

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

CRIMINAL APPEAL NO. AAU 75 of 2019
[In the High Court at Suva Case No. HAC 98 of 2018]

BETWEEN : **THE STATE** *Appellant*

AND : **RAJESH CHAND** *Respondent*

Coram : **Prematilaka, RJA**
Mataitoga, RJA
Qetaki, JA

Counsel : **Mr. L J. Burney and Ms. S. Shameem for the Appellant**
Respondent absent and unrepresented
Ms. T. Kean for Legal Aid Commission

Date of Hearing : **07 November 2023**

Date of Judgment : **29 November 2023**

JUDGMENT

Prematilaka, RJA

[1] The respondent had been indicted in the High Court at Suva on one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and a representative count of rape having penetrated the anus of SK, a boy aged 13 years and 09 months contrary to section 207 (1) and (2)(a) of the Crimes Act, 2009 committed in Nausori in the Central Division.

[2] The assessors had expressed a unanimous opinion that the respondent was guilty of both counts. The trial judge had disagreed with the assessors and acquitted the respondent of count 02 and also overturned the assessors' opinion on count 01, acquitted the respondent of rape but convicted him of defilement contrary to section

215 of the Crimes Act, 2009. The trial judge had sentenced the respondent 31 May 2019 to 03 years of imprisonment with a non-parole period of 01 year for defilement (the effective serving period being 02 years and 11 months and 14 days after the period of remand was deducted).

[3] The appellant had lodged a timely appeal against sentence and a Judge of this court allowed leave to appeal¹ on 13 August 2021. Later, the appellant made an application for a guideline judgment on sentencing for defilement under section 215 of the Crimes Act, 2009 in terms of the Sentencing and Penalties Act and both the appellant and the Legal Aid Commission (LAC) had filed written submissions to assist this court to deliver guidelines for defilement.

[4] The respondent represented by his counsel had appeared before this court till the stage of pronouncement of the single judge ruling and thereafter, neither the Court of Appeal Registry nor the appellant represented by the Director of Public Prosecutions (DPP) has been able to locate the appellant's whereabouts and serve notice of the proceedings. The respondent had long served his sentence. Since there was no date given by this court for the appeal to be mentioned after delivering the ruling as the appeal records were not ready by then and yet to be prepared by the appellant to have the matter ready for hearing before the Full Court, the respondent did not have notice of the subsequent dates of the appeal unless he himself made an effort to find out the same. In the circumstances, the state counsel on the call-over date agreed not to urge an enhancement of the sentence but pursue only the matter of the guideline judgment. Therefore, the appeal was taken up for hearing before this court despite the absence of the respondent as the DPP and the LAC sufficiently assisted the court by way of written and oral submissions on issuing a guideline judgment.

[5] Therefore, the main task of this court in this appeal is to deliver guidelines for sentencing the offenders of defilement contrary to section 215 of the Crimes Act,

¹ **State v Chand** [2021] FJCA 209; AAU75.2019 (13 August 2021)

2009. However, the grounds of appeal would also be considered for the sake of completion.

[6] At the time of the offending, the victim was about 13 years and 09 months old. The appellant was 46 years old. He had penetrated the victim's anus with his penis inside a DVD shop during daytime on a Sunday when it was closed for business. According to the trial judge, the evidence had suggested that the incident may have taken place with the victim's consent.

[7] In sentencing the respondent, the trial judge had followed his own decision in **State v Mawi - Sentence** [2019] FJHC 324; HAC17.2017 (12 April 2019) where he had 'decided' that 'appropriate tariff' for the offence of defilement was an imprisonment between 02 and 08 years. However, the trial judge had declared the 'new tariff' of 02-08 years for defilement contrary to section 215(1) of the Crimes Act, 2009 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.

[8] The appellant does not seem to have an issue with the 'new tariff' adopted by the trial judge in *Mawi per se* but its position is that the impugned sentence meted out to the appellant is unduly lenient having regard to the 'new tariff' suggested in *Mawi*. Nevertheless, the appellant submits 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 Judges² still follow pre-*Mawi* tariff³ of suspended sentence to 04 years for defilement while other High Court Judges⁴ follow *Mawi*. This situation, needless to say, is unacceptable and an

² For example **State v Koroi** [2019] FJHC 483; HAR02.2019 (24 May 2019); **State v Peceli - Sentence** [2019] FJHC 1002; HAC186.2017 (23 October 2019); **State v Malo** [2020] FJHC 179; HAC302.2018S (2 March 2020)]

³ See **Donumainasava v The State** [2001] FJHC 25; Haa0032j.2001s (18 May 2001); **Rokowaga v The State** [2004] FJHC 101; HAA0037.2004 (11 May 2004); **State v Kabaura** [2010] FJHC 280; HAC117.2010 (9 August 2010)

⁴ For example, **State v Dinono - Sentence** [2019] FJHC 871; HAC336.2018 (5 September 2019); **State v Matavalewa** - Sentence [2020] FJHC 2; HAC150.2018 (14 January 2020)

unsatisfactory state of affairs. The resulting lack of consistency as a result of dual system of tariff in defilement cases can be observed in many other cases.

- [9] For example in *Mawi*, a thirty year old man was sentenced after trial to 7 years' imprisonment (5 years non-parole) for defiling a thirteen year old girl. In *Dinono*, a nineteen year old offender was given a suspended sentence after pleading guilty to defiling a thirteen year old girl. In *Koroi*, the High Court reviewed the suspended sentence imposed on an eighteen year old man who pleaded guilty to defiling a fifteen year old girl and concluded that the suspension of sentence was inappropriate. In *State v Raj* - Sentence [2019] FJHC HAC 184.2019 (17 June 2022), without referring to any tariff, a 29 year old teacher who defiled his 13 year old female student was sentenced to 08 years' imprisonment. Though the trial judge in *Mawi* had sentenced a 30 year old man after trial for 07 years' imprisonment (05 year non-parole) for defilement of a 13 year old girl, he had sentenced the respondent, 46 year old, to 03 years of imprisonment (01 year non-parole) for defiling a 13 year old boy after trial. The only material distinguishing feature between the two cases appears to be the gender of the victim.
- [10] In *Daunivalu v State* [2020] FJCA 127; AAU138.2018 (10 August 2020), I highlighted some problems arising out of a single judge of the High Court changing an existing tariff or declaring a new tariff unilaterally in the context of aggravated burglary:

[15] However, it is clear that some High Court judges had felt, perhaps rightly, the need to revisit the 'old tariff', may inter alia be due to the increase in the number of cases of aggravated burglary in the community and the need to protect the public, by having a sentencing regime with more deterrence than the 'old tariff' offers. In my view, there is nothing wrong in a trial judge expressing his view even strongly in such a situation so that the DPP could take steps to seek new guidelines from the Court of Appeal at the earliest opportunity. Yet, when an existing sentencing regime is changed by a single judge unilaterally, only to be followed not by all but a few other judges, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.

[16] Therefore, one must bear in mind the provisions relating to guideline judgments in the Sentencing and Penalties Act namely section 6, 7 and

8 which govern setting sentencing tariffs as well. It is clear that a High Court is empowered to give a guideline judgment only upon hearing an appeal from a sentence given by a Magistrate and then that judgment shall be taken into account by all Magistrates and not necessarily by the other judges of the High Court. However, before exercising the power to give a guideline judgment, the DPP and the Legal Aid Commission must be notified particularly on the court's intention to do so and both the DPP and the LAC must be heard.

[18] *Moreover, when a guideline judgment is given on an appeal against sentence by the Court of Appeal or the Supreme Court it becomes a judgment by three judges and shall be taken into account by the High Court and the Magistrates Court. A judgment of a single judge of the High Court does not enjoy this advantaged position statutorily conferred on the Court of Appeal and the Supreme Court. In addition the doctrine of stare decisis requires lower courts in the hierarchy of courts to follow the decisions of the higher courts.'*

[11] In the same context, it is not inapt to repeat my remarks in several rulings⁵ on the adverse consequences of the dual system of sentencing tariff on the due administration of justice:

'Suffice it to say that the application of old tariff and new tariff by different divisions of the High Court for the same offence of burglary or aggravated burglary is a matter for serious concern as it has the potential to undermine public confidence in the administration of justice. Treating accused under two different sentencing regimes for the same offence simultaneously in different divisions in the High Court would destroy the very purpose which sentencing tariff is expected to achieve. The disparity of sentences received by the accused for aggravated burglary depending on the sentencing tariff preferred by the individual trial judge leads to the increased number of appeals to the Court of Appeal on that ground alone. The state counsel indicated that the same unsatisfactory situation is prevalent in the Magistrates courts as well with some Magistrates preferring the old tariff and some opting to apply the new tariff.....'

[12] The DPP argued at the leave to appeal stage that there is a need to revisit the existing tariff of suspended sentence to 04 years for defilement and deliver a 'long overdue' guideline judgment given that the maximum sentence for defilement now is 10 years of imprisonment under the Crimes Act, 2009 as opposed to 05 years under the Penal

⁵ **Vakatawa v State** [2020] FJCA 63; AAU0117.2018 (28 May 2020), **Kumar v State** [2020] FJCA 64; AAU033.2018 (28 May 2020) and **Daunivalu v State** [2020] FJCA 127; AAU138.2018 (10 August 2020) and **Jeremaia v State** [2020] FJCA 259; AAU030.2019 (23 December 2020)

Code, and accordingly the DPP now seeks guidelines from the Court of Appeal in terms of provisions in sections 6, 7 and 8 of the Sentencing and Penalties Act.

Defilement under the Penal Code

[13] Section 156 dealt with ‘Defilement of girl between thirteen and sixteen years of age’.

156.-(1) Any person who-

- (a) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or*
- (b) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female person suffering from severe subnormality under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was a person suffering from severe subnormality, is guilty of a misdemeanour, and is liable to imprisonment for five years, with or without corporal punishment:*

Provided that it shall be a sufficient defence to any charge under paragraph

- (a) if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.*
- (2) No prosecution shall be commenced for an offence under paragraph (a) of subsection (1) more than twelve months after the commission of the offence.*
- (3) It is no defence to any charge under paragraph (a) of subsection (1) to prove that the girl consented to the act.*

[14] Section 155(1) on the other hand was concerned with ‘Defilement of girl under thirteen years of age’. The purpose of this section was to fill a lacuna in the definition of rape in section 149 where consent would be a defense for a charge of rape irrespective of the age (including a girl under 13 years).

[149] Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of

the act, or in the case of a married woman, by personating her husband.'

[15] Accordingly, section 155 (3) makes it a no defense to a charge for unlawful carnal knowledge of a girl under the age of thirteen years to prove that she consented to the act. If not for section 155(1), consensual sex with a girl under the age of 13 years would be no offence under the Penal Code.

