

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 76 OF 2018

STATE

v

ILIESA SAGOLE

Counsel: **Mr A. Datt for State**
Ms V. Diroiroi for Accused

Date of Sentence: **11 September, 2018**

(Name of the victim is suppressed. She is referred to as LB)

SENTENCE

1. Mr. Iliesa Sagole ("the Accused") stands convicted of one count of 'Indecent Assault on a Female' contrary to Sections 154 (1) and (2), and one count of 'Defilement of a Girl under 13 Years of Age' contrary to Sections 155 (1) and (3) of the Penal Code [Cap. 17] (*now repealed*).
2. The Accused was initially charged in 2008 with two counts of 'Rape' under the Penal Code of the same victim, who was accused's first cousin.
3. After nearly 10 years from the initial charge, the charge sheet was amended. Two rape charges were substituted with one count of 'Indecent Assault on a Female' and

one count of 'Defilement of a Girl under 13 years of age' when the complainant gave a further police statement saying that she had consented on both occasions to the accused's acts. The charge sheet dated 18th January 2018 read as follows:

FIRST COUNT

Statement of Offence

INDECENT ASSAULT ON A FEMALE: Contrary to Section 154 (1) and (2) of the (*now repealed*) Penal Code [Cap. 17].

Particulars of Offence

ILIESA SAGOLE, on the 14th day of September 2008, at Nasolo, Ba in the Western Division, unlawfully and indecently assaulted LB, a girl who was under the age of 16 years at the time, by touching her vagina.

SECOND COUNT

Statement of Offence

DEFILEMENT OF A GIRL UNDER THIRTEEN YEARS OF AGE: Contrary to Section 155 (1) and (3) of the (*now repealed*) Penal Code [Cap. 17].

Particulars of Offence

ILIESA SAGOLE, on the 21st day of September 2008, at Nasolo, Ba in the Western Division, unlawfully had carnal knowledge of LB, a girl who was under the age of 16 years at the time.

4. The Accused whilst being represented by a legal counsel, voluntarily entered pleas of 'guilty' to both counts and admitted the following summary of facts read before the learned Magistrate at Ba.

"The complainant is LB, DOB 02/06/1999, Student, of Nasolo, Ba ("the complainant"). The accused is Iliesa Sagole, DOB 11/05/1989, Labourer, of Nasolo, Ba ("the accused"). The accused and the complainant are first cousins. In September 2008 the complainant and the accused resided in the same village namely Nasolo Village in Ba. The complainant resided with her mother and younger sister in one house ("the complainant's house") and the accused resided with the complainant's grandmother in

another house ("the grandmother's house"). The complainant's house and the grandmother's house were about 500 metres apart.

For the 1st incident, according to the complainant, on 14/09/2008 she was at the grandmother's house. The accused called her into the kitchen, made her lie down on the floor, removed her panty, and touched her vagina with his finger and rubbed his penis on it. The accused did not insert his finger or his penis into the complainant's vagina. The complainant had allowed the accused to touch and rub her vagina. At the time of this 1st incident the complainant was approximately 9 years and 3 months old and the accused was approximately 19 years and 4 months old.

According to the accused, it was the complainant who was showing interest in him on that day (14/09/2008). The accused could not control himself so he took the complainant and touched her vagina with his finger. However he did not admit to rubbing his penis on the complainant's vagina.

For the 2nd incident, according to the complainant, on 21/09/2008 the complainant went to drop her younger sister at the grandmother's house. On her way back the complainant was called by the accused, who took her into a nearby bush and had penile sex with her. The complainant had consented to have sex with the accused. When the accused had penetrated the complainant's vagina with his penis, the victim's vagina bled.

According to the accused, it was the complainant who wanted to have sex with him on that day (21/09/2008). The complainant removed her panty herself. The accused touched her vagina but did not lick it. He then had sex with the complainant.

Since the accused and the complainant were first cousins, and the fact that they resided in the same village only 500 metres apart, the accused knew on both occasions (that is 14/09/2008 and 21/09/2008) that the complainant was a Class 4 student in 2008 hence she was under the age of 13 years at the respective times (A copy of the complainant's Birth Certificate is annexed).

The accused was taken into custody after the matter was reported to the Police following rumors in the complainant's school that she had a relationship with the accused.

