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

CRIMINAL APPEAL NO. AAU 0038 of 2020
[In the High Court at Suva Case No. HAC 38 of 2020]

BETWEEN : **IMTIAZ ALI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

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

Date of Hearing : **20 June 2024**

Date of Ruling : **24 June 2024**

RULING

[1] The appellant had been charged with a count of rape and a count of defilement under the Crimes Act 2009 in the High Court at Lautoka for having raped a juvenile ('PSG') in 2020. The charges were as follows:

'***FIRST COUNT***

Statement of Offence

RAPE*: Contrary to section 207 (1) and 2 (a) of the Crimes Act 2009.*

Particulars of Offence

IMTIAZ ALI *on the 8th day of February, 2020 at Lautoka in the Western Division, had carnal knowledge of "P.G", without her consent.*

SECOND COUNT

'***Statement of Offence***

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

Particulars of Offence

> ***IMTIAZ ALI*** *on the 15th day of February, 2020 at Lautoka in the Western Division, unlawful had carnal knowledge of "P.G", a person who was under the age of 16 years at the time.'*

[2] The High Court judge on 20 March 2023 sentenced him to an aggregate period of 14 years and 11 months of imprisonment with a non-parole period of 12 years.

[3] The appellant's appeal against conviction and sentence is timely.

[4] 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 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)].

[5] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [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].

[6] The trial judge had summarized the facts in the sentencing order as follows:

> '2. *The brief facts were as follows:*

3. *The victim in 2020 was 15 years of age and a year 11 student who used to travel to school in the bus driven by the accused from Sabeto junction to Nadi town.*
4. *On Saturday 8th February, 2020 the victim went to Nadi town to top up her e-transport card when she went to the bus stand she boarded the bus driven by the accused. The accused knew the victim so he started asking her personal questions such as her name, age and school. The victim volunteered all the above information, during the conversation the accused asked the victim to go with him to Lautoka and he will drop her at the Sabeto junction upon return.*
5. *The victim refused and when the bus was near the Sabeto junction the victim pressed the buzzer in order to get off the bus, however, the accused did not stop the bus. Upon reaching Lautoka the accused at Shirley Park bus stop stopped the bus and told the passengers to get off.*
6. *Before the victim could get off the bus the accused closed the door and forcefully took the victim to the rear end of the bus. On the back seat the accused forcefully removed the victim's clothes. The victim was shouting and telling the accused to stop. The accused did not stop but had forceful sexual intercourse with her. After the accused had finished he threatened the victim not to tell anyone about what he had done to her otherwise he will kill her and her family. The victim did not consent for the accused to have sexual intercourse with her.*
7. *At home the victim did not tell her grandmother or her sisters about what the accused had done to her because she was scared of what had happened to her and also she was threatened by the accused not to tell anyone about what he had done.*
8. *The following Saturday 15th February the victim went to Nadi town to meet a friend when she returned to the bus stand she boarded the bus which was going to Lautoka so that she would get off at the Sabeto junction and go home. When the victim entered the bus she saw the driver was the accused.*
9. *At the Sabeto junction the victim pressed the bus buzzer for the accused to stop the bus but the accused did not. Upon entering Lautoka City the accused once again stopped the bus at Shirley Park bus stop and told the passengers to get off the bus. The passengers did not like this and some of them swore at the accused.*
10. *The victim also wanted to get off the bus but the accused told her to stay back so that he could talk to her. After all the passengers left the accused closed the door of the bus forcefully took the victim to the rear end of the bus removed her clothes and had sexual intercourse with her on the back seat. The accused also made a love bite on the neck of the victim.*
11. *After this the accused threatened the victim not to tell anyone about what he had done to her and if anyone asks to make up a story that the love bite was made by a drunkard in one of the restaurants. The victim was scared so she did not tell anyone about what the accused had done to her. On 16th February the victim's aunt came from Ba to attend to pooja ceremony when she saw the love bite on the neck of the victim. The victim told her aunt about what the accused had done to her on two occasions.*
12. *The aunt with the victim reported the matter to the police the same day. The victim was medically examined and according to the examining doctor the*

injuries seen during vaginal examination was consistent with forceful penetration.'