[16] In *Donumainasava* which had been consistently followed in the matter of sentence for defilement of girls between 13 and 16 years under the Penal Code where the tariff was considered as suspended sentence to 04 years of imprisonment until in *Mawi* the learned High Court Judge said that the tariff should be 02 years to 08 years of imprisonment under the Crimes Act, 2009, it was held that:

'A charge under section 156(1)(a) of the Penal Code is specifically designed for consensual sexual intercourse with girls under the age of consent. The offence is clearly designed to protect young girls, who have entered puberty and who are experiencing social and hormonal changes, from sexual exploitation. The offence carries a maximum of 5 years imprisonment. Reported cases in Fiji and abroad show that sentences passed range from suspended sentences (usually where the accused and victim are both of the same or similar age, and are in a relationship) to 3/4 years imprisonment where the accused is in a position of trust in relation to the victim, and much older than her. In England the maximum sentence of this offence is two years imprisonment under Sexual Offences Act 1956. In R -v- Taylor and Others 64 Cr. App. R. 182, the English Court of Appeal laid down guidelines for the sentencing of persons convicted of having unlawful sexual intercourse with a girl under the age of 16. Lord Justice Lawton distinguished between cases of virtuous friendship between young people of the same age which ended in sexual intercourse, and cases where a man in a supervisory capacity set out to seduce a girl under sixteen. In the first type of case, custodial sentences were not needed; in the second, sentences of the maximum of two years, or near that scale, should be imposed. In Fiji of course the maximum sentence is 5 years imprisonment.'

[17] The English Court of Appeal in R -v- Taylor and Others [1977] 64 Cr App R 182 - (unlawful sexual intercourse with girls under the age of sixteen) said at p.185:

"It is clear from what the learned trial judge said that there is doubt amongst many, at the present time, as to what is the proper way of dealing with these cases. What does not seem to have been appreciated by the public is the wide spectrum of guilt which is covered by the offence known

as having unlawful sexual intercourse with a girl under the age of sixteen. At one end of the spectrum is the youth who stands in the dock, maybe 16, 17 or 18, who has had what started off as a virtuous friendship with a girl under the age of 16. That virtuous friendship has ended with them having sexual intercourse with one another. At the other end of the spectrum is the man in a supervisory capacity, a school master or social worker, who sets out to seduce a girl under the age of 16 who is in his charge. The penalties appropriate for the two types of case to which I have just referred to are very different indeed. Nowadays, most judges would take the view, and rightly take the view, that when there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature. What is required is a warning to the youth to mend his ways. At the other end, a man in a supervisory capacity who abuses his position of trust for his sexual gratification, ought to get a sentence somewhere near the maximum allowed by law, which is two years' imprisonment. In between there come many degrees of guilt."

- [18] Thus, the range of suspended sentence to 04 years of imprisonment for defilement of a girl between thirteen and sixteen years of age, was decided in *Donumainasava* based on the maximum sentence of 05 years but influenced by *Taylor* where the maximum sentence for having unlawful sexual intercourse with a girl under the age of 16 years was 02 years under the Sexual Offences Act 1956 in UK. Maximum sentence of 05 years of imprisonment for defilement of girl between thirteen and sixteen years of age had been introduced by Ordinance No. 12 of 1969 to the Penal Code in Fiji. However, this tariff continued to be applied by sentencing courts even after the promulgation of the Crimes Decree in 2009 (now Crimes Act, 2009) which repealed the Penal Code and increased the maximum sentence to 10 years.

Defilement under the Crimes Act, 2009

- [19] Section 215(1) of the Crimes Act 2009 defines 'Defilement of young person between 13 and 16 years of age' as follows:

Defilement of young person between 13 and 16 years of age

215.—(1) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.

Penalty — Imprisonment for 10 years.

(2) It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.

(3) It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act.

[20] Section 214(1) of the Crimes Act on ‘Defilement of children under 13 years of age’ [i.e. A person commits an indictable offence if he or she unlawfully and carnally knows any child under the age of 13 years] seems to be a baggage from the past namely the Penal Code as in the light of section 207 of the Crimes Act, 2009 on ‘rape’ where a child under the age of 13 years is incapable of giving consent, ‘Defilement of children under 13 years of age’ under section 214(1) has no real purpose. Further, both section 214(1) and section 207 carry the same maximum sentence of life imprisonment.

[21] The legislature does not regard persons between 13 and 16 years of age as being incapable of giving consent. However, consent on the part of such a person for sexual intercourse is not regarded by law as a defence to a charge of defilement. Section 215(1) aims to protect minors between 13 and 16 years of age from sexual exploitation and abuse, the underlying objective being to provide legal protection to individuals in this age group, because minors are considered vulnerable and may not have the maturity or understanding to make decisions about sexual relationships with adults. Thus, the law on defilement recognizes the power imbalance and vulnerability of minors, and it is designed to protect them from potentially harmful situations involving adults.

[22] The offense of defilement in cases involving minors typically has the following objectives:

Protection of Minors: One of the primary objectives is to protect minors from sexual exploitation and manipulation by adults. The law aims to prevent adults from taking advantage of the vulnerability of young individuals.

Prevention of Harm: The law seeks to prevent physical, emotional, and psychological harm that can result from sexual relationships between adults and minors, even if the minor appears to give consent.

Upholding Public Morality: Laws related to defilement often reflect societal values and standards regarding appropriate sexual behavior, particularly concerning minors.

Deterrence: By criminalizing sexual relationships with minors, the law acts as a deterrent, discouraging adults from engaging in inappropriate sexual conduct with individuals below the age of 16.

Accountability: Perpetrators who violate these laws can be held accountable for their actions, facing legal consequences such as imprisonment or fines, which can serve as a form of punishment and a deterrent to others.

- [23] The legislature has in no uncertain terms expressed its intention to regard ‘Defilement of young person between 13 and 16 years of age’ as a very serious offence by increasing the maximum sentence up to 10 years as opposed to 05 years under the Penal Code. However, by and large the sentencing tariff has remained the same even under the Crimes Act, 2009 primarily because the great majority of the Magistrates and Judges have followed the range of suspended sentences to 04 years of imprisonment for defilement of a girl between thirteen and sixteen years of age as decided in *Donumainasava* even under the Crimes Act, 2009. Nevertheless, Gounder, J expressed hope in *Koroi* that a review of the tariff to reflect the legislature’s intention to treat the offence seriously may be undertaken at some point of time. The ‘new tariff’ of 02 years to 08 years of imprisonment in *Mawi* could be considered as a reaction to this feeling of inadequacy of the existing sentencing tariff among sentencers though it is not a guideline judgment according to law.
- [24] It would seem that the broad guidance in *Donumainasava* and *Taylor* on sentencing for defilement is not out of place even today. A careful scan of the sentences given in a large number of cases as submitted by the State⁶ numbering 39 and the LCA⁷ numbering 55 attached to their respective written submissions, it becomes clear that courts have, for the purpose of sentencing, broadly distinguished cases based on ‘virtuous friendship/relationship’ on the one hand and ‘sexual exploitation by

⁶ See Annexure A

⁷ See Annexure B

offenders in positions of trust, supervision and control' on the other, with the former being dealt with leniently and the latter harshly. The age difference between the victim and the offender also has been a significant factor in the severity of the sentence.

[25] The LAC has submitted that as per the sentences meted out in the past according to Annexure A for the offence of defilement, the range has been as follows:

- *suspended sentences to 4 years imprisonment usually where:*
 - i. *the accused and victim are both of same or similar age and are in relationship, friendship (virtuous relationship);*
 - ii. *persons of similar age engaging in consensual intercourse ;*
- *higher end of the tariff is for offenders who were older and in position of trust with the victim;*
- *02 or 04 years imprisonment where the accused is in a position of trust in relation to the victim and is much older; and recently 02-08 years imprisonment (since **Mawi**).*

[26] Annexures A and B also demonstrate that young offenders have been treated leniently, for they have not yet matured to full adulthood and not acquired the attributes of a mature adult. In Fiji in terms of the Juveniles Act, "child" means a person who has not attained the age of fourteen years, "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years and "juvenile" means a person who has not attained the age of eighteen years, and includes a child and a young person (note - the definitions of 'juvenile' and 'young person' in section 2 of the Juveniles Act was amended by section 57 of the Prisons and Corrections Act by increasing the upper age limit from 17 years to 18 years). According to the Constitution 'child' means an individual who has not reached the age of 18 years and 'adult' means an individual who is 18 years of age or over. As per the Interpretation Act 1967, child means a person under the age of 18 years. Thus in terms of age one would reach adulthood at 18 years of age.

[27] However, the legal age alone is not conclusive of one's adulthood or maturity. In **R v Peters** [2005] 2 Cr App R(S) 101, the Appeal Court said at para. 11:

“Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity.”

[28] In **R v Clarke** [2018] EWCA Crim 185 [Clarke, Andrews & Thompson [2018] EWCA Crim 185] where Clarke was just 18, Thompson was 19 and Andrews was 17 at the time of the offending), the Lord Chief Justice observed:

*“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. *The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018*) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday”*

[29] In **R v Balogun** [2018] EWCA Crim 2933, the appellant was convicted of three offences of rape and pleaded guilty to four further offences of rape and one offence of distributing offensive photographs of a child. The offences were committed during a five month period in 2016 when the appellant was aged between 18 years 04 months and 18 years 09 months. His victims were aged between 13 and 16. His behaviour was described as a ‘campaign of rape’. The Court of Appeal stated:

“The fact that the appellant had attained the age of 18 before he committed the offences does not of itself mean that the factors relevant to the sentencing of a young offender had necessarily ceased to have any relevance. He had not been invested overnight with all the understanding and self-control of a fully mature adult.”

[30] Therefore, there is ample authority to show that young adults should be treated differently within the criminal justice system as a result of their continuing lack of maturity, particularly when the offender is very young and the disparity in age between the offender and the victim is very small. The youth and immaturity of an offender must always be potential mitigating factors for the courts to take into account when passing sentence. However, where the facts of a case are particularly serious, the youth of the offender will not necessarily mitigate the appropriate sentence (See **R v Paiwant Asi-Akram** [2005] EWCA Crim 1543 and **R v Patrick M** [2005] EWCA Crim 1679).

[31] It is also useful to examine similar offences of defilement and the prescribed punishments in other jurisdictions.

Ireland

[32] In terms of section 3(1) of Criminal Law (Sexual Offences) Act 2006 in Ireland, any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of ‘Defilement of child under the age of 17 years’ and be liable to imprisonment for a term not exceeding 5 years, or if he or she is a person in authority, to imprisonment for a term not exceeding 10 years.

Defilement of child under the age of 17 years.

3.— (1) *Any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall, subject to subsection (3), be liable on conviction on indictment—*

(a) to imprisonment for a term not exceeding 5 years, or
(b) if he or she is a person in authority, to imprisonment for a term not exceeding 10 years.

(2) ...

(3) ...

(4)...

(5) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

- (6) *Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.*
- (7) *It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.*
- (8) ...
- (9) ...
- (10) *A person who—*
- (a) *has been convicted of an offence under this section, and*
 - (b) *is not more than 24 months older than the child under the age of 17 years with whom he or she engaged or attempted to engage in a sexual act, shall not be subject to the provisions of the Sex Offenders Act 2001 .*

[33] Defilement of a child aged under 17 but over 15 is also a serious offence in Ireland, which is punishable by a maximum sentence of five years imprisonment, and if the accused is a person in authority, (such as a parent, step-parent, teacher, sports coach, etc.) the maximum sentence is ten years imprisonment.

