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

CRIMINAL APPEAL NO. AAU 133 of 2016
[In the High Court at Lautoka Case No. HAC 181 of 2011]

BETWEEN	:	**PRAVEEN CHAND**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA** **Gamalath, JA** **Bandara, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Ms. P. Madanavosa for the Respondent**
Date of Hearing	:	**16 September 2022**
Date of Judgment	:	**29 September 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka on one count of rape committed at Lautoka in the Western Division by penetrating the vagina of SO (name withheld), aged 11 years and 11 months, with his fingers between 01 and 30 June 2011 contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009.

[2] The appellant was the uncle of SO and he was 26 years old at the time of the offending.

Facts in brief

[3] The appellant and the victim together with other family members lived in a small house which had no separate rooms. He slept on the sofa while the victim was sleeping on the

bed with her mother on that particular night. The sofa and the bed were joined together. He allegedly started to touch SO's body and then inserted his finger into her vagina while she was sleeping. He told her not to tell anyone or there will be a lot of problems. The appellant opted to remain silent and not lead any other evidence at the trial.

[4] The assessors had unanimously opined that the appellant was guilty as charged. The learned trial judge had agreed with the assessors in his judgment, convicted the appellant and sentenced him on 08 February 2016 to 14 years of imprisonment with a non-parole period of 12 years.

[5] The appellant had been granted extension of time to appeal along with leave to appeal against sentence but leave to appeal against conviction had been refused by the single judge. The appellant has not renewed his conviction appeal before the full court in terms of section 35(3) of the Court of Appeal Act. The appeal records had been prepared by the Legal Aid Commission with the concurrence of the State without trial transcripts as the appeal before this court involves only the sentence appeal.

[6] Guidelines to be applied when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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)].

[7] Grounds of appeal urged on behalf of the appellant are as follows:

> *"1. That the learned sentencing Judge erred in law in considering 12 years as the appropriate starting point.*
>
> *2. That the learned Sentencing Judge erred in law in not considering the time Appellant spent in remand.*
>
> *3. That the learned Sentencing Judge erred in law in not considering the age of the Appellant and his previous good record."*

01st ground of appeal

[8] The appellant's complaint is about the starting point of 12 years. The sentencing tariff applicable to juvenile rape was 10-16 years of imprisonment [vide **Raj v State** (CA) [2014] FJCA 18; AAU0038.2010 (05 March 2014) and **Raj v State** (SC) [2014] FJSC 12; CAV0003.2014 (20 August 2014)] until it was further increased to 11-20 years of imprisonment in **Aicheson v State** (SC) [2018] FJSC 29; CAV0012.2018 (02 November 2018). Where within that range should the starting point be?

[9] Following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) some judges 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.

[10] However, when the starting point is taken at the middle of the tariff it may give rise to a concern whether double counting has occurred as expressed in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), because as elaborated in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) when judges take as their starting point somewhere within the range, they will have already factored into the exercise at least *some* of the aggravating features of the case and if the same features are once again counted as aggravating factors to enhance the sentence, it could amount to double counting. The difficulty for the appellate courts is not knowing 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 [vide **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019)]. In addition it was held in ***Kumar*** that many things which make a crime so serious have already been built into the tariff and if sentencing judges treact as aggravating factors those features of the case which already have been reflected in the tariff itself that may also constitute double counting.

[11] The trial judge had said that he was selecting 12 years as the starting point based on the level of harm on the victim and the level of culpability of the appellant as

described at paragraph 10 of the sentencing order. He had then considered the appellant having taken advantage of the victim's naivety and vulnerability, the age difference of 14 years between the appellant and the victim and threat issued by the appellant to the victim not to divulge the incident to anyone as aggravating factors to enhance the sentence by 03 years. Thus, though the trial judge had taken 12 years as the starting point and added 03 years for aggravating features, I do not think that there is patent double counting in this case.

[12] However, there can always be some latent overlapping of factors taken into account in fixing a starting point and then to enhance the sentence on aggravation, for too mechanistic an approach cannot be adopted towards sentencing which is an art and not a science nor a mathematical exercise. What is important is to see that the final sentence fits and proportionate to the gravity of the offending considering all attendant circumstances. As The Hon JJ Spigelman, a former Chief Justice of New South Wales put it[1]:

> *'The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice, do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.'*

02nd ground of appeal

[13] The appellant argues that his remand period of 21 days had not been taken into by the trial judge. In fact the trial judge had not made any reference to any remand period. Although, the appellant's mitigations submissions had refereed to 21 days of remand period, the state's sentencing submissions neither confirms nor denies such a remand period. The written submissions filed by the Legal Aid Commission and considered by the single judge too does not have any mention regarding a remand period.

