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

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

BETWEEN	**:**	**PETERO MAWI**
		Appellant
AND	**:**	**STATE**
		Respondent
Coram	**:**	**Prematilaka, ARJA**
Counsel	**:**	**Ms. S. Nasedra for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	**:**	**23 August 2021**
Date of Ruling	**:**	**27 August 2021**

RULING

[1] The appellant had been indicted (with another - 02nd accused and appellant in AAU 39 of 2019) in the High Court at Suva on one count of defilement of a young person between 13 and 16 years of age contrary to section 215 (1) of the Crimes Act, 2009 committed at Lau in the Southern Division.

[2] The information read as follows:

COUNT 1

Statement of Offence

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE: *contrary to section 215 (1) of the Crimes Act 2009.*

Particulars of Offence

> ***PETERO MAWI*** *between the 1st day of July, 2016 and the 31st day of July, 2016 at Lau, in the Southern Division, had unlawful carnal knowledge of* ***LL,*** *a young person above the age of 13 years and under the age of 16 years.*

[3] After the summing-up, the assessors had expressed a unanimous opinion that the appellant was guilty as charged. The learned High Court judge had agreed with the assessors' opinion, convicted the appellant of defilement contrary to section 215 of the Crimes Act, 2009. The trial judge had sentenced the appellant on 12 April 2019 to 07 years of imprisonment with a non-parole period of 05 years for defilement (the effective serving period being 06 years, 10 months and 15 days with a non-parole period of 04 years, 10 months and 15 days after the period of remand was deducted).

[4] The appellant had signed a timely appeal against sentence (06 May 2019) and filed another petition against conviction (09 days out of time) and sentence. The respondent agreed in court to consider the conviction appeal too as timely. The Legal Aid Commission had subsequently filed an amended notice of appeal against conviction and sentence along with written submissions on 29 December 2020. The state had filed its written submissions on 26 January 2021. Both parties have consented in writing that this court may deliver a ruling at the leave to appeal stage on the written submissions without an oral hearing in open court or *via* Skype.

[5] In terms of section 21(1) (b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and

Naisua v State [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

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

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii)Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[7] The appellant's grounds of appeal against conviction and sentence are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact when he failed to properly direct the assessors and himself on inconsistencies in the State's case and how to treat such inconsistencies.*
>
> ***Sentence***
>
> ***Ground 2***
>
> *THAT the Learned Sentencing Judge erred in law and in fact in adopting a new tariff for the offence and consequently imposed a sentence that was harsh and excessive.*

[8] For the purpose of sentencing the trial judge had summarised the factual scenario of the case as follows:

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

3. ***Petero Mawi*** *, one night in the month of July 2016 around 8.00pm, you approached the victim and asked her whether you can have sexual intercourse with her. Even though she refused initially, later on she agreed. Then you and the victim had sexual intercourse and the victim in her evidence said that it was consensual. This took place outside her house. The evidence revealed that Salauca Volaukilodoni was also around when you had sexual intercourse with the victim and he approached you after you had finished having sexual intercourse with the victim. Having spoken to Salauca Volaukilodoni you then told the victim that Salauca Volaukilodoni wants to speak to her. The evidence suggests that you wanted the victim to have sexual intercourse with Salauca Volaukilodoni. The victim is related to your wife.'*
4. *Salauca Volaukilodoni, you then told the victim that you want to do the same thing Petero Mawi did with her. She refused. But then you threatened the victim that you will inform her grandfather about her having sexual intercourse with Petero Mawi . It is pertinent to note at this point that the victim's parents had passed away when she was around 5 years old and she was living with her grandparents when this incident took place. Due to your threat, the victim agreed and had sexual intercourse with you. The victim and you are cousins.'*

01st ground of appeal

[9] The appellant's counsel's argument is that the trial judge had not properly addressed the assessors on previous inconsistent statements of the complainant where she had failed to give a credible explanation for differing versions and how the assessors should approach the inconsistencies.

[10] The respondent submits that the trial judge in fact had directed the assessors on how to approach the inconsistencies of the victim who was just 13 years and 02 months old at the time of the incident at paragraphs 6-9 and in particular paragraphs 10-12 of the summing-up. The trial judge had further addressed the assessors on the defence submissions of the alleged inconsistent statements at paragraph 43 and 44 of the summing-up and asked them to evaluate them in the light of what he had stated earlier. I also find that the trial judge had given his mind independently to the inconsistencies in the evidence of the victim (who was the sole witness) that came to be highlighted during the trial at paragraphs 5 and 6 of the judgment. The trial judge had been convinced that the evidence given by the complainant in court was credible and reliable and that she was a credible and a reliable witness.

[11] It appears that regarding the fact that the victim had changed her allegation against the appellant from one of rape (made initially to the police in 2016) to having consensual sexual intercourse (second police statement in 2019 and in court), the trial judge had accepted her explanation that she was pressurized by her aunts to initially say that she did not consent for the appellant to have sexual intercourse with her. The appellant's defence had been that the allegation against him was fabricated by the victim because he saw the complainant having sexual intercourse with his co-accused Saluaca. If the complainant was fabricating an allegation against the appellant she could have stood by her initial police statement and maintained that position in her 2019 police statement and before court to maintain consistency of her testimony and implicated him for rape. She had not done so. There was no reason for her to falsely implicate the appellant with a less serious charge.

[12] The Court of Appeal very recently dealt with a similar complaint in **Ram v State** AAU 024 .2016 (02 July 2021) where the court considered **Singh v The State** [2006] FJSC 15; CAV0007U.05S (19 October 2006), **Ram v. State** [2012] FJSC 12; CAV0001 of 2011 (09 May 2012), **Prasad v State** [2017] FJCA 112; AAU105 of 2013 (14 September 2017) and reiterated the principles expressed in **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) and **Turogo v State** [2016] FJCA 117; AAU.0008.2013 (30 September 2016) that the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. Further, that no hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance.

[13] Therefore, there is no reasonable prospect of success in this ground of appeal.

02nd ground of appeal

[14] The appellant's counsel mainly challenges the sentence on the basis that the trail judge had adopted a new 'tariff' for the offence of defilement when there was no appeal before court to review the existing tariff in terms of the Sentencing and

Penalties Act, departing from the long-followed and well-established tariff and as a result the trial judge had ended up with a sentence well outside the sentencing range.

[15] The trial judge had 'decided' that 'appropriate tariff' for the offence of defilement is an imprisonment between 02 and 08 years, in sentencing the appellant.

[16] The respondent does not seem to have an issue with the reasoning and the new 'tariff' adopted by the trial judge *per se* but disagrees with the methodology of doing so. The state's submissions before this court in **STATE v RAJESH CHAND** AAU 75 of 2019 (13 August 2021) was that the new 'tariff' for defilement adopted by the trial judge had thrown the current sentencing practice into confusion and uncertainty among other judges and magistrates in as much some High Court judges continue to follow the tariff of suspended sentence to 04 years for defilement [for e.g. **State v Peceli - Sentence** [2019] FJHC 1002; HAC186.2017 (23 October 2019) and **State v Malo** [2020] FJHC 179; HAC302.2018S (2 March 2020)] while some other High Court judges follow the new 'tariff' [for e.g. **State v Matayalewa - Sentence** [2020] FJHC 2; HAC150.2018 (14 January 2020)].

[17] Similar confusion and uncertainty currently prevails in many other areas such as aggravated robbery, aggravated burglary, possession and/or cultivation of cannabis sativa/marijuana etc. This situation, needless to say, is unacceptable and an 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; for example **State v Dinono - Sentence** [2019] FJHC 871; HAC336.2018 (5 September 2019) and **State v Koroi** [2019] FJHC 483; HAR02.2019 (24 May 2019).

[18] 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:

> *'[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.'

[19] I think it would also not be inapt to repeat my remarks in **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) 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. The state counsel also informed this court that the State would seek a guideline judgment from the Court of Appeal regarding the sentencing tariff for aggravated burglary. I hope that the State would do so at the first available opportunity in the Court of Appeal or the Supreme Court. Until such time it would be best for the High Court judges themselves to arrive at some sort of uniformity in applying the sentencing tariff for aggravated burglary.'

[20] Thus, since the state is of the view that there is a need to revisit the existing tariff of suspended sentence to 05 years for defilement and deliver a 'long overdue' guideline judgment to achieve a consistent sentencing regime 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 Code, the DPP could take steps to seek such guidelines from the Court of Appeal or the Supreme Court at the earliest opportunity in terms of provisions in sections 6, 7 and 8 of the Sentencing and Penalties Act, because when an existing and long-established sentencing regime is changed by a single judge unilaterally, only to be followed not by all but by a few other judges and magistrates, a serious anomaly in sentencing is bound to occur undermining the public confidence in the system of administration of justice.

[21] Even more worryingly, 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.

[22] I too agree that there is a urgent necessity of laying down new sentencing guidelines by way of tariff for defilement in view of the corresponding increase on the maximum sentence under the Crimes Act, 2009 departing from the earlier tariff set under the Penal Code [*vide* **Donumainasava v The State** [2001] FJHC 25; Haa0032j.2001s (18 May 2001)]. The High Court at paragraph 13 in ***Koroi*** seems to have accepted this. Lord Justice Lawton's helpful remarks at page 185 of **R v Taylor** (1977) 64 Cr. App. R. 182 may provide a useful basis in setting new guidelines.

[23] This necessity for a new guideline judgment for the offence of defilement under the Crimes Act, 2009 alone is sufficient to grant leave to appeal against sentence in this matter.

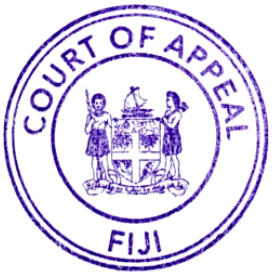
[24] Therefore, until the Court of Appeal or the Supreme Court considers this issue more fully it is advisable for all Judges and Magistrates to follow the well-established tariff of suspended sentence to 04 years for defilement being mindful that a sentence even above the upper limit of 04 years can be meted out with reasons why the sentence is outside the range as highlighted in **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013).

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

[26] Therefore, the final sentence is a matter for the full court to decide in line with proper sentencing guidelines.

Orders

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



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