[34] Several decisions from Court of Appeal in Ireland⁸ show that in cases where the accused had pleaded guilty the sentences had ranged from 1 ½ years of detention for an appellant barely over 15 years to 04 years of imprisonment for a 50 year old appellant, with others in their mid-twenties to early thirties receiving 03 years of imprisonment. However, each sentence had been based on the facts and circumstances peculiar to each case.

⁸ Director of Public Prosecutions -v- J.S [2015] IECA 254; Director of Public Prosecutions -v- Farrelly [2015] IECA 302; Director of Public Prosecutions -v- B.D. [2016] IECA 259; Director of Public Prosecutions-v-L.C. [2023] IECA 30; Director of Public Prosecutions -v- Tulie [2016] IECA 325; Director of Public Prosecutions -v- Hoban[2019] IECA 72; Director of Public Prosecutions -v- V. T. [2021] IECA 117

New Zealand

[35] In New Zealand the offence of defilement is covered under the following sections of the Crimes Act 1961 with the maximum sentence being 10 years of imprisonment.

134 Sexual conduct with young person under 16

- (1) *Everyone who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.*
- (2) *Everyone who attempts to have sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years.*
- (3) *Everyone who does an indecent act on a young person is liable to imprisonment for a term not exceeding 7 years.*
- (4)
- (5) *The young person in respect of whom an offence against this section was committed cannot be charged as a party to the offence if the person who committed the offence was of or over the age of 16 years when the offence was committed.*
- (6) *In this section,—*
 - (a) *young person means a person under the age of 16 years; and*
 - (b) *doing an indecent act on a young person includes indecently assaulting the young person.*

134A Defence to charge under section 134

- (1) *It is a defence to a charge under section 134 if the person charged proves that,—*
 - (a) *before the time of the act concerned, he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years; and*
 - (b) *at the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and*
 - (c) *the young person consented.*
- (2) *Except to the extent provided in subsection (1),—*
 - (a) *it is not a defence to a charge under section 134 that the young person concerned consented; and*

(b) it is not a defence to a charge under section 134 that the person charged believed that the young person concerned was of or over the age of 16 years

[36] The decided cases⁹ in New Zealand demonstrate that the starting point (of imprisonment) in the sentencing process increases from 02 years and 09 months to 09 years (03 ½ years, 05 years and 07 years in between) with the age disparity between the victim and the offender from 06 to 40 years, of course, subject to many variables due to the facts and circumstances of each case.

Hong Kong

[37] The relevant existing offences under Cap. 200 Crimes Ordinance in Hong Kong include:

123. Intercourse with girl under 13

A man who has unlawful sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

124. Intercourse with girl under 16

(1) Subject to subsection (2), a man who has unlawful sexual intercourse with a girl under the age of 16 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.

[38] At present, the offence of sexual intercourse with a person under 16 is of absolute liability in Hong Kong. It is no defence that the accused did not know and had no reason to suspect that the child was under 16.

[39] Both section 123 and section 124 are offences of strict liability. Provided sexual intercourse is proved and, as a fact, the girl was at the time under 13 or 16 as the case

⁹ Faapuea v R [2010] NZCA 20; R v Hessel [2009] NZCA 450; R v Burdett [2009] NZCA 366; R v Brunie [2009] NZCA 300; R v Misileki [2008] NZCA 513; R v Davidson [2008] NZCA 484; R v Stacey [2008] NZCA 465; R v H [2008] NZCA 237; R v Henderson [2007] NZCA 524; R v A CA194/07 (17 October 2007)

may be, the accused will be convicted irrespective of any belief that the girl in question was older than 13 or 16 as the case may be.

[40] The Law Reform Commission of Hong Kong Review of Sexual Offences Sub-Committee, in November 2020 had produced a consultation paper whereby it discussed, a review on laws relating to sexual and related offences in Hong Kong and sentencing and related matters in the review of sexual offences.

[41] The Commission has recommended that a new offence of penetration of a child under 16 which is modelled similar to that of section 9 of the English Act and that the maximum penalty be increased to 14 years' imprisonment as the new offence involve penile penetration of the vagina, anus or mouth of a child under 16. They also recommended that a heavier sentence is required to reflect the seriousness of the offence. The Commission believed that the proposed offence of penetration of a child under 16 should carry a heavier sentence for better protection of a child against sexual exploitation, in particular when it involves penile penetration.

Proposed New Offence	Recommended Maximum Penalty
Penetration of a child under 16	14 years' imprisonment
Sexual assault of a child under 13	14 years' imprisonment
Sexual assault of a child under 16	14 years' imprisonment
Causing or inciting a child under 13 to engage in sexual activity	<u>If the activity caused or incited involved penetration of the anus or vagina; or penile penetration of the mouth:</u> Life imprisonment <u>If no penetration:</u> 14 years' imprisonment
Causing or inciting a child under 16 to engage in sexual activity	14 years' imprisonment

Australia

(Tasmania)

[42] Tasmanian sexual offences are set out in the Criminal Code 1924.

124. *Penetrative sexual abuse of child or young person*

- (1) *Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.*
- (2) *.*
- (3) *The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –*
 - (a) *that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or*
 - (b) *that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.*

(Queensland)

[43] In Queensland, sexual offences are set out in the Criminal Code 1899:

215 *Engaging in penile intercourse with child under 16*

- (1) *Any person who engages or attempts to engage in unlawful penile intercourse with a child under the age of 16 years is guilty of an indictable offence.*
- (2) *If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.*
- (3) *If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to engage in unlawful penile intercourse, to imprisonment for 14 years.*
- (4) *If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to engage in unlawful penile intercourse, to imprisonment for 14 years.*

- (4A) *If the child is a person with an impairment of the mind, the offender is guilty of a crime, and is liable to imprisonment for life.*
- (4B)
- (4C)
- (5) *If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.*
- (5A) *If the offence is alleged to have been committed with the circumstance of aggravation mentioned in subsection (4A), it is a defence to the circumstance of aggravation to prove that the accused person believed on reasonable grounds that the child was not a person with an impairment of the mind.*

(New South Wales)

[44] In New South Wales, the Crimes Act 1900 contains a range of sexual offences.

66C Sexual intercourse—child between 10 and 16

- (1) *Child between 10 and 14. Any person who has sexual intercourse with a child who is of or above the age of 10 years and under the age of 14 years is liable to imprisonment for 16 years.*
- (2) *Child between 10 and 14—aggravated offence. Any person who has sexual intercourse with a child who is of or above the age of 10 years and under the age of 14 years in circumstances of aggravation is liable to imprisonment for 20 years.*
- (3) *Child between 14 and 16. Any person who has sexual intercourse with a child who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years.*
- (4) *Child between 14 and 16—aggravated offence. Any person who has sexual intercourse with a child who is of or above the age of 14 years and under the age of 16 years in circumstances of aggravation is liable to imprisonment for 12 years.*

(Victoria)

[45] In Victoria, sexual offences are governed by the Crimes Act 1958:

49B Sexual penetration of a child under the age of 16

- (1) *A person (A) commits an offence if—*
- (a) *A intentionally—*
- (i) *sexually penetrates another person (B); or*

(ii) causes or allows B to sexually penetrate A; or
(iii) causes B—

(A) to sexually penetrate themselves; or
(B) to sexually penetrate another person (C); or
(C) to be sexually penetrated by C; and
(b) B is a child under the age of 16 years.

(2) A person who commits an offence against subsection (1) is liable to level 4 imprisonment (15 years maximum).

(3) The standard sentence for an offence against subsection (1) is 6 years.

49V Defence to offence against a child under 16—similarity in age

It is a defence to a charge for an offence against section 49B(1) if, at the time of the conduct constituting the offence—

(a) A was not more than 2 years older than B; and
(b) B was 12 years of age or more; and
(c) B consented to the sexual penetration.

49W Defences to offences against children under 16—reasonable belief as to age

(1) It is a defence to a charge for an offence against section 49B(1), if, at the time of the conduct constituting the offence—

(a) B was 12 years of age or more; and
(b) A reasonably believed that B was 16 years of age or more.

(4) A bears the burden of proving (on the balance of probabilities) the matter referred to in subsection (1)(b)....

(South Australia)

[46] In South Australia, sexual offences are governed by the Criminal Law Consolidation Act 1935.

49—Unlawful sexual intercourse

(1) A person who has sexual intercourse with any person under the age of 14 years shall be guilty of an offence and liable to be imprisoned for life.

(3) A person who has sexual intercourse with a person under the age of seventeen years is guilty of an offence.

Maximum penalty: Imprisonment for 15 years.

(4) It shall be a defence to a charge under subsection (3) to prove that—

(a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and

(b) the accused—

(i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or

(ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years.

(4) A person who, being in a position of authority in relation to a person under the age of 18 years, has sexual intercourse with that person is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(5a) It is a defence to a charge under subsection (5) if the accused was a person of a class described in subsection (9)(c) and proves that—

(a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of 17 years; and

(b) the accused—

(i) was, on the date on which the offence is alleged to have been committed, under the age of 18 years; or

(ii) believed on reasonable grounds that the person with whom the accused is alleged to have had sexual intercourse was of or above the age of 18 years.

United Kingdom

[47] In the UK, section 9(2) of the Sexual Offences Act 2003 criminalises *Sexual Activity with a Child* which encompasses the elements of defilement in Fiji where the maximum sentence is 14 years.

Child sex offences

9 Sexual activity with a child

(1) A person aged 18 or over (A) commits an offence if—

(a) he intentionally touches another person (B),

(b) the touching is sexual, and

(c) either—

(i) B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii) B is under 13.

(2) A person guilty of an offence under this section, if the touching involved—

(a) penetration of B's anus or vagina with a part of A's body or anything else,

(b) penetration of B's mouth with A's penis,

(c) penetration of A's anus or vagina with a part of B's body, or

(d) penetration of A's mouth with B's penis,

is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(3) Unless subsection (2) applies, a person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

10 Causing or inciting a child to engage in sexual activity

(1) A person aged 18 or over (A) commits an offence if—

(a) he intentionally causes or incites another person (B) to engage in an activity,

(b) the activity is sexual, and

(c) either—

(i) B is under 16 and A does not reasonably believe that B is 16 or over, or

(ii) B is under 13.

(2) A person guilty of an offence under this section, if the activity caused or incited involved—

(a) penetration of B's anus or vagina,

(b) penetration of B's mouth with a person's penis,

(c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or

(d) penetration of a person's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.

(3) Unless subsection (2) applies, a person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

[48] The UK Sentencing Guidelines provide a breakdown of harm and culpability factors indicating the appropriate sentencing range. However, Category 2 and Category 3 in UK Sentencing Guidelines are not applicable to the offence of defilement under section 215(1) of the Crimes Act, 2009 in Fiji. Culpability A and B in UK Sentencing Guidelines could be *mutatis mutandis* adopted to suit defilement under section 215(1).