[1] http://www.austlii.edu.au/au/journals/CICrimJust/1999/11.pdf

[14] While section 24 of the Sentencing and Penalties Act requires the sentencing court to regard the time in custody before trial as a period of imprisonment (unless ordered otherwise) in sentencing an offender to a term of imprisonment, the Court of Appeal in **Vasuca v State** [2015] FJCA 65; AAU011.2011 (28 May 2015) interpreted section 24 to be discretionary (as opposed to 'mandatory') in order that the sentencing courts would consider any substantial period of remand (depending on the facts and the sentence in each case) as a period of imprisonment already served when calculating the appropriate sentence for any offence without, however, making a precise calculation (see **Basa v The State** Crim. App. No. AAU0024.2005, 24 March 2006). The period of remand of 02 months as against the sentence of 14 years was not considered significant.

[15] However, the Supreme Court in **Sowane v State** [2016] FJSC 8; CAV0038.2015 (21 April 2016) without any reference to ***Vasuca***, held section 24 of the Sentencing and Penalties Act to be mandatory in that the court **shall** regard any period of time during which the offender has been held in custody prior to the trial as a period of imprisonment already served by the offender, 'unless a **court** otherwise orders'. Nevertheless, the Supreme Court stated that in doing so it is not necessary to make an exact allowance for days or even weeks spent on remand. It depends upon its total significance.

[16] In the recent case of **Eremasi Tasova v The State** Criminal Petition CAV 0012 of 2019 (25 August 2022) the Supreme Court, again without any reference to ***Vasuca,*** has confirmed ***Sowane*** and given the benefit of 01 year and 11 months in remand to the appellant and adjusted the sentence accordingly.

[17] While there is no material to show that the appellant was in fact in remand prior to trial for 21 days, even if it is assumed that he was, the period of such remand was so insignificant when assessed against the final sentence of 14 years and I do not think it necessary for this court to adjust the sentence on account of the alleged remand period.

03rd ground of appeal

[18] The appellant complains that the trial judge had not given any consideration and discount for his age and previous good character.

[19] At paragraph 12 of the sentencing order under mitigation, the trial judge had considered both his age and him being a first offender and deducted 01 year from the sentence. The single judge has stated the question is whether that discount is adequate.

[20] It is a recognized principle that where there is evidence of good character, that good character may operate to reduce the sentence which would otherwise have been imposed. Section 2 of the Sentencing and Penalties Act 2009 provides that a court must have regard to these factors when sentencing an offender (vide **Fifita v State** [2010] FJCA 21; AAU0024.2009 (2 June 2010). While the fact that an offender has previous convictions for sexual or violent offences can be a significant aggravating factor, the defendant's good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence (vide **R v Millberry** [2003] Crim LR 207).

[21] In ***Millberry*** England and Wales Court of Appeal (Criminal Division) also said the even in the case of young offenders, because of the serious nature of the offence custody will normally be the appropriate disposal but that the sentence should be 'significantly shorter for young offenders'. The appellant was not a young offender by any means. He was 31 years old mature adult.

[22] In **R v Roberts and Roberts** [1982] 4 Cr App R (S) 8 where Lord Lane, Chief Justice presided, the court stated:

> *"Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence…..A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasis public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length*

of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case."

[23] Time and again courts have highlighted the gravity of sexual offences against children. Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and by meting out harsh sentences [vide Gates, J. in **State v Marawa** [2004] FJHC 338; HAC0016T.2003S (23 April 2004)]. Again it was said that rape is the most serious form of sexual assault more so in the case of child rape. Society cannot condone any form of sexual assaults on children. Children are our future. The courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences [vide **State v AV** [2009] FJHC 24; HAC192.2008 (2 February 2009)]. These sentiments have been amply reflected in the sentences meted out over the years by courts in Fiji.

[24] The casting of the offence of rape in the Crimes Act is such that no distinctions are drawn as to gravity of offending dependent on the object used to penetrate or of the orifice of the victim penetrated. No separate penalties are prescribed. Sufficient no doubt is the unwanted invasion, the violation of the person, the forcible intrusion into the privacy and body of another [vide **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015)]. Thus, although the appellant advances an argument to that effect, the fact that this is a case of digital penetration has no relevance to the matter of sentence.

[25] In any event, 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). 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).

[26] The appellant's sentence is well within tariff and no sentencing error has been established. The ultimate sentence is not harsh or excessive. Therefore, none of the appeal grounds succeeds and the appellant's sentence appeal should stand dismissed.

Gamalath, JA

[27] I agree with the draft judgment of Prematilaka, RJA.

Bandara, JA

[28] I have read in draft the judgment of Prematilaka, RJA and concur with the reasons and proposed orders therein.

Order of the Court:

1. Appeal against sentence dismissed.

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

COURT OF APPEAL FIJI

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Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL