSC 30; CAV 009 of 2015 (23 October 2015)] and **Rokopeta v State** [2016] FJSC 33; CAV0009, 0016, 0018, 0019.2016 (26 August 2016) and **Fraser v State** AAU 128 of 2014 (05 May 2021)].

[32] At paragraph 15 of the judgment the trial judge had dealt with the appellant's daughter's evidence and also highlighted the victim's evidence at paragraph 16 in the judgment in contrast.

15. Ms. Arpana Chand, the daughter of the accused said she started to watch a movie on the phone when the little boy stopped playing with it. She was observing the complainant, who was watching a cartoon on the mobile phone just next to her. I observed the evasiveness and the demeanour of Ms. Arpana Chand when the learned Counsel asked her about the nature of the cartoon the complainant was watching.

16. I observed the manner and the way the complainant gave evidence. She was straight, forthright, and coherence. During the cross-examination, the complainant maintained the same position that she explained in her evidence in chief. There are no adverse inaccuracies, errors, and mistakes in her evidence. Neither do I find any intentional lies nor intentional attempts to deceive in her evidence. As a result, I find the evidence of the complainant is reliable, credible, probable, and truthful. Hence, the defence failed to establish or create a reasonable doubt about the case of the prosecution.'

[33] There is no reasonable prospect of success in this ground of appeal.

12th ground of appeal

- [34] The prosecution case depended on the direct evidence of the victim on the issue of penetration by mouth or tongue and touching of the vulva, vagina or genitalia by hand or finger. Circumstantial evidence of her mother, teacher and father was only supportive nature. However, the case against the appellant was not sought to be proved on such circumstantial evidence. Had the victim's evidence failed the rest of the evidence could not have taken the prosecution case any further.
- [35] In the circumstances, no prejudice had been caused by the absence of specific directions on circumstantial evidence. In any event the counsel could have asked for redirections on this aspect as he himself defended the appellant in the High Court and the failure to do so would disentitle him from even raising this appeal point (**Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19; AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018))
- [36] There is no reasonable prospect of success in this ground of appeal.

13th ground of appeal

- [37] Though 08 years old at the time of the incident and being still a child when she gave evidence the victim appears to have given cogent evidence for a child of her age. Even if the prosecutor had asked certain questions from her it is the trial judge who obviously had satisfied himself of the competence of the child witness to comprehend the nature of her oath and give evidence and her understanding of her duty to tell the truth though she gave evidence from the child room *via* Skype.
- [38] There is no reasonable prospect of success in this ground of appeal.

01st and 02nd grounds of appeal (sentence)

- [39] It is convenient to consider both grounds together as they are concerned with the alleged double counting by the trial judge.
- [40] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the ‘starting point’ in the two-tiered approach to sentencing in the face of criticisms of ‘double counting’ and stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.
- [41] The Supreme Court said in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least some of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise any of the aggravating factors, and they will then have to factor into the exercise all the aggravating features of the case as well as the mitigating features.
- [42] Some judges following **Koroivuki v State** (supra) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.
- [43] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[44] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

*[30] Like in this case, if the trial judges state what factors they have taken into account in selecting the starting point the problem anticipated in **Nadan** may not arise. Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed 'somewhere in the middle of the range' of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naiklekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.*

[45] In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) sentencing tariff for juvenile rape was enhanced and fixed between 11 to 20 years.

*[25] The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.'*

[46] The trial judge had taken the starting point at 13 years on account of the opportunistic nature of the crime, level of harm caused to the child victim in the aftermath of the episode and the need for deterrence (see paragraphs 3, 4 & 7-10 of the sentencing order). Thus, the trial judge had set out what factors had gone into selecting a starting point somewhere above the lower end but closer to it in the tariff.

[47] Thereafter, the trial judge had enhanced the sentence by 03 years due to the vast difference of age (08 and 41), serious breach of trust and exposing the child to sexual activity at the tender age affecting her natural growth considering them as aggravating features (see paragraphs 10 of the sentencing order).

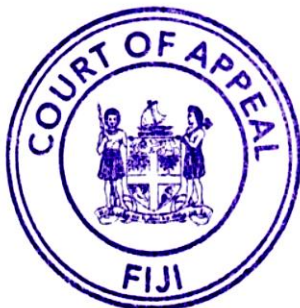
[48] Therefore, it cannot be argued that the trial judge had taken as aggravating factors those already inbuilt in the tariff for juvenile rape. Nor could it be argued that he had double counted the same factors twice. For the argument sake, even if the judge had

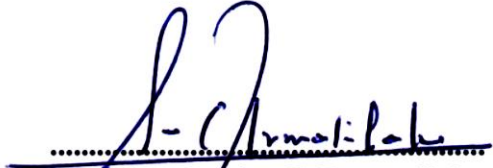
taken 11 years as the starting point the ultimate sentence of 14 years cannot be said to be harsh and excessive given all the aggravating features set out by the trial judge in the above paragraphs (and not considered by the trial judge such as committing the offences in the presence of the appellant's own son) to fix the starting point and then to enhance it. The sentence which is just 03 years above the lower end of the tariff is justified considering all the aggravating features.

[49] It is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide Koroicakau v The State [2006] FJSC 5; CAV0006U.2005S (4 May 2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (Sharma v State [2015] FJCA 178; AAU48.2011 (3 December 2015).

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.




.....
Hon. Mr. Justice C. Prematilaka
ACTING RESIDENT JUSTICE OF APPEAL