The complainant was taken to Lautoka Hospital on 27/10/2008 where she was medically examined by Dr. Khalid Mahmood ("PW 2"). PW 2 found that the complainant's hymen was totally absent and his professional

opinion was that penetration had occurred due to absence of the hymen (A copy of the complainant's Medical Report is annexed).

In his properly conducted caution interview in the i-taukei language, the accused at Q25 to Q28 admitted that the complainant is his cousin and their houses were 500 metres apart in Nasolo Village. At Q29, Q32 to Q33 the accused admitted that on 14/09/2008 he had touched the complainant's vagina after he could not control himself. At Q43, Q50, Q53, Q54 and Q57 the accused admitted that on 21/09/2008 he had had consensual sex with the complainant and she bled slightly (A copy of the accused's translated English Caution interview is annexed).

The accused was initially charged with 2 counts of 'Rape' but this was later amended to 1 count of 'Indecent Assault on a female' contrary to Section 154 (1) and (2) of the Penal Code [Cap. 17] and 1 count of 'Defilement of a girl under 13 years of age' contrary to Section 155 (1) and (3) of the Penal Code [Cap. 17].

On 1st February 2018, whilst being represented by legal counsel from the Legal Aid Commission, the accused voluntarily pleaded 'guilty' to both counts on the Amended Charges.

Per the State's records, the accused is a first offender.

5. The learned Magistrate found the Accused guilty on both counts and recorded a conviction. The State then made an application pursuant to Section 190 (1) of the Criminal Procedure Act 2009 ("the CPA") before the learned Magistrate to have this matter transferred to the High Court for sentencing purposes, indicating that the current sentencing practice may require the accused to be sentenced to more than 10 years imprisonment, which may go beyond the sentencing powers of a Magistrate under Section 7 (1) (a) of the CPA.
6. In the helpful sentencing submission filed by before this court, the State Counsel submits that... *the matter raised a peripheral issue of an inherent conflict between the provisions of the Crimes Act and the Penal Code, which required clarification from a High Court, possibly in the form of a guideline judgment.*
7. Since the offence of 'Defilement of a girl under 13 years of age' carries a higher penalty, and in view of the default practice of imposing concurrent sentences for multiple counts, the State Counsel in his submission has largely focused and

submitted on the dominant offence, that is, 'Defilement of a girl under 13 years of age'.

Analysis

8. Under Section 6(3) of the Sentencing and Penalties Act (SPA), a guideline judgment can be given by a High Court only when it is called upon to hear an appeal filed against a sentence given by a Magistrate. The present application has come before this court pursuant to Section 190 (1) of the CPA for sentencing in its original jurisdiction and, therefore, this court has no jurisdiction to give a guideline judgment but to pass a sentence for accused taking into consideration the range and the 'current sentencing practice'. In this process, the court will endeavor to address the issues raised by the State and clarify the sentencing tariff *vis a vis*, 'Defilement of a girl under 13 years of age' under the Penal Code.
9. After a careful perusal of the Record of the Magistrates Court and a proper inquiry into the circumstances of the case, I am satisfied that the learned Magistrate has properly found the Accused guilty on both counts in the charge sheet and convicted the Accused according to law.

The Maximum Sentence

10. The maximum penalty prescribed for the offence of 'Indecent assault on a female' under the Penal Code was 5 years imprisonment, with or without corporal punishment and the maximum penalty prescribed for the offence of 'Defilement of a girl less than 13 years of age' was imprisonment for life, with or without corporal punishment.
11. The maximum sentence prescribed for comparable offence of 'Defilement of a girl under 13 years of age' under Section 214 (1) of the Crimes Act 2009 is imprisonment for life and this is the same maximum sentence prescribed for 'Rape' under Section 207 (1) of the Crimes Act. The law makers have considered the Defilement of a girl under the age of 13 years' as serious as Rape when they prescribed life imprisonment for both offences.

Tariff for 'Defilement of a girl under 13 years of age':

