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

CRIMINAL APPEAL NO.AAU 125 of 2018
[In the High Court at Lautoka Case No. HAC 87 of 2016]

BETWEEN : **THE STATE**

Appellant

AND : **SAIYAD KHAN**

Respondent

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

Counsel : **Ms. S. Shameem for the Appellant**
: **Mr. M. Kumar for the Respondent**

Date of Hearing : **18 July 2023**

Date of Ruling : **27 July 2023**

JUDGMENT

Prematilaka, RJA

[1] The respondent had been charged and convicted in the High Court at Lautoka on a single count of penile rape of NN, a child under 13 years committed between 01 December 2014 and 31 March 2015 at Sigatoka in the Western Division, contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 as follows.

[2] After the assessors expressed a unanimous opinion that the appellant was guilty as charged, the learned High Court judge had found him guilty and sentenced him on 03 December 2018 to 14 years' imprisonment with a non-parole term of 10 years.

[3] The prosecution had called three witnesses, the complainant (NN), her mother Rehana Sherin Begum and complainant's teacher, Salanieta Nabewa. However, the prosecution case was substantially based on the evidence of the complainant.

Summary of facts

[4] The complainant, aged 12 and the respondent, aged 32 were living in the adjoining flats. The complainant's father and the respondent's father were brothers. The complainant's mother had sent NN to the respondent's house to get her mobile phone charged. The respondent had played a movie and made her watch the television. When the complainant had stepped out of the house after the movie, the respondent grabbed her from the back, took her to his room, and forcefully pushed her on his bed. She cried out for help but no one could hear her because the respondent was covering her mouth. He had taken off her sarwal trousers and his pants and forcefully put his penis into her vagina and had sex with her. It had been painful because it was her first time having sex with a man. She had lost her virginity. The complainant was bleeding from her vagina and crying out for help. The respondent had told her not to tell the incident to anyone in her family and if she did he would slap her. After that she put on her clothes and went home. NN's pregnancy was discovered after a month of the incident. The respondent's family had prevented the complainant from reporting the matter to the police until 01 April 2016.

[5] Rehana Sherin Begum, the complainant's mother had said in evidence that her daughter NN stopped schooling after her cousin Saiyad raped her. She came to know about the rape in March 2015 when her aunty, Jasmine discovered changes in NN's body. When asked, NN said that she was raped by her cousin. Rehana was shocked and got scared to inform her husband. However, she called her husband on the same day and did an abortion on the complainant's pregnancy in Sigatoka to avoid humiliation.

[6] The Defense position was one of total denial and that the allegation had been fabricated by the complainant to cover up her pregnancy. The defense had contended that the complainant had ample time and opportunity to complain to her mother, aunty

Jasmine or her teacher but she had not complained to anyone until her pregnancy was discovered by aunty Jasmine and the reason why she did not complain was because the allegation was never true.

[7] The respondent did not take the stand but his witness Shereena who was the sister-in-law of the respondent testified that Saiyad Khan talked to her about the rape allegation against him and denied the allegation. She then suggested that a DNA test could elicit the truth and suggested to Saiyad that he should go to a doctor for a DNA test. Saiyad was ready to do the test. She approached NN's mother in the presence of NN and made the same suggestion but she refused to let her daughter to be subjected to a DNA test.

[8] At the leave to appeal stage a single judge of this court had refused leave for the respondent's timely appeal against conviction (AAU 128 of 2018) and he had not renewed the conviction appeal before the full court. As far as the appellant's appeal against sentence was concerned, the single judge had allowed leave to appeal on the following gounds of appeal.

> *(i) That the learned trial Judge erred in principle by imposing a sentence of 14 years imprisonment with a non-parole period of 10 years which does not reflect the totality of the respondent's culpability and the seriousness of the crimes. The sentence imposed is unduly lenient;*
>
> *(ii) That the learned trial Judge erred in the exercise of his sentencing discretion by failing to provide a meaningful upwards adjustment of the sentence for the aggravating factors that were present in the circumstances of the case;*
>
> *(iii) That the learned trial Judge erred in principle in failing to give any or any sufficient consideration to deterrence and denunciation given the prevalent of serious child sexual assault cases in Fiji.*

[9] Section 23 (3) of the Court of Appeal Act governs the powers of this court with regard to sentence appeals. In **Bae v State** [1999] FJCA 21; AAU0015u.98s (26 February 1999) the Court of Appeal laid down the applicable principles in exercising those powers as follows.

> *'[2] The question we have to determine is whether we "think that a different sentence should be passed" (s 23 (3) of the Court of Appeal Act (Cap 12)? It is well established law that before this Court can disturb the*

sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King (1936) 55 CLR 499).'

[10] ***Bae*** was adopted by the Supreme Court in **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013) stating that it is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in **House v The King** (1936) 55 CLR 499.

Ground of appeal 1, 2 and 3

[11] Section 6(3) of the New South Wales Criminal Appeal Act 1912 is similarly couched to section 23(3) of the Court of Appeal Act. It states that on an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore, and in any other case shall dismiss the appeal.

[12] The appellant argues that the sentence is manifestly lenient in the current circumstances. In **Markarian v The Queen** (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> *'As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in House v The King ... itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy". (Emphasis mine)*

[13] Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at

below is markedly different to other sentences imposed for other cases (vide **Hili v The Queen** (2010) 242 CLR 520 at [59] referring to **Dinsdale v The Queen** (2000) 202 CLR 321 at [6] and **Wong v The Queen** (2001) 207 CLR 584 at [58]). Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons (vide **Hili v The Queen** at [59]).

[14] In **Kentwell v The Queen** (2014) 252 CLR 601 at [42]) it was held

> *'……….. When a judge acts upon wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, mistakes the facts or does not take into account some material consideration, the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. The discretion in such a case has miscarried and it is the duty of the Court of Criminal Appeal to exercise the discretion afresh taking into account the purposes of sentencing and the factors that the Sentencing Act, and any other Act or rule of law, require or permit. As sentencing is a discretionary judgment that does not yield a single correct result, it follows that a range of sentences in a given case may be said to be "warranted in law". A sentence that happens to be within the range but that has been imposed as the result of a legally flawed determination is not "warranted in law" unless, in the exercise of its independent discretion, the Court of Criminal Appeal determines that it is the appropriate sentence for the offender and the offence. This is not to say that all errors in the sentencing of offenders vitiate the exercise of the sentencer's discretion'*

[15] The appellant's main contention is that the learned trial judge had not adequately enhanced the sentence for aggravating factors highlighted in the sentencing order.

[16] The learned trial judge had correctly identified that the the maximum penalty for rape as life imprisonment and sentencing tariff for juvenile rape as between 11 to 20 years' imprisonment as stated in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018).

[17] The Court of Appeal in **Raj v State** [2014] FJCA 18; AAU0038.2010 (5 March 2014) stated that

> *'[18] Rapes of juveniles (under the age of 18 years) must attract a sentence of **at least 10 years** and the **accepted range of sentences is between 10 and 16 years**….'*

[18] The Supreme Court in **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) referring to the above tariff said

> *"[58] The judge correctly identified the tariff for rape of a child as being between 10-16 years imprisonment (**Mutch v. State** Cr. App. AAU 0060/99, **Mani v. State** Cr. App. No. HAA 0053/021, **State v. Saitava** Cr. Case No. HAC 10/07, **State v. Tony** Cr. App. No. HAA 003/08).*
>
> *[66] The learned sentencing judge was correct in his approach. The Court of Appeal in its judgment at paragraph 18 said:*
>
> *'Rapes of juveniles (under the age of 18 years) must attract a sentence of **at least** 10 years and **the accepted range of sentences is between 10 and 16 years**………..'*
>
> *We indorse those remarks."*

[19] Thus, it appears that what the Supreme Court approved was minimum 10 years of imprisonment (denoted by the words 'at least') and a final sentence between 10-16 years as sentencing tariff for juvenile rape.

[20] Then, in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court enhanced the above tariff as follows

> *'[25] The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.'*

[21] Therefore, it is reasonable to assume that what the Supreme Court did was only to enhance the sentence rage from 10-16 years to 11-20 years. Therefore, for juvenile rape the minimum sentence now should be read as 11 years instead of 10 years and the range of sentences being 11-20. The sentence imposed by the trial judge is within permissible sentencing range.

[22] The State has submitted in **State v Ravasua** [2023] FJCA 95; AAU153.2020 (9 June 2023) that ***Aitcheson*** might be considered an unsatisfactory guideline judgment for several reasons, to wit,

> 1. *It is unclear whether the permissible range of 11-20 years is for offenders convicted after trial.*
>
> 2. *There is lack of clarity as to whether 11 years' imprisonment is the minimum permissible sentence for a child rapist after trial (or after plea).*
>
> 3. *It is not clear whether tariff is applicable to first offenders arguing that many sentencing judges approach* ***Aitcheson*** *as if it only applies to offenders with prior convictions when it is far from clear why a rapist should be entitled to a discount merely because he has no prior convictions.*
>
> 4. ***Aitcheson*** *does not address the issue of the appropriate starting point within the broad permissible range and refers to Justice Keith's remarks in* ***Kumar v State*** *[2018] FJSC 30; CAV0017 of 2018 (02 November 2018).*

[23] Justice Keith's observations in the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 also is relavent if the State were to seek clarifications or modifications to ***Aitcheson,*** which I think it should, to address the above concerns as soon as possible, preferably from the Supreme Court itself in an appropriate case. Until then ***Aitcheson*** should continue to be followed in the matter of sentence on child/juvenile rape cases.

[24] Be that as it may, having identified the correct sentencing range, the learned trial judge had reminded himself as follows.

> 6. *In sentencing offenders, the Courts must have regard to the Constitution of Republic of Fiji and the proportionality principle in sentencing enshrined in it. Section 4 of the Sentencing and Penalties Act 2009 requires the courts to have regard to the maximum penalty prescribed for the offence, current sentencing practice and applicable guidelines issued by the courts.*
>
> 7. *The courts of the Republic of Fiji, at all levels, have repeatedly pronounced that rape of a child is one of the most serious forms of sexual violence and that rapists will be dealt with severely. The courts have underscored that children are vulnerable members of our society. They are entitled to live their lives free from any form of physical or emotional abuse. They are entitled to trust their family member to*

protect them and keep them safe from sexual violence. When family members sexually abuse children, they should expect condign punishment to mark the society's outrage and denunciation against sexual abuse of children. Rape and sexual abuse of children have far-reaching consequences for not only the child victims themselves but also their families and society. The courts have emphasized that the increasing prevalence of such offending in the community calls for deterrent sentences.

8. *By prescribing life imprisonment for Rape, the law makers expect the courts to impose harsher punishment on rape offenders. The sentence must send a clear warning to the society. The offender must be severely punished and be incarcerated to ensure that our younger generation is safe and secure.*

9. *The main purposes of your sentence are deterrence and denunciation. Lord Denning once said: "the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of the citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive or nothing else ... The ultimate justification of any punishment is not that it is deterrent, but that it is the emphatic denunciation by the community of crime...."*

[25] The learned trial judge had then stated that the courts were required to consider the seriousness of the offending and the impact or harm caused to the victim in selecting the starting point of the sentence and recognized that the appellant's offending was very serious in that he had used force and violence to silence the victim and the victim suffered physically and emotionally. Having considered the seriousness of the offence and the harm caused to the complainant, the judge had picked 12 years' imprisonment as the starting point.

[26] The learned judge had then proceeded to identify the following aggravating circumstances which vividly describe the sad plight of the 12 year old victim on that unfortunate day and that of her and her family in the aftermath of the incident.

(a) The victim was vulnerable

The victim was a child of 12 years of age when you raped her. She was vulnerable by reason of her age and other circumstances of the case. Her father and uncles prevented her from reporting the rape to save the family reputation. Victim was angry with her mother because her mother refused to take her to the police station due to pressure from her father's side to which you belong. You exploited her vulnerability.

(b) Breach of trust

The victim was your younger cousin. She was also your neighbor. She knew you from the time she was a little child. You were in a position of trust and had a duty to protect her. You have miserably failed to honour that trust.

(c) The impact of the crime on the victim

The impact of the crime on the victim was extremely traumatic and it is continuing. The impact of the crime on the victim is evident from the testimony of the victim, her mother and also from the Victim Impact Report. The acts committed by you had caused the child victim pain and injury. She was bleeding from her vagina. She had to leave school because she could not concentrate on studies. Her school education came to an abrupt end. She started running away from the house and was not listening to her mother. She became abusive in her behavior and started consuming alcohol, mixing with wrong company.

(d) The victim had to relocate herself

Victim did not want to see you anymore after the incident. Refusing to stay home because you were living in close proximity, she had to relocate herself at her aunt's place.

(e) The victim became pregnant

Victim became pregnant when she was only 12 years old. When this was discovered by her aunt and her parents, she was taken to a doctor who then terminated the pregnancy.

(f) The victim was exposed to sexual activity at such a tender age.

(g) The victim lost her virginity

You took away victim's virginity. It was the first time she was having sex and she started to bleed from her vagina after the rape.

(h) The disparity in the age

There was an age difference of 17 years between you and the victim.

(i) The victim was threatened with violence

You threatened to slap the victim if she told anyone and told her that if anything happened she must not blame you. She was afraid to tell her parents about the rape because you had warned her not to tell anyone.

(j) The victim was prevented from reporting the crime and the interference was continued even through the trial

You threatened to slap the victim if she told anyone and told her that if anything happened she must not blame you. You and your family members had taken every effort to prevent the matter being reported to police. They had tried to influence the witnesses for the Prosecution in various forms even after the trial had commenced.

(k) The consequences for the family unit

By your act, you have destroyed the family unit where the victim's relationship with her father had been severely affected as a result of the incident and matters related to the incident. In view of the Court of Appeal of England and Wales decision in ***Tiffany, Attorney-General's Reference*** *No. 52 of 2009 [2009] EWCA Crim 2125 (2 October 2009) I considered as an aggravating factor the profound effect that the offending had on an already emotionally damaged and extremely vulnerable child, together with the consequences for the family unit.*

[27] Undoubtedly, this a catalogue of very serious aggravating factors that one may come across in a rape case.

[28] The trial judge had added 03 years to the starting point of 12 years for those aggravating factors bringing the interim sentence to 15 years' imprisonment. He had then deducted 01 year for the following mitigating factors and 33 days of remand period making the final sentence 14 years of imprisonment.

(a). You are 32 year old young person. You are not married and currently employed as a panel beater earning $ 100 a week. You are the sole breadwinner of your family looking after your widowed mother who is suffering from a kidney failure.

(b) You are a first offender. You do not have any previous convictions.

[29] The seriousness of the issue of child and juvenile rape in Fiji needs little emphasis, for courts have expressed them forcefully and eloquently on many an occasion in the past. However, for the purpose of this appeal, I shall still refer to a few of those observations despite running the risk of being repetitive, because one only needs to look at the monthly statistics of sexual crimes published by the Director of Public Prosecutions which stand as a grim reminder of the gravity of this nationwide malaise which shocks the conscience of any reasonable person, to realise that this longstanding scourge is continuing unabated.

[30] The appellant in its sentencing submissions filed in the High Court had adverted to all the aggravating factors referred to by the trial judge and more in a detailed discourse which includes findings in a UNISEF report titled 'Hidden in Plain Sight: A Statistical analysis of violence against children'[1] (04 September 2014) which is the largest-ever compilation of data on the subject of violence against children shedding light on the prevalence of different forms of violence against children, with global figures and data from 190 countries and a report published by the Independent Inquiry into Child Sexual Abuse (IICSA) titled 'The impact of child sexual abuse: A rapid evidence assessment' in July 2017'[2].

[31] UNISEF report has documented that sexual violence is one of the most unsettling of children's rights violations and experiences of sexual violence in childhood hinder all aspects of development: physical, psychological and social. Children who have been abused or neglected are often hampered in their development, experience learning difficulties and perform poorly at school. They may have low self-esteem and suffer from depression, which can lead, at worst, to risk behaviour and self-harm.

[32] IICSA research has demonstrated that that being a victim and survivor of child sexual abuse is associated with an increased risk of adverse outcomes in all areas of victims and survivors' lives. Additionally, long-term longitudinal research suggests that – in many cases – these adverse outcomes are not just experienced over the short and medium term following abuse, but instead can endure over a victim and survivor's lifetime. In the words of victims and survivors, taken from one of the qualitative studies included in the IICSA review:

> *"What he did to me affected my whole life, every relationship, my personal identity and the general trajectory of my life's path. Childhood sexual abuse manifested in all aspects of my life."*

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[1] https://data.unicef.org/resources/hidden-in-plain-sight-a-statistical-analysis-of-violence-against-children/#:~:text=Publications-,Hidden%20in%20Plain%20Sight%3A%20A%20statistical%20analysis%20of%20violence%20against,and%20data%20from%20190%20countries.

[2] https://webarchive.nationalarchives.gov.uk/ukgwa/20221216171632/https://www.iicsa.org.uk/key-documents/1534/view/iicsa-impacts-child-sexual-abuse-rapid-evidence-assessment-full-report-english.pdf

"The effects of what happened have stayed with me, un-dealt with and unprocessed, throughout my life. The damage from my early years has coloured everything else at all stages of my life. I know it sounds dramatic but I'm just telling it like it is."

[33] Thus, sexual violence breaches not only the fundamental right to protection of children from all forms of violence guaranteed by the United Nations Convention on the Rights of the Child (UNCRC) and other international human rights treaties but also the right of every child in Fiji to be protected from abuse and any form of violence under section 41(1)(d) of the Constitution under Chapter 2- Bill of Rights.

[34] Rape of a child is one of the most serious forms of sexual violence and a rapist will be dealt with severely[3]. Children are vulnerable members of our society. They are entitled to live their lives free from any form of physical or emotional abuse. They are entitled to trust their family members to protect them and keep them safe from sexual violence. When family members sexually abuse children. They should expect condign punishment to mark the soceity's outrage against sexual abuse of children[4]. The increasing prevelance of such offending in the community calls for deterrent sentence[5].

[35] A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes [see **The State of Punjab vs Gurmit Singh & others** 1996 AIR 1393, 1996 SCC (2) 384 & **Matasavui v State** [2016] FJCA 118; AAU0036.2013 (30 September 2016)]

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[3] **Naulumosi v State** [2018] FJCA 24; AAU0021 .2014 (08 March 2018)

[4] **State v Vusolo** [2018] FJHC 531; HAC 40.2018 (25 June 2018); **Raj v State** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014)

[5] **State v Senikuba** – Sentence [2018] FJHC 829; HAC 32.2017 (06 September 2018)

[36] Rape shakes the insight of a woman who once was a 'happy person', and had no clue of being a victim of the said horrifying and nightmarish encounters [see **Lokesh Mishra v. State of NCT Delhi** CRL. A. 768/2010 decided on 12 March 2014) & ***Matasavui***].

[37] Rape is the most serious form of sexual assault. Sexual offenders must be deterred from committing this kind of offences (see **State v AV** [2009] FJHC 24: HAC 192.2008: 21 February 2009 & **Raj v The State** CAV 0003of 2014: 20 August 2014 [2014 FJSC 12]

[38] Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound (see **State v Tauvoli** [2011] FJHC 216; HAC027.2011 (18 April 2011) & ***Alfaaz***)

[39] In **R v Radich** [1954] NZLR 86 the New Zealand Criminal Court of Appeal said

> *"... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment."*
>
> *"If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences."*

[40] In **Subramani v State** [2015] FJCA 102; AAU0112.2014 (13 August 2015)] the Court of Appeal said

> *'[15] The offence of rape of young person related to the appellant is a serious offence. In this case the complainant was 11 years old and the appellant was her grand uncle (her grandfather's brother). The authorities indicate that whilst rehabilitation is a factor to be considered when fixing a non-parole period, so also are deterrence,*

denunciation, condign punishment and community protection and expectations. The appropriate person to balance these objectives in each case is the sentencing judge. In the present case, given the age of the appellant, re-habilitation is not a particularly relevant matter whereas the expectations of the community and the protection of young girls should be reflected in both the head sentence and the non-parole term so as to send a strong signal that the counts will impose appropriate sentences in such cases.' (emphasis mine)

[41] The Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 said

> *'[36] The scourge of child sexual abuse. Having identified the current sentencing practice, I turn to what has driven this application for a guideline judgment. It goes without saying that the rape of children and juveniles is a truly shocking crime. Victims of offences of this kind will be utterly confused by what has happened, and their sense of humiliation will be profound. They will realise that they have been used unashamedly and treated without any regard for their own feelings. Their sense of self-worth will often have been irreparably damaged. The trauma which they will inevitably experience could well be life-long. All aspects of their development are likely to be affected: some experience learning difficulties, other perform less well at school than might otherwise have been the case, and invariably they suffer from low self-esteem. It is for these reasons that the courts have consistently said that those convicted of the rape of children and juveniles must expect heavy sentences which truly reflect the gravity of the crime.'*

[42] No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilized entity [see **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018) and ***Matasavui***]

[43] I have no doubt that the learned trial judge had said all the right things about aggravating factors. For example, he had taken into account *inter alia* the extremely traumatic impact of the crime (which is continuing) on the victim as borne out by the evidence and the victim impact report (see **Sharma v State** [2017] FJSC 5; CAV0031 of 2016 (20 April 2017), resultant pregnancy [see **Regina v P.M.** [2009] EWCA Crim 2202 (12 October 2009)], her loss of virginity (see **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), exposure to sexual activity at a young age and consequences for the family unit (see **Tiffany, Attorney-General's Reference No.**

52 of 2009 [2009] EWCA Crim 2125 (2 October 2009) in addition to her vulnerability, breach of trust, the disparity in the age, threat of violence by the appellant, pain and injury to the victim and prevention of the victim from reporting the crime and interference even during the trial.

[44] Except the appellant's personal and family circumstances which should have been of little value as a migratory factor [see ***Raj*** & **Rokolaba v State** [2018] FJSC 12; CAV0011 of 2017 (26 April 2018)], the trial judge had correctly considered his previous character which was devoid of blemish as a mitigating circumstance.

[45] Thus, I do not think that the appellant has demonstrated any material sentencing error the trial judge had committed unless it is apparent from the length of the sentence itself. Yet, even if no specific error is shown, I have to see whether the sentence *per se* is unreasonable or plainly unjust, because it is this last kind of error that is described in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy" (vide ***Markarian)***.

[46] Given the totality of circumstances of this case, I am of the view that the ultimate sentence does not reflect the very serious nature and the high degree of criminality involved in the case. I agree with the appellant that the aggravating circumstances deserved an upward adjustment of 5-6 years instead of 03 years which is manifestly inadequate. This is where the manifest leniency of the overall sentence had crept in. In **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73], the New Zealand Supreme Court stated that

> *'[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.'*

[47] At the same time, I am mindful that when the trial judge picked the starting point at 12 years, he may have, unwittingly though, considered some aggravation later reflected in the aggravating factors as well. Thus, it is possible that there had been a discreet double counting involved given the observations of the Supreme Court in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) at paragraphs [57] and [58].

[48] I have also considered all the previous sentencing decisions given by the High Court in child/juvenile rape cases submitted to this court by the appellant not for comparison but to understand how courts have treated similar offending for sentencing *i.e.* for consistency which also convince me that there is a marked inadequacy of the final sentence. In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence 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)]. However, within a permissible range, particularly when the range is broad such as the sentencing tariff for juvenile rape, a sentence could still be manifestly harsh or lenient.

[49] Therefore, I think that this is a case where a more severe sentence is warranted in law and should have been passed. I would consider the appropriate sentence to be 15 years and 06 months with a non-parole period of 12 years and 06 months which I think will fit the gravity of the crime committed by the respondent. Therefore, I shall quash the sentence imposed by the High Court and pass a sentence of 15 years and 06 months with a non-parole period of 12 years and 06 months in substitution therefore.

Qetaki, JA

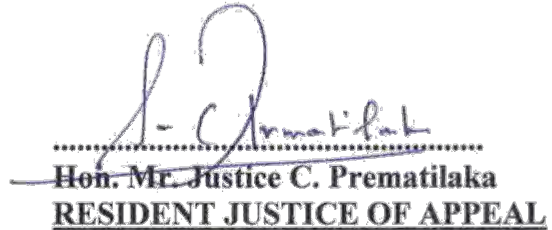
[50] I have considered the judgment of Prematilaka, RJA in draft. I entirely agree with the judgment and the reasoning.

Morgan, JA

[51] I agree with the draft judgment and have no further comments.

Order of the court are:

1. *Appeal against sentence is allowed.*
2. *Respondent's sentence of 14 years imprisonment with a non-parole period of 10 years is set aside.*
3. *A sentence of 15 years and 06 months with a non-parole period of 12 years and 06 months is passed on the respondent to be effective from 03 December 2018.*



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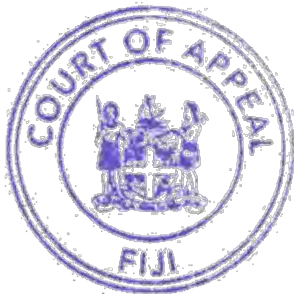
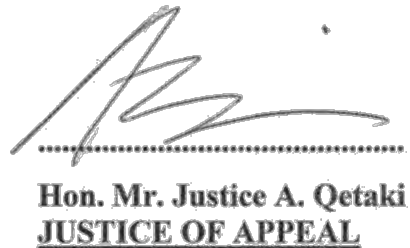
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL





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Hon. Mr. Justice A. Qetaki
JUSTICE OF APPEAL

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Hon. Mr. Justice W. Morgan
JUSTICE OF APPEAL