[7] The grounds of appeal urged by the appellant are as follows:

'__Conviction__

Ground 1

THAT *the Learned Trial Judge erred in law and in fact not to properly analyse the alibi evidence produced by the appellant, therefore causing substantial miscarriage of justice to occur to the appellant.*

Ground 2

THAT *the Learned Trial Judge erred in law and in fact when he failed to properly analyse the medical evidence relating to penetration thereby causing substantial miscarriage of justice to occur to the appellant.*

Ground 3

THAT *the Learned Trial Judge erred in law and in fact when he failed to properly analyse the inconsistencies in the complainant's evidence in court with her police statement, therefore causing substantial miscarriage of justice to occur to the appellant.*

Ground 4

THAT *the Learned Trial Judge erred in law and in fact to convict the appellant on the evidence of the complainant despite the complaint suppressing the alleged incident until she was found with a mark on the neck (love bite) by the aunty namely Aruna Devi Goundar.*

Ground 5

THAT *the Learned Trial Judge erred in law and in fact when he failed to judiciously interview the complainant about her affairs with the third person who she mentioned to her aunty being responsible for the love bite. Had the learned trial judge judiciously questioned the complainant about this third person, it would have been revealed to the Court that the complainant is now married with this third person and that the prosecution despite being privy to this fact, had withheld this fact from the Court and the Defence.*

Ground 6

THAT *the Learned Trial Judge erred in law and in fact when he stated that the appellant took advantage of a young female with no experience despite having no evidence of prior sexual engagements and experiences of the complainant.*

Ground 7

THAT *the Learned Trial Judge erred in law and in fact when he failed to comprehend that the prosecution has legal burden to prove beyond reasonable doubt that the appellant knew that the complainant was under the age of 16years at the time of the alleged incident.*

Sentence

Ground 8

THAT *the Learned Trial Judge erred in principle to consider the unchallenged victim impact report which explained the effect of the crime on the complainant to select as an aggravating feature to enhance the sentence of the appellant.*

Ground 9

THAT *the Learned Trial Judge erred in sentencing principle when he failed to explain in his sentencing remarks how the final sentence of 14years and 11month's imprisonment was reached and how was 12years set as non-parole period to be served before the appellant would be entitled to parole.'*

Ground 1

[8] The Court of Appeal comprehensively dealt with all aspects of alibi defense at paragraph 12-23 of the recent judgment of **Munendra v State** [2023] FJCA 65; AAU0023.2018 (25 May 2023). I do not propose to reiterate the same here for obvious reasons.

[9] The trial judge, having dealt with the facts relating to defense evidence including alibi evidence at paragraphs 87-124, had specifically given his attention to alibi defense at paragraphs 150-151 once again, Thereafter, he had set out the law *correctly* (though not in exact terms in ***Munendra),*** at paragraphs 152 and 154 (taken together) according to the relevant principles set out in ***Raisele v State*** [2020] FJCA 49; AAU088.2018 (1 May 2020) which are similar to what ***Munendra*** set out more recently.

[10] The trial judge had accepted PSG's evidence as truthful and reliable. He had unreservedly accepted that it was none other than the appellant who had committed

rape and defilement as alleged by PSG (see paragraphs 158-159, 180, 190 & 193). Then, at paragraphs 181-189 and 191-192, he had affirmatively rejected the alibi defense which means the judge had accepted that the prosecution had refuted the *alibi* defense by questioning the accused and his *alibi* witnesses and challenging their credibility and that it had also proved beyond reasonable doubt not only that the accused was present at the crime scene on both occasions by its own evidence but also removed or eliminated a reasonable possibility of him being somewhere else according to the alibi evidence.

Ground 2

[11] The trial judge had indeed analyzed medical evidence at paragraphs 53-61 and 175 of the judgment. It is clear that the doctor's observations of several injuries on her genitalia show positively an act of penetration by a blunt object which according to PSG was the appellant's penis.

Ground 3

[12] The trial judge had meticulously dealt with all inconsistencies in PSG's evidence at paragraphs 41-51 of the judgment and returned to the topic at paragraphs 125-128 once again. Then he had dealt with the law relating to contradictions, discrepancies, inconsistencies and omissions at paragraphs 166-174 and concluded that those inconsistencies and omissions had not affected her credibility.

[13] Keith, J adverted in **Lesi v State** [2018] FJSC 23; CAV0016.2018 (1 November 2018) as follows:

> *'[72] Moreover, not being lawyers, they do not have a real appreciation of the limited role of an appellate court. For example, some of their grounds of appeal, when properly analysed, amount to a contention that the trial judge did not take sufficient account of, or give sufficient weight to, a particular aspect of the evidence. An argument along those lines has its limitations. The weight to be attached to some feature of the evidence, and the extent to which it assists the court in determining whether a defendant's guilt has been proved, are matters for the trial judge, and any adverse view about it taken by the trial judge can only be made a*

<u>ground of appeal if the view which the judge took was one which could not reasonably have been taken</u>.'

<u>Ground 4 & 5</u>

[14] The trial judge had extensively dealt with the episode attached to PSG's love bite on her neck and the possible involvement of another person with it at paragraphs 51 and again at paragraph 62-65, and 80-84 under 'recent complaint' evidence. The trial judge had again revisited the same issue under 'analysis' at paragraphs 138 & 139 and at 171-173 under 'determination' section where he concluded that it was the appellant who had manipulated PSG to implicate another boy from Tiger's Restaurant as the person responsible for the love bite.

[15] The appellant has submitted that PSG is now married to the said person and the prosecution had deliberately withheld that information from the defence and the court. There is no material at all at this stage to substantiate either of these allegations. Therefore, it has at this stage no relevance to the determination of the appeal. Such material must be before court by way of an application to lead fresh evidence which, if made properly, will be considered in accordance with the law applicable to allowing fresh evidence in appeal.

<u>Ground 6</u>

[16] The appellant has withdrawn this ground of appeal as confirmed by his counsel at the leave hearing.

<u>Ground 7</u>

[17] The appellant submits that the prosecution had failed to prove that the appellant knew that PSG was under 16 years at the time of the incident. In the first place, the appellant did not run his defence on the basis that he did engage in sexual intercourse on 15 February 2020 with PSG but he had reasonable cause to believe, and did in fact believe, that PSG was of or above the age of 16 years. No such proposition had been brought up during the trial by the appellant as only he could speak to such a defence.

Secondly, by doing so now, the appellant is jeopardising his defence of total denial coupled with his alibi passionately pursued at the trial. Secondly, it is not possible to pursue this defence based on age of the victim without first admitting to the act of sexual intercourse. It would be akin to an accused saying that he did not commit rape but if he did, it was with the victim's consent.

[18] The Court of Appeal said in the sentencing guideline judgment on defilement in **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023):

> *'[21] …………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.'*

[19] In **Reddy v State** [2018] FJCA 10; AAU06.2014 (8 March 2018), the Court of Appeal also said *inter alia* on the defence that an accused had reasonable cause to believe and did in fact believe that the victim was of or above the age of 16 years *vis-à-vis* the accused's burden as follows:

> *'[4] It would appear then that in the ordinary course of events the defences available to an accused charged with defilement would include (a) that he was not the person who committed the act as he was not present at the time, or (b) that he was present but that sexual intercourse never took place or (c) that he had reasonable cause to believe and did in fact believe that the other person was of or above the age of 16 years.*
>
> *'[7] In my view once the Appellant had indicated that his defence was that no act of sexual intercourse took place, then the issue of age which is the basis of the statutory defence, is irrelevant. Questions by Counsel relating to age should not have been allowed.* ***The obligation of the trial judge to consider whether to give directions on defences rests on there being some evidence adduced during the trial that warrants consideration of that defence by him and whether to give directions****. In this case there was no evidence that related to what the Appellant believed to be the age of the complainant nor was there any evidence as to the appearance of the complainant at the time of the alleged sexual intercourse.* ***There was no***

challenge to the age of the complainant and the defence was not raised by any evidence given by the Appellant*.*

[8] Under those circumstances it was not necessary for the trial judge to raise the defence in his summing up let alone give detailed directions as to whether the defence was available on the evidence. ***In fact in the absence of the defence being raised by the appellant in the form of some evidence that satisfied the evidentiary burden it is difficult to understand how the Judge could give meaningful directions****.*

[9] In my judgment it is unnecessary to consider ground 1 which seeks to challenge the learned trial judge's directions or the lack thereof on the statutory defence when it was not raised in evidence nor relied upon by the Appellant. For that reason I conclude that there is no merit to ground 1.'

[20] In addition, the respondent has submitted that the trial judge had correctly identified the elements of defilement at paragraph 16 of the judgment and his discussion at paragraph 21, 105, 165 shows that there was ample evidence by PSG and in his own evidence to show that the appellant did not have reasonable cause to believe, and did in fact did believe, that PSG was of or above the age of 16 years. All the evidence highlighted at those paragraphs shows otherwise that PSG, being a school going child was under 16 years.

<u>Ground 8 (sentence)</u>

[21] Section 306 of the Criminal Procedure Act permits court to receive evidence in the matter of evidence which includes a victim impact statement. Section 4(2) of the Sentencing and Penalties Act also allows the court to have regard to the impact of the offending on the victim. There is judicial sanction in the form of **<u>Bhan v The State</u>** [2005] FJHC 187; HAA0062J.2005S (15 July 2005) by Shameem J, on the propriety of using victim impact statement in sentencing process as follows:

'It is desirable that the court hears some form of evidence about the impact of the crime on the victim. Victim impact statements are tendered and considered in a number of overseas jurisdictions, as a routine part of the sentencing process. However, they are not customary in Fiji, although the Criminal Procedure Code allows the court to hear any evidence it wishes to assist in the sentencing process. This is regrettable. The impact of the offending on the victim is directly relevant to the sentence. Further, to force the offender to hear of such impact becomes an important part of holding him or her accountable. It

is the confrontation of the offender, of the consequences of his or her criminal conduct'.

[22] Therefore, receiving and considering the impact that the offending had on PSG by way of her impact statement was permissible and the appellant or his trial counsel had not objected to or challenged it by seeking an opportunity to test her in the witness box with what is contained therein.

Ground 9

[23] The appellant challenges the sentencing process with regard to the trial judge deviating from two-tiered system of sentencing.

[24] In the sentencing guideline judgment on the imposition and length of the minimum term on murder convicts in **Vuniwai v State** [2024] FJCA 100; AAU176.2019 (30 May 2024) the Court of Appeal said:

> *'[52] However, as held in **Qurai v State** [2015] FJSC 15; CAV24.2014 (20 August 2015), Sentencing and Penalties Act does not seek to tie down a sentencing judge to the two-tiered process of reasoning described above and leaves it open for a sentencing judge to adopt a different approach, such as 'instinctive synthesis'. The 'instinctive synthesis' method of sentencing is where the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case; only at the end of the process does the judge determine the sentence [see **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)].'*

[25] However, what the trial judge had adopted is not strictly 'instinctive synthesis' method of sentencing but what the Supreme Court highlighted in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018), *for the judge had taken a starting point* and set out aggravating and mitigating factors without, however, assigning any numerical values to increase and decrease the starting point in arriving at the final sentence, which was explained in ***Vuniwai*** by the Court of Appeal as follows:

> *[54] The Supreme Court in **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) seems to have suggested another*

sentencing methodology where the court identifies its starting point, states the aggravating and mitigating factors and then announces the ultimate sentence without saying how much was added for the aggravating factors and how much was then taken off for the mitigating factors.'

[26] Thus, the trial judge had not committed any sentencing error. However, the Court of Appeal advised the trial judges as follows on applying 'instinctive synthesis' method which may be equally applicable to the method adopted by the trial judge.

> *'[55] However, the Supreme Court and the Court of Appeal have premised the application of the sentencing guidelines in **Tawake**[1] (aggravated robbery in the form of street mugging), **Kumar**[2] (burglary & aggravated burglary), **Seru**[3] (cultivation of cannabis sativa), **Matairavula**[4] (aggravated robbery against public service providers) and **Chand**[5] (Defilement) in such a way that not only is it advisable and preferable but may indeed be convenient for the sentencing courts to adopt the two-tiered system and not 'Instinctive synthesis' methodology in order to effectively give effect to the sentencing guidelines. **Therefore, in my view, the two-tiered methodology, at least for the time being, should be the preferred option for sentencing courts in Fiji whether there are specific guidelines or otherwise**.'*

[27] The trial judge had taken 11 years as the starting point. In **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court said that the tariff previously set for juvenile rape in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years. The trial judge had started with 11 years and ended up imposing a sentence of 14 years and 11 months with a reasonable non-parole period of 12 years.

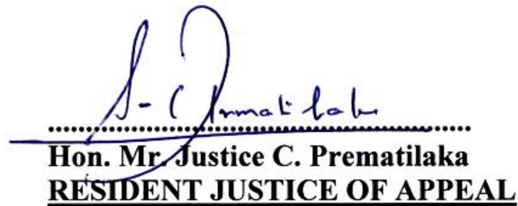
[28] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered and even if the starting point was too high, it does not follow that the sentence ultimately imposed will be one that falls outside an appropriate range for the offending in question [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

[1] **State v Tawake** [2022] FJSC 22; CAV0025.2019 (28 April 2022)
[2] **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022)
[3] **Seru v State** [2023] FJCA 67; AAU115.2017 (25 May 2023)
[4] **Matairavula v State** [2023] FJCA 192; AAU054.2018 (28 September 2023)
[5] **State v Chand** [2023] FJCA 252; AAU75.2019 (29 November 2023)

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)]. I do not think that the ultimate sentence irrespective of the methodology applied in the sentencing process is disproportionate, harsh or excessive.

Orders of the Court:

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



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

Solicitors:

M.Y. Law Lawyers for the Appellant
Office of the Director of Public Prosecution for the Respondent