12. It appears that there is no established tariff for 'Defilement of a girl under 13 years of age' neither under the Penal Code nor under the Crimes Act. The courts in Fiji have mostly applied the sentencing guideline set out in John Peter Vunilagi v The State (Criminal Appeal Nos. HAA 75/2004 and 76/2004) decided under the Penal Code. In that case a term of 6 years' imprisonment was upheld.
13. In John Peter Vunilagi v The State (supra), the appellant had appealed against his sentence from the Magistrates' Court for 'Defilement of a girl under 13 years of age' and other related offences. Justice Shameem (as she then was) said that "...In in respect of the defilement of girls under the age of 13 years, the statutory maximum is life imprisonment. There can be only exceptional circumstances which could justify a term of imprisonment of less than 3 years imprisonment".
14. In England the maximum sentence for having sexual intercourse with a girl under 13, is also life imprisonment. Her Ladyship went on to refer to the case of Attorney-General's Reference (No. 1 of 1989) 90 Cr. App. R. 149, where the English Court of Appeal had said that "... a wide range of sentences could be expected, but where the victim was not far short of her thirteenth birthday and there were no particularly adverse or favorable features, a term of 6 years would be appropriate. The younger the girl when the sexual approach was first made, the more likely it would be that her will was overborne, and the more serious the crime"
15. It appears that due to the net being cast so wide in terms of the range, subsequent sentencing courts did not expound much on the tariff for 'Defilement of a girl under 13 years of age', rather they simply selected a starting point and made appropriate adjustments for aggravating and mitigating factors. The State Counsel has referred me to number of cases like DPP v Yasin Ali (Suva Criminal Case No. 441 of 2010); The State v Niraj Kiran Prasad (Suva Criminal Case No. 711 of 2011; and Tevita Dakai v The State (Criminal Appeal No. HAA 36 of 2001).
16. In State v Joel Shankar Charitar Lal (Ba Criminal Case No. 72 of 2008) Resident Magistrate Mr Ratuville (as he then was) said that the "... tariff for the offence ranges from three years imprisonment (Solomoni Qio v The Queen [1978] HAA 37/78) to 5 years imprisonment (Tevita Dakai v The State [2001] HAC 0036/01)".

17. The Learned Magistrate was simply quoting two judgments with the maximum and minimum sentences imposed for 'Defilement of a girl under 13 years of age'. There was no mention of a tariff in Tevita Dakai v The State (supra) or in Qio v Reginam [1978] JFSC 56.

The current approach to sentencing for 'Defilement of a girl under 13 years of age':

18. The tariff for rape of minors (children under the age of 18), as set out by the Court of Appeal judgment in Raj v The State (Crim. App. No. AAU0038 2010) and affirmed by the Supreme Court is 10 to 16 years imprisonment. This tariff represents the current sentencing practice in rape cases where the victim is under the age of 18 years which include the victims below the age of 13 years who lacked mental capacity to consent.
19. The argument of the State Counsel is that in the absence of an established tariff for 'Defilement of a girl under 13 years of age' neither under the Penal Code nor under the Crimes Act, and since the 'current sentencing practice' for sentencing an offender who has raped a minor represents the tariff confirmed by the Supreme Court in Raj, a tariff similar to that prescribed in Raj should be applied to offenders of 'Defilement of a girl under 13 years of age'. The State Counsel submits:

"However, the conduct amounting to 'Defilement of a girl under 13 years of age' under the Penal Code would now be statutory rape under the Crimes Act. Consequently, the tariff for 'Defilement of a girl under 13 years of age' under the Crimes Act ought to be the same as that for 'Rape' of minors – that is 10 to 16 years imprisonment per Anand Abhay Raj v The State" (supra).

20. The State Counsel further submits that the express provision under Section 207 (3) - that a child under the age of 13 years is incapable of giving consent – is in direct conflict with the gist of the 'Defilement of a girl under 13 years of age' provision under Section 214 (1). The State Counsel argues that it could not have been Parliament's intention to have children under 13 years of age deemed incapable of

consenting for one offence (Rape), and then passively permitting them to consent for another (Defilement of a girl under 13 years of age).

21. It is further submitted that the above rationale renders the charge of 'Defilement of a girl under 13 years of age' under Section 214 (1) of the Crimes Act redundant, because of Section 207 (3) proviso.
22. On the face of it, the argument advanced by the State Counsel appears sound as far as the Crimes Act offence is concerned as both offences (rape of minors including those under 13 and Defilement of a girl under 13 years of age) share the common purpose of punishing the offenders who have carnal knowledge of girls under the age of 13 years. This argument also appears consistent with the equality principle in sentencing which requires the courts to punish similar offending in a similar manner.
23. The State Counsel's argument however goes further and invites this court to punish a person charged under the Penal Code for 'Defilement of a girl under 13 years of age', taking into consideration the current sentencing tariff prescribed for offenders in juvenile rape cases in *Raj*, on the basis that Section 4 (2) (b) SPA mandates a sentencing court to take heed of '*the current sentencing practice and the terms of any applicable guideline judgment*'.
24. The State Counsel submits that 'the current sentencing practice' means the current sentencing practice at the time of sentencing, and not what the practice was at the time of the offending. To support this argument the State Counsel has quoted the views expressed by the English Court of Appeal in *R v H* (J) 1 WLR 1416[2012]. In *R v H* (J) (supra) the court was dealing with the issue of sentencing in 'cold cases', which are cases where the offenders are brought to justice many years after the crimes were committed.
25. At paragraphs [47] of the judgment, the full Court distilled some guidelines on how to approach sentencing in 'cold cases'. These were:
 - (a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any