[49] I agree that defilement covers a broad spectrum of culpability, and any revised tariff must allow the sentencing courts sufficient flexibility to impose proportionate sentences according to fact specific circumstances. Therefore, a broad range must be adopted to accommodate the full range of culpability from juvenile offenders to the most exploitative adults having regard to the presence of the factors in Culpability A in terms the UK Guidelines and relevant statutes in other jurisdictions. In doing so, it is necessary to expand the current sentencing range to reflect the statutory maximum of 10 years' imprisonment prescribed by section 215 of the Crimes Act 2009 in order that the most culpable offenders may be sentenced appropriately.

Sentencing Process

Step 1

[50] The court should determine which category of culpability the offence falls into by reference to the Table under step 2.

Culpability A (Category 1 & 2)

Category 01

- *Exploitative relationship. Sexual exploitation by offenders who abuse their positions of trust, supervision, authority or control vis-à-vis the victims.*
 - ❖ *In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.*
 - ❖ *Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependent. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive.*
 - ❖ *A person in a position of authority, in relation to a child, includes the following persons:*
 - (a) *A person who is a teacher, if the child is a pupil of the teacher or a pupil at the educational institution at which the teacher works;*
 - (b) *A parent of the child or a person who is in a significant relationship with a parent of the child. Parent of a child includes a step-parent, surrogate parent, adoptive parent, foster parent and guardian of the child and anyone who has parental responsibility for the child;*
 - (c) *A person who provides religious, sporting, musical or other instruction to the child;*
 - (d) *A person who is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child;*
 - (e) *A health professional or social worker providing professional services to the child;*
 - (f) *A person who is responsible for the care of the child if that child has a cognitive impairment;*
 - (g) *A person employed or providing services in a prison or corrections centre or a detention centre or a training centre or a person engaged in the administration of those institutions acting in the course of the person's duties in relation to the child;*
 - (h) *A person employed or providing services in a children's home/residential facility, child care facility/service or a person engaged in the administration of those institutions, acting in the course of the person's duties in relation to the child;*

- (i) *A person who provides child care to, or a child care service in respect of, the child for fee or reward;*
- (j) *an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).*

Category 02

- *An offence may be made more serious where an offender has abused their position to facilitate and/or conceal offending*
- *Significant disparity in age*
- *Significant degree of planning and premeditation.*
- *Offender acts together with others to commit the offence*
- *Use of alcohol/drugs on victim to facilitate the offence*
- *Grooming behavior used against victim*
- *Use of threats (actual or threatened including blackmail) and actual or threatened violence or use of a weapon.*
- *Sexual images of victim recorded, retained, solicited or shared*
- *Specific targeting of a particularly vulnerable child*
- *Offender lied about age*
- *Commercial exploitation and/or motivation*
- *Offence racially or religiously aggravated*
- *Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) or transgender identity (or presumed transgender identity)*
- *Offence motivated by, or demonstrating, hostility to the victim based on his or her disability (or presumed disability)*

Culpability B

- *When there is a virtuous friendship/relationship which ends in unlawful sexual intercourse between the victim and offender of similar age group.*
- *Where the offender is a child, 13-16 years of age, juvenile or a young adult still developing physically and psychologically or retaining the vulnerabilities of childhood.*
- *Factor(s) in Culpability A not present*

Step 2

[51] Having determined the culpability (A or B), the court should use the corresponding starting points to reach a sentence within the culpability range in the Table below. The starting point applies to all offenders irrespective of plea or previous convictions.

Having determined the starting point, step two allows further adjustment for aggravating or mitigating features (not exhaustive) set out below. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Table

<u>Culpability</u>	Culpability A Category 01 with one or more factors in category 02.	Culpability A Category 01 without one or more factors in category 02 or category 02 without one or more factors in category 01.	Culpability B*
Defilement of persons between 13-16 years of age	<p><i>Starting Point:</i> 06 years</p> <p><i>Sentencing Range:</i> 05–08 years</p>	<p><i>Starting Point:</i> 05 years</p> <p><i>Sentencing Range:</i> 04–08 years</p>	<p><i>Starting Point:</i> 03 years</p> <p><i>Sentencing Range:</i> 02–04 years (offender above 18 but young adult)</p> <p><i>Starting Point:</i> 06 months</p> <p><i>Sentencing Range:</i> Up to 02 years (offender under 18)</p> <p><i>*Final sentence may be fully or partially suspended if doing so achieves a sentence that is proportionate to and fits the gravity of the offending.</i></p>

Statutory aggravating factors:

- *Previous convictions, having regard to*
 - a) The nature of the offence to which the conviction relates and its relevance to the current offence; and*
 - b) The time that has elapsed since the conviction*

- *Offence committed whilst on bail*

Other aggravating factors:

In consideration of these factors, care should be taken to avoid double counting factors including those already taken into account in assessing culpability or those inherent in the offence (for example planning & premeditation or vulnerability of the victim). When sentencing young adult offenders (typically aged 18-25), consideration is also given to the guidance on the mitigating factors relating to age and lack of maturity when considering the significance of such conduct.

- *Ejaculation*
- *Pregnancy or STI as a consequence of offence*
- *Planning and premeditation on the part of the offender*
- *Particular cruelty in the commission of the offence*
- *The extent of any loss, damage, or harm resulting from the offence*
- *The victim was particularly vulnerable because of his or her health, physical or mental disability or any other factor known to the offender.*
- *The offence involved unlawful entry into, or unlawful presence in a dwelling place.*
- *Location of offence*

i. In general, an offence is not made more serious by the location of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others).

ii. Courts should be cautious about aggravating an offence by reason of it being committed for example in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.

iii. An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.

- *Timing of offence:*

i. In general, an offence is not made more serious by the timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others).

ii. Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight unless it also indicates increased harm or culpability not already accounted for.

- *Victim compelled to leave their home, school, etc.*
- *Failure to comply with current court orders such as DVRO*
- *Offence committed whilst on licence or sentence*
- *Offence committed on the presence of others, especially other children*
 - i. *This reflects the psychological harm that may be caused to those who witnessed the offence.*
 - ii. *The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.*
- *Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution*
 - i. *The more sophisticated, extensive or persistent the actions after the event, the more likely it is to increase the seriousness of the offence.*
- *Attempts to dispose of or conceal evidence*
- *The offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristics such as race, colour, nationality, religion, gender identity, sexual orientation.*
- *Failure of offender to respond to previous warnings*
 - i. *Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.*
 - ii. *This may particularly be the case when:*
 - *Such warning(s) or advice were of an official nature or from a professional source and/or*
 - *The warning(s) were made at the time of or shortly before the commission of the offence.*
- *Commission of offence whilst under the influence of alcohol or drugs*
- *Victim encouraged to recruit others.*
- *The offence was a family violence offence while the offender was subject to a protection order or against a person who, in relation to the protection order, was a protected person:*
- *Any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has caused a delay in the disposition of the proceedings or had an adverse effect on a victim or witness.*

Mitigating factors:

- *No previous convictions or no relevant/recent convictions:*
 - i. *First time offenders usually represent a lower risk of reoffending. Reoffending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders receive a mitigated sentence.*
 - ii. *Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.*
 - iii. *When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.*
 - iv. *Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.*

- *Remorse:*
 - i. *The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction).*
 - ii. *Lack of remorse should never be treated as an aggravating factor.*
 - iii. *Remorse can present itself in many different ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc.*

- *Previous good character and/or exemplary conduct:*
 - i. *This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.*

- ii. *However, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor*
- *Age and/or lack of maturity. Age and/or lack of maturity can affect:*
 - *the offender's responsibility for the offence and*
 - *the effect of the sentence on the offender.*
 - i. *Either or both of these considerations may justify a reduction in the sentence.*
 - ii. *The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).*
 - iii. *In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:*
 - *evaluate the consequences of their actions*
 - *limit impulsivity*
 - *limit risk taking*
 - iv. *Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.*
- *Diminished intellectual capacity or understanding. Mental disorder or learning disability, particularly where linked to the commission of the offence.*
- *Demonstration of steps taken to address offending behaviour.*
- *Physical disability or serious medical condition requiring urgent, intensive or long-term treatment:*
 - i. *There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending.*
- *That the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost.*
- *Any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement.*

[52] The LAC has submitted that 'consent' may be considered as a mitigating factor in appropriate circumstances though it is no defence to a charge of defilement. Consent

of the girl is irrelevant to the commission of the offence and it is also irrelevant to sentence (see *Donumainasava*). Secondly, an offender initially charged with rape of a person between years 13 to 16 would be convicted for defilement only on the basis of ‘consent’ and even when an offender is charged in the first place for defilement instead of rape of such a person it is based on ‘consent’. Thus, ‘consent’ is already taken into account in defilement and cannot be regarded once again as a mitigating factor.

[53] Thereafter, the following steps should be taken to conclude the sentencing process.

- **Step 3** - Consider any factors which indicate a reduction, such as cooperation with and assistance to the investigators and prosecution.
- **Step 4** - Reduction for early guilty plea.
- **Step 5** - Whether having regard to the provisions contained in the Sentencing and Penalties Act, it would be appropriate to impose an extended or longer sentence; for example habitual offenders.
- **Step 6** - (Totality & proportionality principle). If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.
- **Step 7**- The court must consider whether to give credit and how much for time spent on remand in accordance with the law.
- **Step 8** - Non-parole period as applicable.
- **Step 9** - Reasoned sentencing order.

[54] The above guidelines are intended to be applied irrespective of the methodology (for example two-tiered process or ‘instinctive synthesis’ approach) used by sentencing courts in Fiji (see **Naikelekelevesi v State** [2008] FJCA 11; AAU0061.2007 (27 June 2008) and **Qurai v State** ([2015] FJSC 15; CAV24.2014 (20 August 2015)). Sentencing must achieve justice in individual cases and that requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed. The prime justification and function of the guideline judgment is to promote consistency in sentencing levels nationwide. Like cases should be treated in like manner, similarly situated offenders should receive similar sentences and outcomes should not turn on

the identity of the particular judge. Consistency is not of course an absolute and sentencing is still an evaluative exercise. The guideline judgments are ‘guidelines’ (and not tramlines from which deviation is not permitted), and must not be applied in a mechanistic way. The bands themselves typically allow an overlap at the margins. Sentencing outside the bands is also not forbidden, although it must be justified (vide *Zhang*).

[55] The Court of Appeal said in *Seru v State* [2023] FJCA 67; AAU115.2017 (25 May 2023) that:

[45] Sentencing is founded upon two premises that are in perennial conflict: individualized justice and consistency. The first holds that courts should impose sentences that are just and appropriate according to all of the circumstances of each particular case. The second holds that similarly situated offenders should receive similar sentencing outcomes. The result is an ambivalent jurisprudence that challenges sentencers as they attempt to meet the conflicting demands of each premise.

