

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

CRIMINAL APPEAL NO.AAU 0065 of 2019
[In the High Court at Suva Case No. HAC 17 of 2017]

BETWEEN : **PETERO MAWI**

Appellant

AND : **STATE**

Appellant

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Appellant**

Date of Ruling : **18 July 2022**

RULING

[1] The appellant had been indicted (along with the appellant in AAU 39 of 2019) in the High Court at Suva on one count of defilement of a young person between 13 and 16 years of age contrary to section 215 (1) of the Crimes Act, 2009 committed at Lau between 01 and 31 July 2016 in the Southern Division.

[2] After the appellant was found guilty, the trial judge had sentenced him on 12 April 2019 to 07 years of imprisonment with a non-parole period of 05 years for defilement (the effective serving period being 06 years, 10 months and 15 days with a non-parole period of 04 years, 10 months and 15 days after the period of remand was deducted).

[3] The appellant's timely appeal against conviction and sentence was taken up for leave to appeal hearing before me and leave was granted to appeal only against sentence on 27 August 2021 [reported as **Mawi v State** [2021] FJCA 131; AAU0065.2019 (27 August 2021)]. Thereafter, through the Legal Aid Commission the appellant had made

an application for bail pending appeal and both parties consented to have a ruling on bail pending appeal on the written submissions alone.

[4] The factual scenario of the case is as follows.

2. The victim in this case was 13 years old at the time the two of you sexually exploited her.

*3. **Petero Mawi**, one night in the month of July 2016 around 8.00pm, you approached the victim and asked her whether you can have sexual intercourse with her. Even though she refused initially, later on she agreed. Then you and the victim had sexual intercourse and the victim in her evidence said that it was consensual. This took place outside her house. The evidence revealed that Salauca Volaukilodoni was also around when you had sexual intercourse with the victim and he approached you after you had finished having sexual intercourse with the victim. Having spoken to Salauca Volaukilodoni you then told the victim that Salauca Volaukilodoni wants to speak to her. The evidence suggests that you wanted the victim to have sexual intercourse with Salauca Volaukilodoni. The victim is related to your wife.'*

[5] It is clear from the Ruling that leave to appeal was primarily granted due to the concern associated with the 'new tariff' of 02 -08 years of imprisonment adopted by the trial judge departing from the hitherto followed tariff of suspended sentence to 04 years of imprisonment for the offence of defilement.

[6] The court observed with anxiety in the Ruling the submission of the DPP in **State v Chand** [2021] FJCA 209; AAU75.2019 (13 August 2021) that the new 'tariff' for defilement adopted by the trial judge had thrown the current sentencing practice into confusion and uncertainty among other judges and magistrates in as much some High Court judges continue to follow the tariff of suspended sentence to 04 years for defilement while some other High Court judges follow the new 'tariff'. Therefore, the court urged the DPP to seek new guidelines as early as possible from this court or the Supreme Court in the light of lack of uniformity that has crept into sentencing for defilement.

[7] The respondent at the leave to appeal hearing did not have a notable issue with the reasoning and the new 'tariff' itself adopted by the trial judge but disagreed with the methodology of doing so in as much the trial judge had declared the new 'tariff' of 02-08 years for defilement without adhering to the mandatory provisions in sections

6, 7 and 8 of the Sentencing and Penalties Act which renders the new ‘tariff’ invalid in law. This suggests that the DPP is also of the view that it is time that the old tariff of suspended sentence to 04 years of imprisonment for the offence of defilement should be revisited, particularly in view of the fact that unlike under the Penal Code (maximum sentence 05 years) the maximum sentence for defilement under the Crimes Act, 2009 is 10 years of imprisonment and also the need to establish uniformity of sentencing.

[8] On the other hand, the Ruling observed that it is the ultimate sentence that is of importance and when a sentence is reviewed on appeal, again it is the ultimate sentence that must be considered (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) and that the approach taken by the appellate court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[9] It is for the Court of Appeal or the Supreme Court to set new sentencing guidelines for defilement as early as possible and to facilitate that I earnestly urge the DPP to have the appeal records in **State v Chand** [2021] FJCA 209; AAU75.2019 (13 August 2021) finalised for hearing before the Court of Appeal as quickly as possible. Then the full court hearing the appellant’s appeal may decide what his sentence should be in keeping with the new sentencing regime.

Bail pending appeal

[10] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success

in appeal. However, an appellant can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [11] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [12] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [13] The appellant had committed the offending when the complainant had turned 13 years just 02 months before. She was living with her grandparents as her parents had passed away when she was 05 years old. The appellant is her uncle and is more than twice of her age. He had coxed her to have sexual intercourse with his co-accused who ended up raping her. Given what I had already stated above I do not envisage a very high likelihood of success in the appellant’s appeal against sentence in the sense that his current sentence would be drastically reduced by the full court.

[14] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard*' together.

[15] The appellant has so far served about 03 years and 03 months of imprisonment and even when his remand period is taken into account he will not have served more than 04 years by the end of 2022. If the Legal Aid Commission representing him acts diligently and expeditiously to have the appeal records ready for the sentence appeal there is a chance that his appeal will be heard by the full court without an undue delay. If not, the appellant is still free to apply for bail pending appeal at an appropriate time in the future.

Order

1. Bail pending appeal is refused.




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