definitive sentencing guidelines relevant to the situation revealed by established facts.

- (b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011 (*when the offence was committed*) what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed....."
26. In light of these judicial pronouncements, the State submits that, applying Section 4 (2) (b) of the SPA and the principles laid down in *R v H (J)* (*supra*), the court in the present case should consider what the current approach to sentencing would be had the offence been committed today, (at the date of the sentencing hearing) under the Crimes Act.
27. 'R v H guidelines are applicable to the sentencing of historic sexual offences and 'cold cases'. Cold case is a term used to describe unresolved cases. The essential principle is clear: offenders sentenced today for historic offences are to be sentenced in accordance with the regime applicable at the date of sentence, & current sentencing practice, subject to the perhaps obvious caveat that the sentence that can be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum has been reduced, when the lower maximum applies.
28. The rationale behind this guidance was further explained *in Stephen John Forbes and others* (*supra*)

"Plainly the fact that attitudes have changed is of no moment as the late Dr David Thomas observed in his commentary on R v H:

"An offender brought to justice many years after the date of his offence, who complains that his sentence would have been less severe if he had been brought to justice at an earlier stage, may reflect on the fact that it was his choice not to take the initiative and admit the offences when the earlier more lenient sentencing policy was in operation."

29. The maximum sentence available at the time of the commission of the offence of 'Defilement of a girl under 13 years of age' was life imprisonment and therefore the 'maximum sentence caveat' does not apply to the present case because no change in the prescribed penalty for the offence of 'Defilement of a girl under 13 years of age' has eventuated from the repealing of the Penal Code to the operation of the Crimes Act.

30. I agree that the suggested sentencing approach by the State Counsel does not conflict with the 'rights of accused persons' under Section 14 (2) (n) of the 2013 Constitution of the Republic of Fiji ("the Constitution") because the prescribed punishment for the offence has not been changed between the time the offence was committed and the time of sentencing.

31. Section 14 (2) (n) states:

An accused has the right to the benefit of the least severe prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing.

32. I also agree that tariffs set by judges are not prescribed punishments in terms of the Constitution. Section 136(1) of the Constitution defines 'prescribed' as "prescribed in, by or under a written law". Tariffs are fixed by judges hence tariffs cannot be considered as punishments prescribed by any written laws.

33. The only penalty prescribed by written law for the offence of 'Defilement of a girl under 13 years of age' is the maximum penalty of life imprisonment, under Sections 155 (1) and (3) of the Penal Code and Section 214 (1) of the Crimes Act. Therefore the suggested sentencing approach does not conflict with the 'rights of accused persons' under Section 14 (2) (n) of the 2013 Constitution of the Republic of Fiji

34. However, I am not inclined to follow the sentencing guidelines suggested for England in R v H without any supporting authorities from this jurisdiction. Even in

England, various issues have arisen in relation to their application. In Stephen John Forbes and others [2016] EWCA Crim 1388, the same Court observed:

"Although these principles are clear,, various issues have arisen in relation to their application"

35. The Crimes Act provides that a child under the age of 13 years is incapable of giving consent [Section 207(3)]. However under the Penal Code, when the Accused committed the offence, the law did not recognize that the girls under the age of 13 lacked the mental capacity to give consent. Therefore a person who has had carnal knowledge of a girl under the age of 13 years was charged with Defilement of a girl under 13 years of age when there was no evidence that the sexual intercourse took place without her consent. (This is the very reason why one of the rape charges against the Accused was dropped and substituted with 'Defilement of a Girl under 13 years of age' when the victim gave a further statement to police saying that she had consented to the accused's acts).
36. Therefore, there was a valid reason to maintain a separate offence of Defilement of a girl under 13 years of age' distinct from the offence of rape in the Penal Code. However, under the Crimes Act, there is no logic to have a separate offence because a person who has carnal knowledge of a girl under the age of 13 commits rape irrespective her consent. Therefore, State Counsel's argument that the offence of 'Defilement of a girl under 13 years of age' under Section 214 (1) of the Crimes Act has become redundant because of Section 207 (3) proviso has a valid basis. However, the intention of the Legislature is that the offence of Defilement of a girl under 13 years of age' should be retained despite the introduction of Section 207 (3). Therefore it is still possible for the DPP in his wisdom to indict a person under Section 214 (1) of Crimes the Act for Defilement of a girl under 13 years of age' instead for Rape.
37. If I were to apply the R v H guidelines to punish the Accused as suggested by the State Counsel, the Accused is liable to be punished for rape of a minor and the offence would attract a sentence in the range between 10-16 years.
38. However, at the time the offence was committed the Accused could not have been charged or convicted for rape under the Penal Code because the complainant had

consented to have sexual intercourse with the Accused. That is why the rape charge was dropped after so many years. Therefore, the Accused when he pleaded guilty had every right to believe that he would only be punished for Defilement of a girl under 13 years of age and not for rape. It is not fair or reasonable to punish the Accused for an offence that was not in existence at the time of the offence.

39. Furthermore, this is not a 'cold case' where the offender was brought to justice many years after the date of his offence. The Accused was brought to justice and first charged in 2008 and the Record of the Magistrates Court indicates that the delay of almost 10 years was not due to a fault of the Accused. If the judicial system had ensured a speedy trial to the Accused he would have been punished according to the sentencing practice then existed. Even in *R v H (supra)* the court said.. *sentence for an offence which was committed many years earlier will be imposed at the date of the sentencing hearing on the basis of the statutory provisions then current and...., by measured reference to any relevant definitive sentencing guidelines in force on that date"*
40. For all of the above reasons I reject the argument of the State and proceed to identify the applicable tariff or relevant definitive sentencing guidelines in force on that date for Defilement of a girl under 13 years of age under the Penal Code.
41. On the basis of Justice Shameem's observations in *John Peter Vunilagi v The State (supra)* that *..there can be only exceptional circumstances which could justify a term of imprisonment of less than 3 years imprisonment"* and Her Ladyship's reference to the case of Attorney-General's Reference (No. 1 of 1989) 90 Cr. App. R. 149, where the English Court of Appeal had said that *"... a wide range of sentences could be expected, but where the victim was not far short of her thirteenth birthday and there were no particularly adverse or favorable features, a term of 6 years would be appropriate"* a sentence in the range of 3 to 6 years is appropriate in a case where the victim was not far short of her thirteenth birthday and there were no particularly adverse or favorable features. If there is a considerable age gap between the offender and the victim and/ or some adverse features are present, the sentencer at his discretion may go beyond this range, after recording reasons.

Sentence for Head (Second) Count

42. On the basis of this construct I pick a starting point of 3 years for the offence of Defilement of a girl under 13 years of age from the middle range of the proposed tariff considering the objective seriousness of the offence.
43. Having picked a starting point I look at the aggravating features of the offending. The Accused had breached the trust and confidence of the victim as her elder first cousin, when he was expected to be responsible for the safety and wellbeing of her younger cousin. It is also aggravating that there is a considerable age difference (approximately 10 years) between the victim and the accused.
44. In the summary of facts admitted to by the accused in the Ba Magistrates Court, the Accused admitted that it was the complainant who wanted to have sex with him. As per the case of Attorney-General's Reference (No. 53 of 2013) (R v Wilson) [2014] 2 Cr. App. R. (S.) 1, this is an aggravating factor.
45. In Attorney-General's Reference (No. 53 of 2013) (R v Wilson) (*supra*) a 40 year old accused was convicted of having sexual intercourse with a 13 year old girl. The sentencing court took the fact that it was the girl who had initiated the sexual activity as a mitigating factor.
46. On appeal the English Court of Appeal took view that since the purpose of the legislation making it a crime punishable with imprisonment to have sexual relations with those under 16 years was to protect those under 16, a reduction of punishment on the basis that the victim encouraged the commission of the offence was wrong. The victim's vulnerability was an aggravating rather than a mitigating feature. The court said at paragraph [20] that

"...the reduction on the basis that the person who needed protection encouraged the commission of an offence is therefore simply wrong. ...[sic] ...an underage person who encourages sexual relations with her needs more protection, not less. ...[sic] ... the victim's vulnerability was an aggravating rather than a mitigating feature".