*[46] Sentencing guidelines are designed to find the correct equilibrium between giving a sentencing magistrates or judges sufficient discretion to tailor a sentence that is appropriate in the circumstances of the individual case, yet limiting discretion enough to achieve consistency between cases. Justice O'Regan in *R v Taueki* [2005] NZCA 174; [2005] 3 NZLR 372 (CA) went to significant lengths to highlight the need to avoid a ‘rigid or mathematical approach’.*

[56] I shall now proceed to consider the grounds of appeal raised by the appellant.

Sentence

- i) *The Learned Sentencing Judge erred in law in treating the sex of the victim as a relevant factor when he reasoned that: “It follows that, defilement of a female child where the Accused penetrates her vagina with his penis should be considered more serious compared to the offence of defilement committed by penetrating the anus of a child with his penis.” Male victims of defilement are entitled to equal protection under the law.*
- ii) *The Learned Trial Judge erred in principle in treating the Respondent’s conduct during trial as a mitigating factor in the particular circumstances of this case.*

- iii) *The sentence is unduly lenient having regard to the tariff proposed in State v Mawi – Sentence [2019] FJHC 324; HAC17.2017 (12 April 2019), which proposed tariff the Appellant seeks to support.*

01st Ground of Appeal

[57] The trial judge stated in paragraph 6 of the sentence order:

[6] In Mawi (supra), the accused (Mawi) was 30 years old and the victim's age was 13 years and 02 months. The age gap therefore was 17 years. The victim in the said case was a girl and the accused had unprotected sexual intercourse with her where he penetrated the victim's vagina with his penis. Vaginal intercourse with a female child has the inherent danger that it could lead to the child being impregnated. It follows that, defilement of a female child where the accused penetrates her vagina with his penis should be considered more serious compared to the offence of defilement committed by penetrating the anus of a child with the penis.

[58] Obviously, the above reasoning is illogical and flawed. If defilement results in unwanted pregnancy in female victims it would certainly be an aggravating factor but no risk of pregnancy in male victims would not make the offence less serious. The trial judge's reasoning also defies protection afforded to children and every other person irrespective of their gender by the Constitutional provisions [see Articles 41(1)(d), 26(1) and 26(3)]. Legally, it also does not matter whether it is vaginal or anal intercourse as far as the statutorily prescribed maximum sentence for defilement is concerned. Further, potential pregnancy is not the only harm that could possibly be caused by penetration of vagina or anus. Physical injuries to vagina or anus and sexually transmitted diseases are examples of other serious harms. The trial judge had not considered at all the possible psychological trauma caused to the victims irrespective of their gender. The trial judge's reasoning would also be sending a wrong signal to offenders having predatory tendencies towards male children that even if they are caught they would be treated leniently by courts than their counterparts committing similar crimes against female children.

02nd Ground of Appeal

[59] The trial judge had considered the respondent's conduct during trial as a mitigating factor. However, the appellant's conduct at the trial set out at paragraph 09 of the sentencing order does not seem to support the judge's decision to grant the respondent a discount:

[9] In your mitigation, your counsel tried to convince this court that you did not contest that you committed the offence of defilement and you have admitted committing defilement when you were interviewed by the police. The argument is that, had you been charged for defilement, you would have pleaded guilty at the inception. This position however, was not reflected in your evidence or from the questions put to the victim during cross-examination. You clearly denied penetration during the trial. As stated before, your evidence was that you are unable to have erections after your accident 10 years ago. Further, there was no indication before the trial that you are willing to plead guilty for defilement. However the admissions made by you during the trial did in fact assist me to reach my conclusion with regard to your guilt for the offence of defilement. Therefore, I do agree that the said conduct during the trial where you made crucial admissions should earn you a discount in your sentence.

[60] There had been no indication before the trial that the appellant was willing to plead guilty to defilement and it is not clear what 'crucial' admissions he made during the trial which is said to have assisted the trial judge to reach his conclusion with regard to the appellant's guilt for the offence of defilement. In any event, the trial judge has not referred to any act of remorse on the part of the respondent during the trial warranting a mitigation of the sentence. The trial judge has clearly fallen into a sentencing error.

03rd Ground of Appeal

[61] In the light of what I have stated relating to setting the sentencing tariff for defilement and given his own decision in *Mawi*, it is clear that the trial judge's ultimate sentence is inadequate and should have received a higher sentence. However, given the then long-established tariff of suspended sentence to 04 years of imprisonment (see *Donumainasava*) at the time of sentencing, 03 years of imprisonment may not look so

inadequate as the sentence imposed lies within the then permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)].

[62] A Guideline judgment applies to all sentencing that takes place after that date of its delivery regardless of when the offending took place. The more difficult issue is whether it should also apply to those who have already been sentenced and if so in what circumstances. A guideline judgment only applies to sentences that have already been imposed, if and only if two conditions are satisfied: (a) that an appeal against the sentence has been filed before the date the judgment is delivered; and (b) the application of the judgment would result in a more favourable outcome to the appellant (vide **Zhang v R** [2019] NZCA 507). Therefore, I would not attempt to resentence the appellant on the basis of new guidelines for defilement as he would not receive a more favourable sentence under the new guidelines.

[63] The trial judge in **Mawi** had sentenced a 30 year old man after trial for 07 years' imprisonment (05 year non-parole) for defilement of a 13 year old girl whereas he had sentenced the respondent, 46 year old, to 03 years of imprisonment (01 year non-parole) for defiling a 13 year old boy after trial. The only material distinguishing feature between the two cases appears to be the gender of the victim.

[64] I wish to place on record my appreciation for the assistance rendered to this court by Mr. Burney and Ms. Shameem, counsel for the DPP and Ms. T. Kean for the LAC whose well-researched written submissions was acknowledged even by the appellant's counsel, in formulating the guidelines for defilement.

Mataitoga, RJA

[65] I agree with the reasons and conclusion.

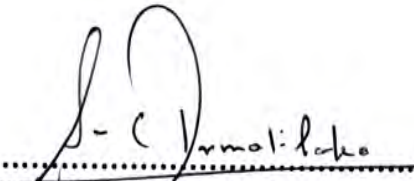
Oetaki, JA

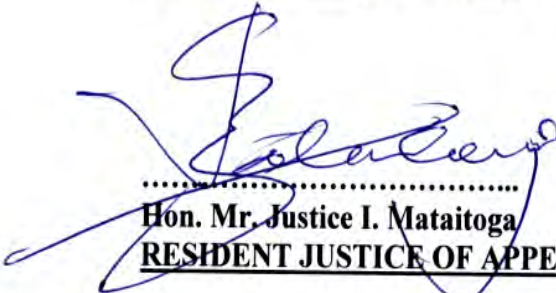
[66] I have considered the judgment of Prematilaka, RJA in draft, and I agree with the guidelines proposed and the order made.

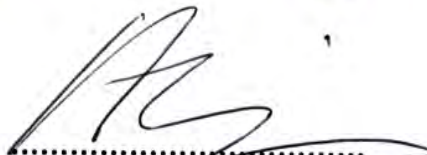
Order of the Court:

1. Appeal against sentence is allowed on the grounds urged but for the reasons given the sentence is not quashed.




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


.....
Hon. Mr. Justice I. Maitoga
RESIDENT JUSTICE OF APPEAL


.....
Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

Solicitors:

Office for the Director of Public Prosecutions for the Appellant
Legal Aid Commission on notice for the Guideline Judgment.
Respondent absent and unrepresented

Annexure A

Case -	Victim's Age -	Offender's Age -	Relationship -	Guilty Plea or Trial -	Tariff Adopted -	Sentence -
1. <i>State v Raj – Sentence [2019] FJHC HAC 184.2019 (17 June 2022)</i>	13	29	Teacher - Student	After trial	Suspended sentence – 4 years imprisonment	8 years imprisonment concurrent with the Rape sentence of 16 years imprisonment with non-parole of 12 years.
2. <i>State v Valu - Sentence [2020] FJHC 950; HAC203.2017 (13 November 2020)</i>	16	28	Boyfriend/ girlfriend	Not guilty of rape. Convicted of lesser offence of defilement		Head Sentence - 28 months 3 weeks Non-parole period - 18 months 3 weeks Suspended for 3 years
3. <i>Chand v State [2020] FJHC 562; HAA079.2019 (23 July 2020)</i>	15	Unknown	Nil	After trial		MC – 30 months imprisonment non-parole of 24 months HC – appeal against sentence dismissed
4. <i>State v Singh - Sentence [2020] FJMC 88; Criminal Case 137 of 2013 (22 June 2020)</i>	15	18	Boyfriend/ Girlfriend	After trial		2 years imprisonment suspended for 2 years
5. <i>State v Taura - Sentence [2020] FJHC 427; HAC047.2019S (15 June 2020)</i>	15	21	Boyfriend/ girlfriend	Not guilty of rape. Convicted of lesser offence of defilement		9 months imprisonment suspended for 18 months

6. <i>State v Peniseni [2020] FJHC 328; HAA30.2019 (22 May 2020)</i>	14 ½	61	Stepdaughter/ Stepfather	Guilty plea at MC State appeal to HC		MC - 1 year 11 months HC - 4 years non-parole 3 years
7. <i>State v Jabber - Sentence [2020] FJHC 311; HAC009.2020 (13 May 2020)</i>	14	29	Neighbors	Guilty plea		2 years imprisonment
8. <i>State v Malo [2020] FJHC 179; HAC302.2018S (2 March 2020)</i>	14	34	Grandniece/ Granduncle	Not guilty of rape. Convicted of lesser offence of defilement		3 years imprisonment
9. <i>State v Peceli - Sentence [2019] FJHC 1002; HAC186.2017 (23 October 2019)</i>	15	19	Boyfriend/ girlfriend	Guilty plea		18 months imprisonment suspended for 2 years
10. <i>Gounder v State [2019] FJHC 895; HAA32.2019 (18 September 2019)</i>	14	Unknown	Boyfriend/ girlfriend	After trial in MC Accused appealed conviction to HC		MC - 3 years 18 months and 16 days non-parole 3 years HC – conviction appeal dismissed
11. <i>State v Rinamalo [2019] FJMC 118; Criminal Case 108 of 2018 (12 August 2019)</i>	13	17	Cousins	Guilty plea		2 years imprisonment with non-parole of 1 year
12. <i>State v Lal [2019] FJHC 565; HAR001.2019 [Labasa] (10 June 2019)</i>	13	23	No	After trial at MC HC review		MC - 11 months' imprisonment [2 months to serve in prison and 9 months suspended for 2 years] HC - 3 ½ years' with a non- parole period of 2 years

13. <i>State v Koroi</i> [2019] FJHC 483; HAR02.2019 (24 May 2019)	15	Unknown	No	Guilty plea		MC - 20 months imprisonment where 2 months to be served and 18 months suspended for 2 years HC – review not allowed
14. <i>State v Davuilevu</i> - Sentence [2019] FJHC 427; HAC205.2018 (10 May 2019)	14	18	No	Guilty plea		15 months 9 days suspended for 2 years
15. <i>State v Kumar</i> - Sentence [2019] FJMC 42; Criminal File 554 of 2017 (9 April 2019)	15	32	No	After trial		2 years 6 months imprisonment with non-parole of 2 years
16. <i>State v SV</i> - Sentence [2019] FJMC 56; Criminal Case 76 of 2016 (9 April 2019)	15	19	Boyfriend/ girlfriend	After trial		1 year 8 months imprisonment suspended for 2 years
17. <i>State v Ramere</i> [2018] FJHC 1017; HAC38.2017 (19 October 2018)	13	15	Nil	Not guilty of rape. Convicted of lesser offence of defilement		12 months imprisonment suspended for 3 years
18. <i>State v Prasad</i> [2018] FJMC 89; Criminal Case 552 of 2012 (21 September 2018)	15	52	No	After trial		12 months imprisonment
19. <i>State v VN</i> - Sentence [2018] FJMC 116; Criminal Case 148 of 2018 (17 August 2018)	15	18	Cousins	After trial		2 years imprisonment from which 6 months to be served and 1 ½ years suspended for 2 years

20. <i>Naiwau v State</i> [2018] FJHC 193; HAA01.2018 (16 March 2018)	15	30	Cousin/ Church Leader	After trial at MC HC affirmed sentence		2 years 11 months and 2 weeks imprisonment with a non-parole of 18 months
21. <i>State v Tute - Sentence</i> [2016] FJHC 678; HAC14.2015 (27 July 2016)	14	29	Nil	Not guilty of rape. Convicted of lesser offence of defilement		2 years non-parole 1 year 4 months
22. <i>State v Tulevu - Sentence</i> [2016] FJHC 564; HAC65.2014 (10 June 2016)	15	38	Boyfriend/ girlfriend	Not guilty of rape. Convicted of lesser offence of defilement		2 years 1 month non-parole 1 year 6 months
23. <i>State v Balak</i> [2015] FJHC 709; HAC260.2014 (1 October 2015)	13	56	Family friends. She'd call him uncle	After trial		4 years imprisonment concurrent with the rape sentence of 13 years non-parole 11 years
24. <i>State v Kele</i> [2015] FJMC 70; Criminal Case 1642.2014 (8 July 2015)	15	23	Nil	Guilty plea		2 years imprisonment suspended for 2 years
25. <i>State v Tabuyaqona</i> [2015] FJMC 69; Criminal Case 850.2011 (22 June 2015)	15	52	Nil	After trial		20 months imprisonment with non-parole of 18 months
26. <i>State v Tawake</i> [2015] FJMC 42; Criminal Case 263.2011 (27 March 2015)	15	24	Nil	Guilty plea		12 months imprisonment suspended for 3 years
27. <i>State v Biusaya</i> [2015] FJMC 33; Criminal Case 282.2015 (9 March 2015)	15	40	Relatives	Guilty plea		16 months imprisonment

28. <i>State v Vetaukula - Sentence [2014] FJHC 500; HAC46.2013 (8 July 2014)</i>	15	22	Village Headman	Guilty plea		18 months imprisonment
29. <i>State v Sovalevu - Sentence [2014] FJHC 117; HAC315.2012 (5 March 2014)</i>	15	41	Neighbors	Not guilty of rape. Convicted of lesser offence of defilement		2 years imprisonment with non-parole period of 20 months
30. <i>State v Mafutuna [2013] FJMC 425; Criminal Case 604.2010 (19 December 2013)</i>	15	27	Nil	After trial	Charged under the Penal Code	15 months imprisonment
31. <i>State v Lal [2013] FJMC 120; Criminal Case 1094.2011 (26 March 2013)</i>	15	23	Girlfriend/boyfriend	After trial -	Tariff adopted - Suspended sentence to 4 years imprisonment	2 years imprisonment of which 1 month to be served and 23 months suspended for 2 years
32. <i>State v Prasad [2011] FJMC 135; Criminal Case 918.2009 (24 October 2011)</i>	14	17	Girlfriend/boyfriend	Guilty plea		18 months imprisonment suspended for 4 years
33. <i>State v Vanavana [2011] FJMC 46; CRC158.2009 (28 March 2011)</i>	15	43 and 19	Nil	After trial		42 year old - 2 years 6 months non-parole 12 months 19 year old - 1 year 6 months non-parole 6 months
34. <i>State v Matayalewa Crim. Case No: HAC 150 of 2018 (Sentence dated 14 January 2020)</i>	12	28	Cousins	After trial	2 – 8 years imprisonment	Head Sentence – 12 years 6 months. Non-parole period – 10 years 6 months [aggregate sentence given the rape counts]

35. <i>State v Dinono - Sentence [2019] FJHC 871; HAC336.2018 (5 September 2019)</i>	13	19	Cousins	Guilty plea		Head Sentence – 2 years 7 months and 25 days. Non-parole period – 1 year 7 months and 25 days. Suspended for 3 years
36. <i>State v Rabuli - Sentence [2019] FJMC 72; Criminal Case 401 of 2018 (10 May 2019)</i>	14	20	Relatives	Guilty plea		2 years imprisonment suspended for 3 years
37. <i>State v Mawi - Sentence [2019] FJHC 324; HAC17.2017 (12 April 2019)</i>	13	30	Relatives	After trial		Head Sentence – 6 years 10 months and 15 days. Non-parole period – 4 year 10 months and 15 days
38. <i>State v Lagivere - Sentence [2017] FJHC 386; HAC132.2016 (30 May 2017)</i>	14	27	Cousins	Not guilty of rape. Convicted of lesser offence of defilement		2 years 8 months non-parole 1 year 2 months
39. <i>State v Chand - Sentence [2016] FJHC 889; HAC314.2015 (6 October 2016)</i>	15	19	Boyfriend/ girlfriend	Not guilty of rape. Convicted of lesser offence of defilement		9 months imprisonment of which 3 years to be served and 6 months suspended for 2 years

Annexure B

5.0 LIST OF CASE AUTHORITIES AND SENTENCES UNDER PENAL CODE, CAP 17

No	Case Name	Citation	Brief Facts	Age of Complainant & Accused	Tariff Applied	Aggravating factors	Sentence
<u>PENAL CODE</u> <u>DEFILEMENT OF A GIRL BETWEEN 13 AND 16 YEARS OF AGE</u> <u>Contrary to Section 156(1)(a) of the <i>Penal Code</i> CAP 17</u>							
1.	Kunadei v The State	[2002] FJHC 187; HAA0080J.2002S (3 December 2002) Appeal from MC	Pleaded guilty to one count of Defilement	Complainant was 14 years and 9 months old The accused was 21 years old	Elia Donumainasava -v- The State Crim. App. HAA0032 of 2001	Victim getting pregnant Education coming to an end	3 years sentence quashed and substituted for a term of 6 months imprisonment.
2.	Namami v State	[1995] FJLawRp 25; [1995] 41 FLR 152 (17 July 1995)	Pleaded guilty Appealed his sentence from MC	Complainant was 15 years 6 months and 22 days Accused was 18 years		Nil	2 ½ years' imprisonment at MC Appeal was allowed. Father of the Appellant was ordered to enter into a recognizance of \$100 to keep the peace and be of good behaviour for a period of 12 months.

3.	Donumainasava v The State	[2001] FJHC 25; Haa0032j.2001s (18 May 2001) Appeal from MC	Charged with one count of Defilement under the Penal code First offender Pleaded guilty He was charged with another	Complainant was 15 years old Accused was 22 years old	R -v- Taylor and Others 64 Cr. ACr. App. R. 182	Complainant became pregnant & dropped out of school, Complainant does not know who the father of her child is. Age gap of 7 years	Appeal dismissed and 2 years imprisonment at MC remains
4.	Lingam v The State	[2004] FJHC 441; HAA0082.2004L (30 July 2004) Appeal from MC	Pleaded guilty to one count of Defilement	Complainant is 15 years old Accused is 30 years old	Etonia Rokowaqa v State – Cr. Appeal No. HAA0037 of 2004	Age gap Accused is married with 3 children; Breach of trust (neighbours)	5 years' imprisonment is set aside and the appellant was sentenced to 3 years imprisonment Appeal against sentence allowed
5.	Vale v The State	[1995] FJHC 117; Haa0022j.95b (17 July 1995) Appeal against sentence by A	Appellant was convicted of Defilement after a guilty plea First offender	Accused was 21 years old			Imprisonment for 3 years "consecutive to the sentence he is serving now". After appeal 9 months imprisonment.
6.	Valo v The State	[1990] FJHC 37; Haa0008j.90b (5 April 1990) Appeal against sentence	Sentenced to 18 months imprisonment after he pleaded guilty to an offence of Defilement in MC First Offender	Complainant was 14 years 8 months Accused was 24 years old		Accused was married man with one child. He had entered the complainant's house at midnight and had committed this offence Complainant received injuries	Appellant's appeal against sentence is allowed He was immediately release upon his entering in his own recognizance in the sum of \$100 he keep the peace and be of good behaviour towards the complainant for a period of 2 years.

6.0 LIST OF CASE AUTHORITIES AND SENTENCES UNDER CRIMES ACT 2009

CRIMES ACT 2009: Defilement of a Young Person Between 13 and 16 years of age Contrary to section 215 (1) of the Crimes Act.							
1.	State v Lagivere	Sentence [2017] FJHC 386; HAC132.2016 (30 May 2017)	He pleaded guilty	Complainant was 14 years. Accused was 27 years old	State v Chand (2016) FJHC 889; HAC314.2015 (6 October 2016) -2 to 4 years.	Breach of trust (cousins) Age difference (13 years); Taking advantage of victim's naivety.	Head Sentence – 02 years and 08 months imprisonment Non-parole period – 01 year and 02 months
2.	State v Mafutuna	[2013] FJMC 425; Criminal Case 604.2010 (19 December 2013)	charged with 2 counts of defilement one under the Penal Code and one under the Crimes Act	Complainant was 15 years and 5 months old The accused was 27 years	Kabaura HAC 117/2010S	Age gap (12 years)	15 months imprisonment.
3.	Rinasau v State	[2015] FJHC 533; HAM203.2014 (13 July 2015) Appeal from MC	Charged with one count of abduction and one count of defilement Pleaded G First offender	Complainant was 15 at the time Accused was 23 years old.	Rokowaqa HAA 37.2004 & Kabaura HAC 117/10)	Nil	18 months for the abduction and 3 years and 10 months for the defilement imprisonment. After appeal, Appellant had to serve 20 months imprisonment

4.	State v Vanavana	[2011] FJMC 46; CRC158.2009 (28 March 2011)	Two accused persons. Both pleaded guilty to Defilement under the Penal Code	Complainant was 15 years and 8 months Accused persons were 43 years and 20 years old	State v Etonia Kabaura [2010] FJHC 280	Nil	(i) Two years and six months imprisonment on 43 year old Accused, non-parole 12 months (ii) One year and three months on 20 year old Accused, non-parole 6 months
5.	Chand v State	[2020] FJHC 562; HAA079.2019 (23 July 2020)	Pleaded NG and convicted after trial Charged with one count of abduction and one count of defilement MC Appeal			Taking advantage of the victim's vulnerability and naivety.	30 months of imprisonment with a non-parole period of two years.
6.	State v Raibevu	Sentence [2012] FJHC 1040; HAC27.2011 (27 April 2012)	Charged with two counts of defilement, one count under the crimes decree and one count under the penal code Pleaded not guilty First Offender	Complainant was 15 years and seven months The accused was 61 years old	(Rokowaqa CA 37/2004, Kabaura H AC 117/2010). Donumainasuva CA 32/2001	Age difference	Three years imprisonment. Two years non-parole

7.	State v Ali - Sentence	[2012] FJHC 1121; HAC235.2011 (21 May 2012)	After trial Rape charge, the accused was found not guilty but he was convicted for alternative charge of Defilement	Complainant was 15 years 9 months old Accused was 28 years	Rokowaqa CA 37/2004, State v Kabaura [2010] FJHC 280) Elia Donumainasava v St ate Crim.App.HAA 32 of 2001	Close relation Accused knew the victim was under the age of 16 years – age gap Victim's education disrupted. Victim emotionally and psychologically affected. Victim gave birth to a child.	02 years imprisonment
8.	Rokowaqa v The State	[2004] FJHC 101; HAA0037.2004 (11 May 2004)	Charged with a representative offence of defilement of a girl between 13 and 16 years of age. Pleaded guilty. Sentence appeal	Complainant was 15 years old. Accused was 40 years old.	State v Roqica & Others Criminal Appeal No. HAA 037 of 2002S	Breach of Trust. (He was an employer at the orphanage that where complainant lived) 25 year gap	Sentenced to 4 years imprisonment. Appeal was dismissed and sentence maintained.

9.	State v Dinono	Sentence [2019] FJHC 871; HAC336.2018 (5 September 2019)	Charged with one count of defilement Pleaded guilty First offender	Complainant was 13 years old 2 months The accused was 19 years old The accused person was the paternal cousin of the complainant	State v Mawi [2019] FJHC 324 ; HAC17.212 (12 April 2019) where the sentencing tariff for defilement was 02 years to 08 years.	Breach of trust Age of the victim; Age difference between {06 years} Unprotected sexual intercourse with the victim at a cassava plantation Taking advantage of victim's vulnerability and naivety.	Head Sentence – 02 years; 07 months and 25 days Non-parole period – 01 year; 07 months and 25 days Suspended for 3 years.
10.	State v Pita Vetaukula	Criminal Case No. HAC 46 of 2013 (8 July 2014)	Pleaded Guilty Offender was the headman of the village. First offender	Complainant was 15 years. Accused was 22 years old.	(Elia Donumainasava v State [2001] HAA 32/01S , 18 May 2001).	position of authority over the complainant Age gap of 6 years.	18 months imprisonment

11.	State v Mawi	Sentence [2019] FJHC 324; HAC17.2017 (12 April 2019)	Charged with one count of defilement while his co- accused was charged with Rape First offender Pleaded guilty	Complainant was 13 years old Accused was 30 years old	State v Chand (2016) FJHC 889 ; HAC314.2015 (6 October 2016) - 02 years to 04 years.	The incident took place just two months after the victim's 13th birthday; age difference [17 years.] Victim made to lie down on the ground outside her house and he had Unprotected sexual intercourse. Taking advantage of the victim's vulnerability and naivety.	Head Sentence – 06 years; 10 months and 15 days Non-parole period – 04 year; 10 months and 15 days
12.	State v Valu -	Sentence [2020] FJHC 950; HAC203.2017 (13 November 2020)	Acquitted for two counts of Rape but convicted for two counts of Defilement First offender	Complaint was below 16 years. Age gap of 17 years.	Ditto	Breach of trust. Age gap	Head Sentence - 28 months and 3 weeks, non-parole period - 18 months and 3 weeks Suspended for 3 years.

13.	State v Kalounivalu	[2014] FJHC 938; HAC10.2014 (24 December 2014)	Convicted for defilement First offender	Complainant was 14 years Accused was 18 years old	(<i>Elia Donumainasava v State</i> [2001] HAA 32/01S, 18 May 2001 <i>State v Pita Vetaukula</i> Criminal Case No. HAC 46 of 2013 (8 July 2014)	Some degree of exploitation of the complainant. Accused not in a sincere relationship. Accused only used her for sexual gratification.	12 months imprisonment
14.	State v Ramere	[2018] FJHC 1017; HAC38.2017 (19 October 2018)	Juvenile acquitted for rape but convicted for defilement. First offender	Complainant was 13 years and 5 months old Juvenile was 15 years old	<i>Elia Donumainasava v State</i> [2001] HAA 32/01S, 18 May 2001.	Nil	12 months imprisonment, suspended for 3 years.

15.	Domoni v State	[2009] FJHC 142; HAA089.2008 (10 July 2009)	Pleaded not guilty at MC Convicted for rape and sentenced to 9 years imp. Convicted for defilement after appeal as per s.156 of the Penal Code .	Complainant was 14 years. Accused was 51 years old	(Etonia Rokowaqa v State Criminal Appeal No. HAA 37 of 2004). (Elia Donumainasuva v State Criminal Appeal No. HAA032 of 2001 State v Roqica & Others Criminal Appeal No. HAA037 of 2002S).	Huge age gap Subsequent threat made to the complainant to keep quiet about incident. They were neighbours. Sexual exploitation of a young girl by an older man.	4 years imprisonment
16.	Naiwau v State	[2018] FJHC 193; HAA01.2018 (16 March 2018) MC Appeal	Convicted after trial for one count of defilement	Complainant was 15 years 11 months old. Accused was 35 years old		Breach of trust (he was a youth leader) Age gap Victim became pregnant	2 years, 11 months and 2 weeks imprisonment, non- parole of 18 months. Appeal dismissed

17.	State v Taura	Sentence [2020] FJHC 427; HAC047.2019S (15 June 2020)	Acquitted for Rape but convicted for Defilement. First offender	Complainant was 15 years old Accused was 21 years old	Elia Donumainasava v The State, Criminal Appeal No. HAA 032 of 2001S, High Court, Suva; Etonia Rokowaqa v State, Criminal Appeal No. HAA 037 of 2004, High Court, Suva and State v Etonia Kabaura, Criminal Case No. HAC 117 of 2010S, High Court, Suva.	Breach of Trust. The complainant was vulnerable 6 year age gap No regard for her right as a child and human being	9 months imprisonment suspended for 18 months
18.	State v SV	Sentence [2019] FJMC 56; Criminal Case 76 of 2016 (9 April 2019)	Convicted for defilement after trial First offender	Complainant was 15 years old Accused was 19 years old	Etonia Rokowaqa v. State Criminal Appeal No. HAA 37 of 2004	Age difference (4 years) Impregnated the victim	1 year 8 months imprisonment, suspended for 2 years.

19.	State v Tabuyaqona	[2015] FJMC 69; Criminal Case 850.2011 (22 June 2015)	Pled not guilty. convicted for one count of abduction and one count of defilement First offender	Complainant was 15 years Accused was 48 years	Elia Donumainasava –v- State [2001] HAA 32/01S	Age difference (33 years) Exploitation of a very young girl	Defilement 20 months imprisonment to be served concurrently with the first count of 16 months 18 months non-parole.
20.	State v Raovuna -	Sentence [2011] FJHC 59; HAC 021.2010 (10 February 2011)	Acquitted of one charge of rape but convicted on the lesser charge of defilement. Pled guilty to defilement before trial, which was not accepted by the State	Accused was 19 years old Virtuous relationship	Kabaura HAC 117/2010S - suspended sentence to four years imprisonment	Nil	8 months imprisonment suspended for 2 years.
21.	State v Kabaura	[2010] FJHC 280; HAC117.2010 (9 August 2010)	Pled G Convicted for one count of indecent assault and one count of defilement	Complainant was 14 years old. Accused was 58 years old.	(<i>Etonia Rokowaqa v. State</i> Criminal Appeal No. HAA37 of 2004); <i>Elia Donumainasuva v. State</i> Criminal Appeal No. HAA032 of 2001).	Age difference The exploitation of the complainant by luring her with gifts and money over a period of time, The pregnancy of the complainant Loss of schooling opportunities for her.	2 months imprisonment for indecent assault on count 1 and 3 years imprisonment for defilement with a non-parole period of 2 years on count 2.

22.	State v VN - Sentence	[2018] FJMC 116; Criminal Case 148 of 2018 (17 August 2018)	After trial, the Juvenile was convicted of a representative count of defilement. First offender	Complainant was 15 years Juvenile was 18 years old	Etonia Rokowaqa v. State Criminal Appeal No. HAA 37 of 2004	Age difference (3 years) Victim became pregnant and had to drop or of school.	2 years imprisonment, he had to serve 6 months imprisonment immediately. The remaining 1 year 6 months suspended for 2 years.
23.	Musuvanua v State	[2014] FJHC 459; HAA010.2014 (27 June 2014) Appeal from MC	Charged - 08 counts of Defilement. Victim was the sister-in-law of the Appellant as he married to the elder sister of the victim. Pleaded guilty at MC	Accused was 33 years old	Domoni v State (2009) FJHC 142:HAA089/2008 . - suspended sentence to 4 years imprisonment Etonia Rokowaqa v State HAA 37 of 2004		24 months imprisonment, concurrently for counts 1-7 imprisonment and 12 months consecutive imprisonment for the count 08. In total 3 years imprisonment. Non parole period was not set in this case. Appeal in HCT was dismissed
24.	State v Tute -	Sentence [2016] FJHC 678; HAC14.2015 (27 July 2016)	Pleaded not Charged to Rape but convicted after trial to defilement First offender	Complainant was 15 years Accused was 29 years	State v. Eremasi Rainasau HAM 203 of 2014 suspended sentence to four years imprisonment	Breach of trust Took advantage of vulnerability	2 years imprisonment, non- parole period 1 year and 4 months.

25.	State v Tamanisau	[2011] FJHC 752; HAC177.2010S (18 November 2011)	Accused found guilty as charged, for counts of defilement after trial. First offender	Complainant was 15 years old Accused was 42 years old	Elia Donumainasava v The State, Criminal Appeal No. HAA 032 of 2001S, High Court, Suva; Etonia Rokowaqa v State, C riminal Appeal No. HAA 037 of 2004 State v Etonia Kabaura, Criminal Case No. HAC 117 of 2010S, High Court, Suva.	Age gap Having sexual intercourse, knowing she was under 16 years old. Took her out for a car ride after 10pm, when you as a father, knew she should be with her parents. He gave her money to fulfil his desires. He exploited her naivety.	3 years imprisonment on each count, sentences concurrent. Non parole of 2 years
26.	State v Kele	[2015] FJMC 70; Criminal Case 1642.2014 (8 July 2015)	Pleaded guilty to one count of Defilement First offender	Complainant was 15 years old Accused was 23 years old	State v Kabaura [2010] FJHC 280 ; HAC 117.2010 (9 August 2010)	Nil	2 years imprisonment, suspended for 2 years

27.	State v Prasad	[2018] FJMC 85; Criminal Case 552 of 2012 (21 September 2018)	Convicted after trial for one count of defilement First offender	Complainant was 15 years old Accused was 52 years old	Elia Donumainasuva v The State Criminal Appeal No. HAA0032 of 2001	Victim was mentally challenged and had hearing disabilities Victim got pregnant and had injuries on her vagina Breach of trust Taking advantage for his own benefit.	12 months imprisonment.
28.	State v Sovalevu	[2014] FJHC 117; HAC315.2012 (5 March 2014)	After trial for the offence of Rape and Defilement, he was convicted for only defilement First offender	Complainant was 16 years Accused was 41 years		Age gap of 25 years	2 years imprisonment 20 months non parole

29	State v Malo	[2020] FJHC 179; HAC302.2018S (2 March 2020)	Found not guilty and acquitted of two counts of rape after trial but convicted for two counts of defilement. First offender	Complainant was 14 years old. Accused was 34 years old	State v Isikeli Tamanisau, Criminal Case No. HAC 177 of 2010S <i>Elia Donumainasava v T he State, Criminal Appeal No. HAA 032 of 2001S Etonia Rokowaqa v State, Criminal Appeal No. HAA 037 of 2004 State v Etonia Kabaura, Criminal Case No. HAC 117 of 2010S</i>	Breach of Trust. Age difference (20 years).	3 years imprisonment
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30.	State v Kumar	Sentence [2019] FJMC 42; Criminal File 554 of 2017 (9 April 2019)	Pleaded NG to 4 counts of defilement and abduction. Convicted for only 1 count of abduction and one count of defilement. First offender.	Complainant 15 years and 8 months and 4 days old. Accused was 32 years old	State v. Pita Vetaukula (HAC 46 of 2013)	1 year was added for aggravating factors but no indication as to what this was	(2) Years six (6) months imprisonment with a non-parole of 2 years.
31.	State v Tavakece	Sentence [2023] FJHC 117; HAC176.2020 (27 February 2023)	After trial the accused was found not guilty of one count of rape but found him guilty and convicted him for the lesser offence of defilement	Complainant was 15 years of age Accused 18 years	(Elia Donumainasava v State [2001] HAA 32/01S State v Pita Vetaukula Criminal Case No. HAC 46 of 2013 (8 July 2014)	no aggravating factors	1 year and 4 months imprisonment suspended for 3 years
32.	State v Tulevu	Sentence [2016] FJHC 564; HAC65.2014 (10 June 2016)	Court found the accused guilty and convicted him for the lesser offence of defilement First offender	complainant was 15 years of age accused was 38 years		Age difference	2 years 1 month imprisonment, non-parole period of 1 year 6 months

33.	State v Reddy	[2014] FJHC 33; HAC96.2011 (4 February 2014) [2018] FJCA 10;	Charged with Rape and Defilement. Court found him NG for rape but	Complainant was 16 years of age and the accused was 22 years	Kabaura [2010] FJHC 280 . Donumainasava (HA A 32 of 2001)	breach of trust teacher/student	two years imprisonment, non-parole 18 months
	Reddy v State	AAU06.2014 (8 March 2018)	G of defilement. First offender Appellant appealed case against conviction				Appeal dismissed. Conviction was affirmed
34.	State v Biusaya	[2015] FJMC 33; Criminal Case 282.2015 (9 March 2015)	Charged with 3 counts of defilement Pleaded guilty First offender	Complainant was 15 years Accused was 40 years old	State v Raibevu - Sentence [2012] FJHC 1040	Age difference Breach of trust	16 months imprisonment
35.	State v Balak	[2015] FJHC 709; HAC260.2014 (1 October 2015)	accused was convicted after trial for one count of statutory rape of a 12 year old girl and two counts of defilement	Complainant was 12 years and 11 months old		Breach of trust. Degree of pre-planning involved Age Gap	four years imprisonment for defilement

	Balak v State	[2021] FJCA 112; AAU132.2015 (3 June 2021))	First offender Appellant appealed case against conviction				Appeal dismissed.
36.	State v Tawake	[2015] FJMC 42; Criminal Case 263.2011 (27 March 2015)	charged in this Court for 03 counts of Defilement Pleaded guilty First offender	Complainant was 15 years Accused was 24 years old	State v Raibeve [2012] FJHC 1040	Nil	12 months imprisonment suspended for 03 years.
37.	State v Ali	[2023] FJHC 155; HAC38.2020 (20 March 2023)	Accused found guilty of one count of rape and one count of defilement First offender	Complainant was 15 years The accused was 30 years old	<i>(Elia Donumainasava v State [2001] HAA 32/01S, 18 May 2001).</i> <i>State v Pita Vetaukula Criminal Case No. HAC 46 of 2013 (8 July 2014),</i>	Breach of trust Vulnerability of victim Planning Exposure of child Prevalence Psychological/emotional harm	14 years and 11 months imprisonment with a non-parole period of 12 years
38.	State v Peceli	[2019] FJHC 1002; HAC186.2017 (23 October 2019)	Accused charged with rape. charge was reduced to defilement and he pleaded guilty, First offender	Complainant was 14 years Accused was 18 years old	Donumainasava v The State [2001] FJHC 25 ; Haa0032j.2001s (18 May 2001)	Nil	18 months' imprisonment suspended for 2 years

39	State v Saukiwera	[2022] FJHC 602; HAC225.2019 (21 September 2022)	Charged with rape but after trial convicted for defilement First offender	Complainant was 14 years and 6 months old Accused was 24 years	Ditto State v Raibevu [2012] FJHC 1040 ; HAC27.2011 (27 April 2012)	Breach of trust Age disparity (10 year gap) Taking advantage of the complainant Planning Unprotected sexual intercourse	3 years' imprisonment, suspended for 7 years
40	State v Rinamalo	[2019] FJMC 118; Criminal Case 108 of 2018 (12 August 2019)	Charged with two counts of Defilement Pleaded Guilty First offender	Complainant was 13 years and 15 years on count two On the first count the juvenile was 17 years old and for the second count the accused was 19 years old	State v Raibevu - Sentence [2012] FJHC 1040 Naiwau v State [2018] FJHC 193 ; HAA01.2018 (16 March 2018)	Age difference (4 years) Breach of trust	02 years imprisonment non-parole period of 01 year.
41.	Roligalevu v State	[2012] FJHC 1092; HAC052.2011 (18 May 2012)	convicted of rape and defilement	Complainant was 14 years Accused was 36 years old	Rokowaqa CA 37/2004, Kabaura H AC 117/2010 Donumainasuva CA 32/2001 Raibevu HAC 27/2011)	Breach of trust Age difference	4 years imprisonment for defilement

42.	State v Lal	[2019] FJHC 565; HAR001.2019[Labasa] (10 June 2019) Review case Sentence in MC was too lenient	Pleaded not guilty and convicted after trial	Complainant was 13 years old. Accused was 23 years	<i>Donumainasava v The State</i> [2001] FJHC 25; Haa0032j.2001s (18 May 2001)	Age gap Breach of trust	11 months' imprisonment – 2 months to serve in prison and 9 months suspended for two years. Sentence was enhanced after review: Accused was sentenced to 3 ½ years' imprisonment with a non-parole period of 2 years.
43.	State v Bakorocau -	[2023] FJHC 112; HAC252.2021 (1 March 2023)	Charged with one count of defilement Pleaded guilty First offender	Complainant was 14 years Accused was 23 years old	State v Lal [2019] FJHC 565; HIR001.2019 [Labasa] (10 th June 2019)	vulnerable victim disparity in age (09 years); serious breach of trust; planning, scheming and premeditation; Taking advantage of complainant's vulnerability and innocence; Exposure of the innocent mind of a child to sexual activity	2 years imprisonment suspended for a period of 7 years.

44.	State v Suvadi	Sentence [2022] FJHC 536; HAC02.2021 (26 August 2022)	Found guilty and are convicted for Defilement after trial	Complainant was 15 years and 7 months Accused was 57 years.	State v Lal [2019] FJHC 565 ; HIR001.2019 [Labasa] Elia Donumainasuva v State State v Roqica & Others	Breach of trust Age disparity (42 years) Pre-planning Exposure of innocent mind	(03) years and nine (09) months imprisonment with non-parole period of (02) years and (09) months
45.	State v Matayalewa	Sentence [2020] FJHC 2; HAC150.2018 (14 January 2020)	Convicted for 2 counts of Rape and 3 counts of Defilement First offender	Complainant was 12 years Accused was 28 years old	State v Mawi [2019] FJHC 324 ; HAC17.2017 (12 April 2019, State v Dinono - Sentence [2019] FJHC 871 ; HAC336.2018 (5 September 2019).	Age difference Breach of trust emotional and psychological trauma	(12) Years, six (6) months imprisonment with non-parole period of (10) years and six (6) months. Concurrent sentence

46.	State v Koroi	[2019] FJHC 483; HAR02.2019 (24 May 2019) Criminal Review Case	Charged with two counts of defilement Pleaded guilty First offender	Complainant was 15 years Accused was 18 years old	Donumainasava v The State [2001] FJHC 25 ; Haa0032j.2001s (18 May 2001)	Exploit of the victim Victim got pregnant	20 months' imprisonment on each count of defilement, served concurrently. Sentence was partially suspended as follows: 2 months to serve in custody and 18 months suspended for 2 years. Although the suspension of sentence was wrong in principle, the review is refused on the ground that it would lead to an unjust result if the suspension is set aside now when the Accused is out of prison after serving the custodial term of his sentence. Review was not allowed.
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47.	State v Mocimoci	Punishment [2023] FJHC 91; HAC116.2022 (20 February 2023)	Acquitted of rape but convicted for defilement First offender	Complainant was 15 years old Juvenile was 17 years	State v Lal Elia Donumainasuva v State State v Roqica & Others	victim was vulnerable & was alone at home; breach of trust; (Senior in school) Juvenile was two years her senior and had unprotected sexual intercourse.	2 years imprisonment suspended for a period of 5 years
48.	State v Roqica	[2003] FJHC 314; HAA0037J.2002S (9 April 2003) State Appeal	3 accused persons all charged with one count of defilement each All pleaded guilty First offenders	Complainant was 13 years 7 months A1 – 20 years A2 – 19 years A3 – 17 years	Elia Donumainasuva v The State Crim. App. No. HAA0032 of 2001	Nil at MC At HCT Age of the victim/age gap sexual exploitation	Each bound over for \$200.00 each to keep the peace for 24 months and for each to pay \$35.00 court costs. Sentences of the three Respondents were quashed substituted with 6 months imprisonment

49.	State v Chand	[2021] FJCA 209; AAU75.2019 (13 August 2021) Appeal against sentence by the State	Charged with two counts of rape, acquitted later for one rape and convicted for another count defilement	Complainant was 13 years and 09 months Accused was 46 years old	State v Mawi [2019] FJHC 324 ; HAC17.2017 (12 April 2019) - 02 years to 08 years imprisonment.	The victim was 13 years and 09 months old at the time of offence; The age difference between you and the victim is 33 years; and You took advantage of the victim's vulnerability and naivety.	02 years and 11 months and 14 days with a non-parole period of 01 year Matter currently before FCA
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