47. Having considered these aggravating factors I increase the sentence by 3 years to arrive at a sentence of 6 years imprisonment.

48. I would then consider the compelling mitigating features brought to the attention of the court by both counsel. It is apposite at this stage to quote what the English Court of Appeal in *R v H (J)* (supra) at paragraph [47] has said:

- c. *As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. Due allowance for the passage of time may be appropriate. The date may have a considerable bearing on the offender's culpability. If, for example, the offender was very young and immature at the time when the case was committed, that remains a continuing feature of the sentencing decision. Similarly if the allegations had come to light many years earlier, and when confronted with them the accused had admitted them, but, for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had been investigated and not then pursued to trial, these too would be relevant features.*
- d. *In some cases it may be safe to assume that the fact that, notwithstanding the passage of years, the victim has chosen spontaneously to report what happened to him or her in his or her childhood or younger years would be an indication of continuing inner turmoil. However the circumstances in which the facts come to light varies, and careful judgment of the harm done to the victim is always a critical feature of the sentencing decision. Simultaneously, equal care needs to be taken to assess the true extent of the accused's criminality by reference to what he actually did and the circumstances in which he did it.*
- e. *The passing of the years may demonstrate aggravating features if, for example, the accused has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.*
- f. *Early admissions and a guilty plea are of particular importance in historic cases. Just because they relate to facts which are long passed, the accused will inevitably be tempted to lie his way out of the allegations. It is greatly to his credit if he makes early admissions. Even more powerful mitigation is available to the offender who out of a sense of guilt and remorse reports himself to the authorities.*

49. Most of the mitigating features discussed above are present in Accused's case. The Accused had pleaded 'guilty' to both offences at the first available opportunity when the amended Charge Sheet was filed. As per the State's records, the Accused had no previous convictions. The Accused had co-operated with the police during investigations and admitted the offences in his caution interview. Since the date of the offending, the Accused has led a clean life for the past 10 years.
50. The Accused was taken into custody after the matter was reported to police following rumors in the victim's school that she had a relationship with the accused. There is no evidence that she had suffered psychologically or emotionally. The Accused was very young (19 years old) at the time when the offences were committed. The passage of time between the commission of the offence and sentence is considerable. Two rape charges were hanging over Accused's head for a decade.
51. I give a discount of one year for the early guilty plea. Having considered all other mitigating circumstances, I deduct the sentence by one year to arrive at a sentence of 4 years imprisonment for the 2nd count (Defilement of a girl under the age of 13 years).

Sentence for First Count

52. For the offence of Indecent Assault on a Female, in the case of Rokota v the State [2002] FJHC 168; HAA0068J.2002S (23 August 2002) Shameem J laid down the tariffs as between 12 months to 4 years imprisonment. Her Ladyship highlighted certain cases that clarified the general sentencing principles of indecent assault as follows:

"From these cases a number of principles emerge. Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of

the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these"

53. Considering the above guidelines, I pick a starting point of 2 years imprisonment for the 1st count of Indecent Assault on a Female. I add 2 years for aggravating features discussed above and deduct one year for mitigating features. The sentence for the 1st count is 3 years' imprisonment.

54. The Accused is a young and first offender. Having considered the rehabilitation potential of the Accused, Section 18 (1) of the Sentencing and Penalties Act, and the principles enunciated in *Tora v State* [2015] FJSC 23; CAV11.2015 (22 October 2015), a non-parole period of 3 years is imposed. To give effect to one transaction and totality principles, I order the sentences to be served concurrently.

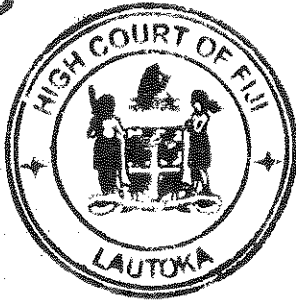
55. Summary


1st Count (Indecent Assault on a Female) - 3 years' imprisonment (to be served concurrently with the sentence on the 2nd count).

2nd Count (Defilement of a girl under 13 years of age) - 4 years' imprisonment.

Accordingly, the Accused is sentenced to 4 years' imprisonment to be served concurrently. He is eligible for parole after serving 3 years in prison.

56. 30 days to appeal to the Fiji Court of Appeal.




Aruna Aluthge
Judge

At Lautoka
11th September, 2018

Counsel: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused