

IN THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

CRIMINAL APPEAL NO.AAU 107of 2016
[High Court Criminal Case No. HAC 143 of 2013)

BETWEEN : **JOSEPH SHYAM NARAYAN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Ms. V. Ravono for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **13 November 2018**

Date of Judgment : **29 November 2018**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Bandara JA and I am not in agreement with his order to enhance the sentence of imprisonment of the appellant. As such the following reasons are given to substantiate my point of view.

The Facts

[2] As emerged during the trial in the High Court, this case is based on the straight forward evidence relating to two counts; the first count of sexual assault, contrary to section 210 (1)(a) of the Crimes Decree 44 of 2009 (Penal Code) and the second count of Rape,

contrary to section 207(1) and 207(2) (b) of the Crimes Decree, 44 of 2009 (Penal Code) and the alleged incidents had taken place between 1- February -2013 and 28- February- 2013, and 13 March 2013, respectively.

- [3] The evidence revealed through the victim, a school girl at the time of the alleged incidents, goes to show how the appellant being her de-facto step-father, caressed her amorously on several occasions, followed by rape by penetrating with the tongue. There was no evidence of penile penetration or any violence being used in the commission of the alleged offences.
- [4] At the conclusion of the trial, the appellant was convicted on both counts. The appellant sought leave to appeal against both conviction and sentence. Whilst granting leave on sentence, the learned single Judge refused to grant leave on conviction.
- [5] The sentence imposed in the High Court was 11 years imprisonment with a non-parole period of 9 years. The learned High Court Judge reduced the period in remand, and thus the final sentence is;

Head sentence – 10 years, 10 months and 18 days.

Non-parole – 8 years, 10 months and 18 days

The Ground of Appeal

- [6] Confining to the ground of appeal against the sentence, for which the leave had already been granted, the appellant is seeking to prosecute the appeal based on two grounds of appeal;
- Ground 1 – That the sentence imposed on the appellant is harsh and excessive.
- Ground 2 – That the sentence was harsh and excessive in that the non-parole period imposed by the learned trial Judge is too close to the head sentence, thus depriving the appellant of his 1/3 remission provided under Section 27 of the Prisons and Corrections Act 2006.

The State's response

- [7] The State, in responding submitted that the recent judgment of **Gordon Aitcheson v. The State**, Criminal Petition No. CAV 0012.2018 (on appeal from Court of Appeal No. AAU 0066.2015;2 November 2018), the Supreme Court has increased the tariff for Rape to be 11 to 20 years (before Gordon it was 10 to 16 years) and based on the strength of the decision in **Gordon**, this Court may now revise the sentence of imprisonment and increase the sentence.
- [8] I am disinclined to agree with the State's request. As it has been the usual practice followed in these courts hitherto, if this Court were to consider the enhancement of the present sentence the appellant should have been informed of the intention of the Court at the very outset of the hearing of the appeal so that it would have given the him a reasonable opportunity to decide for himself the kind of action that he would wish to take with regard to the appeal;(see **Ram Chandra Naidu v. R** [1974] Fiji LR 63;**Christine Doreen Skipper v.R**; Court of Appeal Criminal Appeal No. AAU0010.2005, 5, S, 25 November 2005).
- [9] Stating frankly, in relation to this appeal, this Court never felt the need to follow such a procedure and in the circumstance it would not be appropriate to consider the enhancement of the sentence at this late stage.
- [10] Besides, I cannot overlook the fact that the State has not filed a cross appeal or a counter appeal against the sentence in terms of section 21(2)(c) of the Court of Appeal Act and Rules(Cap 12) which reads as follows:
- "21(2). The State on a trial held before the High Court may appeal under this part of the Court of Appeal*
- 21(2) (c).With the leave of the Court of Appeal against the sentence passed on the conviction of any person unless the sentence is one fixed by law."(emphasis added)*

[11] The State should also , like in the case of a person convicted on a trial held before a High Court ,[(see section 21 (1)] ,follow the procedure that has been laid down in section 21(2), whenever it seeks to invoke the jurisdiction of the Court of Appeal. In my opinion if the State has failed to adhere to the proper procedure, later it cannot invite the Court to act *ex meromotu*. Going by the plain reading of section 21 of the Court of Appeal Act and Rules (Cap 12), it is easy to understand that that section is the enabling provision to be used to invoke the appellate jurisdiction of the Court of Appeal. Having regard to the plain language of the section, it provides the legal and conceptual basis upon which a convicted person or the State can appeal against a decision of a high court. Two streams are recognized and one stream is flowing from a convicted person and the other is flowing from the State as an appellant. Once the streams reach the Court of Appeal, the manner in which they must be dealt with is set out in section 23 of the Court of Appeal Act and Rules (Cap 12).Section 23 (3) deals directly with the procedure to be followed with regard to an impugned sentence against which an appeal has been lodged either by a convicted person ,(as in the present appeal) or by the State (as failed to do so in relation to the present sentence of imprisonment imposed in the High Court against the appellant).That is how I understand the operation of the relevant provisions of the Court of Appeal Act and Rules (Cap 12).

[12] Most importantly, the Constitutional Provision under Chapter 2 – Bill of Rights -section 14 which deals with the Rights of accused persons cannot be overlooked in this instance. Section 14(2) (n) states as follows:

*“14(2) – “Every person charged with an offence has the right _
(n) to the benefit of the least severe of the prescribed punishment if the
prescribed punishment for the offence has been changed between the
time the offence was committed and the time of sentencing....”*

- [13] In Fiji, the prescribed punishments are contained mainly in the statutory instruments. However, the operation of the Common Law principles as laid down by judicial pronouncements of appellate courts do also play a pivotal role in deciding on the quantum of a punishment, especially in the context of prescribing a minimum sentence of imprisonment, which is almost synonymous with the imposition of the non-parole sentence as per section 18 of the Sentencing and Penalties Act, which is directly referable to the determination of tariff for various offences.
- [14] Taking the aforementioned factors into account, their cumulative effect is that the State's application for enhancement of the sentence by virtue of the dicta in Gordon cannot be considered favourably at this late stage.

The grounds of appeal

- [15] Now I wish to turn to the first ground of appeal upon which the appellant is placing reliance to contend that the sentence is harsh and excessive.
- [16] I have carefully perused the citations of decided sentencing judgments referred to in the written submissions for the appellant. I am completely unable to be persuaded by the logical proposition that is sought to be advanced in favour of the appellant that the sentence imposed herein is harsh and excessive.
- [17] The learned Trial Judge's assessment of the sentence had been based on an objective and a dispassionate approach to the facts and circumstances of this case.
- [18] The following were the aggravating factors, quite correctly of course, the learned Trial Judge had considered in quantifying the sentence;
- “(a) You were the victim's stepfather. There was breach of trust.
 - (b) Age gap between you and the victim is 20 years; and

(c) You took advantage of the victim's naivety and vulnerability."

[19] A matter that has escaped the attention of the learned sentencing Judge should also find some space in my judgment, for in my opinion it reveals the manner in which the appellant had made attempts to drive guilt into the victim for the purpose of achieving his sexual gratification.

[20] As revealed in the evidence of the victim, somewhere in February 2013, while the victim was smoking in the bathroom, presumably quite secretly, the appellant had forced himself into the bathroom, where she was still naked. The appellant had questioned the victim about her smoking habit, probably to instil guilt in her mind, and thereafter touched her vagina. According to the evidence of the victim, the appellant thereafter had told the victim that if she would keep what he had done to her as a secret, he would also keep a secret of the fact that she was into smoking. In addition, the appellant had later persuaded the victim to smoke marijuana with him.

[21] This in my view is a clear instance where the appellant had made the victim feel guilty over smoking secretly, a form of blackmailing, so that he could take advantage of the situation for his sexual gratification.

The impugned sentence

[22] As stated already, the appellant is not challenging presently his conviction. As regards the sentence of imprisonment, in **Raj v The State** [2014] FJSC 12 CAV003.2014 (20th August 2014) the tariff for rape is set at 10 to 16 years.

[23] In the light of aforementioned facts, the appellant's claim that the sentence is harsh and excessive is with no merit. The ground should therefore fail.

2nd Ground of Appeal

- [24] “The sentence was harsh and excessive in that the non-parole period imposed by the learned trial Judge is too close to the head sentence thus depriving the appellant of his 1/3 remission provided under section 27 of the Prisons and Correction Act 2006.
- [25] Section 18 of the Sentencing and Penalties Act prescribes the manner in which the range of an appropriate non-parole sentence of imprisonment should be determined by a Court. The range covers the imposition of the minimum sentence to that of a higher sentence, based on the various factors that a sentencing court must take into account in quantifying a sentence. The discretionary power, vested in a court of law, meaning the judicial arm of the governance, has been left to be judiciously exercised by judges in deciding on the appropriate sentence of imprisonment, particularly, in relation to the minimum sentence.
- [26] Section 4 of Part 2 of the “Sentencing Guidelines” of the Sentencing and Penalties Act lays down “the only purposes for which sentence may be imposed by a Court of law”. I have already discussed the issues relating to the efficacy of this section in the judgment of the Court in Rarasea v State [2018] FJCA 156;AAU 0118.2014 (4 October 2018) and for the purpose of dealing with the present ground of appeal , that decision may also be taken into consideration.
- [27] Section 4 (2) prescribes the matters for which a Court must have regard in imposing a sentence. They are called the guiding principles.
- [28] These guiding principles should play a pivotal role in the exercise of determining the appropriate sentence by a sentencing court and each limb of the section should be accorded an equal importance for the purpose of deciding the appropriate sentence.

- [29] Section 4(1) (d) state that a court in imposing a sentence of imprisonment should have regard to conditions that are conducive for “the promotion and facilitation of the rehabilitation of offenders.”(see section 4 of the Sentencing and Penalties Act).
- [30] In the case of **Paula Tora v. The State** Criminal Appeal No. AAU 0063/2011 this factor had been discussed clearly by Hon. Calanchini, P.
- [31] The exercise involved in fixing a non-parole sentence should be examined vis-à-vis the provisions of the Prisons and Correction Act 2006, with a particular emphasis being attached to Section 27.
- [32] In ventilating this proposition in clear terms in **Paula Tora v The State** Criminal Petition No. CAV 11 of 2015, the Hon Calanchini J. held, that “... *it is my view that the purposes of sentencing set out in Section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result non-parole term should not be so close to the head sentence as to deny or discourage the possibility of rehabilitation*”.
- [33] I could not agree more with that decision. In my understanding of the operation of section 18 of the Sentencing and Penalties Act, that section provides a legal and judicial calibrator to be used by a court of law in determining the appropriate final sentence, which includes the fixing of a non-parole period as well.
- [34] The operation of Section 18(1) is certainly conditional to the operation of Section 18(2), which lays down the point of entry into the exercise of determining the non-parole period. The subsection reads as follows;
- “If a Court considers that the nature of the offence, or the past history of the makes the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under subsection (1).”*

- [35] In my understanding of the wording of section 18 of the Sentencing and Penalties Act, subsections 3 and 4 play a crucial role in the determination of the gap that should be maintained between the head sentence and the non-parole sentence. Sections 18 (3) and 18(4) state as follows;

18 (3) "If a Court sentences an offender for less than 2 years but not less than one year, the Court may fix a period during which the offender is not eligible to be released on parole.

18(4). Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

- [36] Section 18(3) of the Sentencing and Penalties Act stipulates the starting point of the kind of sentence for which the non-parole period should be prescribed. It is therefore, correct to be described as an entry point or a threshold provision which should be read along with section 18 (4) of the Sentencing and Penalties Act. In other words, in the event of imposing a sentence of imprisonment which ranges from 1 to 2 years, the law provides for the imposition of 6 months non-parole period, which is quite compatible with the test of commonsense.
- [37] In my opinion the 6 months gap referred to in 18(4) of the Sentencing and Penalties Act is generally and may be even directly referable only to section 18(3) of the said Act. This gap is providing a basic yardstick to be used in deciding on an appropriate non-parole period and based on this conceptual mechanism, a sentencing judge is free to make a decision with regard to the appropriate gap that should be maintained between the head sentence and the non –parole sentence. The 6 months gap is a conceptual calibrator that is not to be used in a general sense or universally. In other words a sentencing judge is required to make a determination based on proportionality on the accurate gap that should be maintained between the head sentence and the non-parole period. It is a sliding scale scenario that has been envisaged and the method of using the mechanism is left in the hands of a sentencing judge, who should exercise his judicial discretion rationally and with sagacity. In this context that in determining the gap that should be fixed

between the head sentence and the non-parole sentence, it is imperative for a judge to be sensitive to follow the guidelines as laid down in Section 4 of the Sentencing and Penalties Act.

[38] In that context, Section 4 (d) should play a role that is equally important and on a par with the other guideline principles laid down in section 4 of the Sentencing and Penalties Act.

[39] Thus, it would make provision for averting any room for discordance between the impositions of a non-parole period which is too close to the head sentence, a moot point that keeps coming up like a recurring decimal.

[40] In essence, if I may encapsulate the proposition that has now been advanced in relation to the perceivable conflict between the imposition of a non-parole sentence and the implementation of the provisions contained in Section 27 of the Prisons and Corrections Act, I wish to state the following;

- (1) *that in interpretation of a statute, it is necessary to adopt a holistic view of the entire statutory instrument and in that sense the sentencing guidelines as stipulated in Section 4 (1) and (2) of the Sentencing and Penalties Act should be given a foremost consideration as providing the policy and jurisprudential matrix in sentencing.*
- (2) *In fixing a non-parole period in terms of Section 18 of the Sentencing and Policies Act there is the need to be mindful of the importance that should be accorded to Section 4(1)(d) of the Sentencing and Penalties Act, thereby the operational sphere of section 27 of the Prisons and Correction Act 2006 would not be impeded.*
- (3) *Section 18 of the Sentencing and Penalties Act provides a mechanism to be used for the purpose of calculating a proper sentence of imprisonment and in that context section 18(2) and 18(3) and 18(4) are provisions meant to be used as threshold*

provisions, which provide a yardstick to be used in determining the final sentence of imprisonment.

- (4) Section 18(1) and 18(2) are to be considered in conjunction, and so are the sections 18(3) and 18(4) of the Sentencing and Penalties Act. In that context section 18(4), the stipulated gap of 6 months period, is not to be utilized in a general sense, in every instance. It is only to be used as a calibrator, and judicial discretion should be used in determining the gap between the head sentence and the minimum sentence, without overlooking the need to give effect to the provisions contained in section 4(1) and 4(2) of the Sentencing and Penalties Act.*
- (5) By the application of section 18(2), a court should make a preliminary assessment whether a case in hand needs the triggering of section 18(1) of the Sentencing and Penalties Act. If there is no need for the imposition of a non-parole period, then the operation of section 27 of the Prisons and Correction Act 2006 would not become a matter of concern.*
- (6) To the maximum extent that is possible within the ambit of law, the imposition of a non-parole sentence should not have a conflict with other laws that have a close kinship to the exercise of rehabilitation and reformation of offenders.*

The Present Grounds of Appeal

[41] Notwithstanding what has already been stated above, in the instant case the learned trial Judge had picked from the lowest end of the tariff in sentencing the appellant. The appellant's behaviour towards the victim, who entertained almost every nuance of her filial love towards her step-father, deserves nothing but the highest degree of abhorrence.

[42] In the context, I do not wish to interfere with the sentence of imprisonment imposed by the learned High Court Judge and therefore the grounds of appeal advanced in favour of the appellant is without merit.

Conclusion

- [43] This appeal should therefore be dismissed and the sentence of imprisonment imposed by the learned High Court Judge is affirmed.

Prematilaka, JA

- [44] I have read in draft the judgment of Bandara JA and agree with conclusions and the orders proposed.

Bandara, JA

- [45] The Appellant was charged with one count of sexual assault committed between 1st and 28th day of February 2013 contrary to Section 210 (1)(a) of the Crimes Act and one count of the offence of Rape committed on 13th day of March 2013 contrary to Section 207 (1)(2) (b) of the Crimes Act 2009.
- [46] On 18th of July 2016 the Appellant was found guilty on both counts after trial in the High Court in Suva.
- [47] On 25th July 2016 the Appellant was sentenced to an aggregate sentence of 10 years, 10 months and 18 days of imprisonment with a non-parole period of 8 years 10 months and 18 days.
- [48] On 19th August 2016 the Appellant filed his application for leave to appeal against conviction and sentence within the stipulated time period.
- [48] On 16th June 2017 a single Judge of the Court of Appeal in his Ruling refused the application for leave to appeal against conviction but allowed the application for leave to appeal against sentence. No renewal application has been filed before this court against the conviction and the Counsel for the Appellant confirmed at the hearing that the conviction is not being canvassed in these proceedings.

[49] Being aggrieved by the said sentence imposed by the learned High Court Judge the appellant has appealed to this court.

The grounds of appeal against the sentence are as follows:-

Ground (1): THAT the sentence imposed on the Appellant is harsh and excessive on two folds;

- (i) That the sentence imposed on the Appellant was harsh and excessive in comparison with the sentence with other sexual offence cases.
- (ii) That the non-parole period imposed by the learned trial judge is too close to the head sentence depriving the Appellant of his 1/3 remission under Section 27 of the Prisons and Corrections Act 2006.

Facts of the case briefly

[50] Three witnesses have given evidence on behalf of the prosecution in this case. They are namely the complainant, the complainant's Biology teacher, and the mother of the complainant. The Appellant himself and his sister have given evidence on behalf of the defence.

[51] The complainant lived with her mother and her de facto step father (the Appellant), his son, his two nieces and his parents at Kalokalo Crescent in Makoi. The mother of the complainant was running a Bean Cart business at the time near Hansons Supermarket, about 8 miles away from Suva. She used to start her work between 7 am to 8 am and finish between 6.30 pm to 7.30 pm.

[52] The Appellant worked as a taxi driver. He used to start work in the morning, picked up children from school around 3 pm brought them home, have lunch and tea and started work again between 5 pm to 6 pm and work till about 9 pm.

- [53] The complainant's parents separated when she was 10 years old. After the separation she was living with her father and the de-facto stepmother. Subsequently her father moved to New Zealand and she lived with her step mother for some time. Due to personal differences that arose between the complainant and her step mother, her father had thought it best for her to move to a boarding school. However, the complainant's mother had not liked the idea and had decided that the complainant should come to live with her. In 2011 the complainant had moved to live at the house of the Appellant.
- [54] One day, about a week after she started living at the Appellant's house the latter called her into the living room and told her that she should not call the Appellant 'father', since he did not accept her as his daughter and that he was getting lustful feelings about her. He had also asked how she was feeling towards him. She had clearly told him that since he was her mother's husband she respected him as a father. Although after the incident the situation was normal from time to time the accused started to pass unacceptable comments on her, in the nature, that she looked very sexy in the dress she was wearing, he was feeling greedy when he looked at her, etc. In such situations, she had only reacted telling him not to make that type of comments.
- [55] On a day in February 2013 the complainant had gone to the bathroom to have a bath. Before the bath, she had smoked a cigarette. Just when she was about to throw the cigarette butt away, the Appellant had pushed open the bathroom door, which did not have a proper lock, and could easily be opened if pushed. Since she was about to take a bath she had been naked at the time. The Appellant had asked why she was smoking and the complainant without answering him had put the towel on herself. The accused then had touched her vagina with his finger. Thereafter he had told her that if she kept his secret he would keep her secret. She had not told the incident to anyone because she did not want anyone to let her father know about her habit of smoking.

[56] The complainant was a juvenile who had done exceptionally well at school being the College Prefect when she was in Form 6 and being the Deputy Head Girl when she was in Form 7. She also had been part of the Team Mathematics Competition in 2013 when she was in Form 7 at school.

[57] On 11 March 2013, when the complainant came back from school the appellant had told her that he wanted to lick her vagina. She had told him; “No, it was not right”. The accused then held her hand and led her to the bath room. In the bath room, the appellant had taken her pants and panty off and had kissed her vagina. Thereafter he had kissed her lips. She had started crying in the bathroom and the appellant had left. She had not let anyone know of the incident, thinking that it would lead to cause a lot of problems to her parents, since her father was “pretty much stressed” having arguments about her with her step mother, and her mother leading a happy married life.

[58] Thereafter on 11th March, the Appellant had brought a roll of marijuana and made her smoke marijuana. In her evidence she stated as follows: - (page 306 of the court proceedings).

“Ms Sanjana – He had brought what he called what he told me.

Judge – Yes.

Ms Sanjana – Was marijuana that he bought for \$10.

Judge – Yes.

Ms Kumar – why was he showing that to you.

Ms Sanjana – He wanted me to smoke it with him.

Judge – Yes.

Ms Kumar – What happened next?

Ms Sanjana – I told him I did not want to smoke it.

Judge – Yes.

Ms Sanjana – He lit the roll of marijuana ... and gave it to me to take a puff, he continuously kept pressuring me to smoke it”.

When she refused to smoke marijuana the appellant kept on pressing her to smoke. She got the impression that the appellant was doing so in order to get her drowsy so that he could take physical advantage of her.

[59] On the 13th day of March, the Appellant had wanted to lick her vagina again but the complainant had refused. The Appellant had then told her that he had seen her whole body, touched her and kissed her and therefore she should allow him to lick her vagina. The complainant had told him that she wouldn't let him do it again. But he had told her to go to the bathroom and wash herself. Since he started scolding her, she had taken a towel and gone to the bathroom. She had washed herself and remained in the bathroom for some time. The appellant had then opened the bathroom door and had asked her what she was doing for so long. Then he had forcibly taken her to the bedroom, pushed her on the bed and starting licking her vagina and also put her tongue inside her vagina. The appellant had continued to do the said acts for about five minutes. The complainant had asked him not to do it, but the appellant had responded saying that while he was enjoying she too should enjoy it. The appellant had further asked whether her vaginal fluid had come out and she had responded saying 'yes'. The incident had made the complainant scared, sad and angry.

[60] The complainant firstly complained the incidents of sexual assaults she was undergoing to her form teacher, Sushi Kumar Singh, (who was called to give evidence on behalf of the prosecution at the trial). Kumar Singh had told her to tell the incidents to her mother which the complainant obliged.

[61] In the morning of the day she informed the incidents to the form teacher, the accused had dropped her at school and told her not to come home unless she makes up her mind to have sex with him. She had told him that she would not be coming home and gone ahead with complaining.

[62] Pursuant to Section 207(1) of the Crimes Decree 2009 the maximum punishment for rape is life imprisonment. At the time the sentencing order was made, it was settled that the tariff for rape of a child victim was between 10 to 16 years as set out in Anand Abhay Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014).

[63] The learned High Court Judge had taken 10 years as the starting point of the aggregate sentence. The aggravating factors and the mitigating factors are set out in the 9th and 10th paragraphs respectively, of the sentencing order in the following manner:-

- “9. I consider the following as aggravating factors;*
- a) you were victim’s stepfather. There was a breach of trust;*
 - b) age gap between you and the victim is 20 years; and*
 - c) you took advantage of the victim’s naivety and vulnerability.*
- 10. Your counsel submits the following as your mitigating circumstances;*
- a) you are 41 years old;*
 - b) you are the sole breadwinner of your family; and*
 - c) you support your parents who are having medical conditions”.*

[64] Considering the aggravating factors the learned High Court Judge had added 5 years to the starting point and made the sentence 15 years of imprisonment. A discount of 4 years has been given upon consideration of the mitigating factors.

[65] The learned High Court Judge in sentencing the Appellant, had expressly declined to treat the fact put forward by the counsel for the defence, that the accused was ‘remorseful of being found guilty’ as a mitigating factor.

[66] The two offences, the Appellant were convicted of, were offences of similar character. The learned High Court Judge had acted under Section 17 of the Sentencing and Penalties

Decree 2009 and imposed an aggregate sentence of imprisonment in respect of both counts.

- [67] However, in **Gordon Aitcheson v The State**; [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court enhanced to the prevailing tariff for rape against children to be between 11 – 20 years stating that;-

“...the increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the Court must consider widening the tariff for rape against children...”

- [68] In the instant case the State urges this court that in the light of the new tariff that has been set by the Supreme Court in Aitcheson’s case, to invoke Section 23(3) of the Court of Appeal Act and the Respondent has correctly understood this to mean an enhancement of the sentence imposed by the High Court.

- [69] On behalf of the Appellant it has been urged, that the judgment in **Gordon Aitcheson** (supra) setting the new tariff, was delivered only on the 2nd November 2018 by which time the hearing of the Appellant’s appeal had already been fixed. They have raised the issue whether the principle set out in Gordon’s case, in relation to the tariff, could be retrospectively applied in the instant case.

- [70] It is the contention of the Appellant that the application of the new tariff to the instance case would be prejudicial to him, in that a totally new penalty and a more severe one would be imposed.

- [71] In response, the State contends that the penalty for the rape of children is life imprisonment and that remains the same, and a new tariff does not involve a change of the statutory or legislative regime.

[72] I shall now consider the two contrary contentions raised by the parties. It is widely held that the principle of legality provides some protection from retrospective laws. People should generally not be prosecuted for conduct that was not an offence at the time the impugned conduct. Retrospective laws are commonly considered inconsistent with the rule of law.

[73] The principle of the rule against retrospective legislation is embodied in many international instruments pertaining to the protection of human rights. According to Article 15 of the International Convention on Civil and Political Rights:-

“Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed....”

[74] However, the common law principle of setting a tariff for a sentence does not amount to a change of penalty set out by a statute.

[75] In **Black Clawson International v Palserwele Waldron Aschaffenburg** [1975] AC 591, Lord Diplock stated, that “acceptance” of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.

[76] William Blackstone wrote in his *Commentaries on the Laws of England*:

‘[h]ere it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must

of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement'

- [77] In *The Rule of Law*, Lord Bingham [Tom Bingham, *The Rule of Law* (Penguin UK, 2011)] wrote:

'Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.'

- [78] In *Polyukhovich v Commonwealth (Polyukhovich)* (1991) 172 CLR 501, 608, Toohey J said:

'All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.'

- [79] The commonly accepted principle is that one cannot be punished for something which was not a criminal offence when he committed it. However, could the new tariff set by the Supreme Court, if applied to the instant case, amount to a more severe punishment, than the accused could have been punished at the time of the offence? Would the new tariff seek to punish the Appellant for something that was not criminal at the time of its commission? In my judgment the answer to both is 'No'.

- [80] I am also of the view that the tariff of a sentence does not amount to a substantive law. Tariff is the normal range of sentences imposed by court on any given offence and it is considered to be part of the common law and not substantive law. It may also be said that tariff of a sentence helps to maintain uniformity of sentencing across given offences. The procedure for determining the appropriate sentence include taking an appropriate starting

point and having regard to the aggravating and mitigating circumstances on the merits of each case. Any change effected to an existing tariff for a given offence therefore could be retrospective in its operation. Therefore, the new tariff that was set out in **Gordon Aitcheson** (supra) could be retrospectively applied to the instant case. The punishment for the substantive offence of rape in terms of Section 207 (1) (2) of the Crimes Act 2009 is life imprisonment which remains the same before and after **Gordon Aitcheson**.

- [81] The original written submissions of the appellant had understandably not dealt with this issue as the State had urged this Court to act under section 23(3) of the Court of Appeal Act in the light of **Gordon Aitcheson** only in its original written submissions dated 12 November 2018. The hearing of the appeal was on the following day where, however, this issue was addressed orally by both parties and the Court granted time for both counsel to file further written submissions on this matter. Accordingly, both Counsel had helpfully filed supplementary written submissions on 20 November 2018 and dealt with the State's application for this Court to act under section 23(3).
- [82] It is well settled that the Appellant and or his counsel should be put on notice when the court is considering enhancing sentence and such a warning has always been considered a fair procedure (vide **Gordon Aitcheson**, **Ram Chandra Naidu v R** [1974] Fiji LR 63; **Christine Doreen Skipper v R** Court of Appeal, Cr. App. 70/1978; **Kumar v The State** AAU0018J of 2005: 29 July 2005 [2005] FJCA 54 and **Tevita Poese v The State** Court of Appeal Crim. App. No. AAU0010.2005S, 25th November 2005). This is to enable the appellant an opportunity to make representations.
- [83] However, the Court in this instance did not have to specifically give that warning to the Appellant or his counsel. Firstly, the Court did not want to give the impression that it had already decided to enhance and in fact the Court had not made up its mind. Secondly, it was not necessary and would have been superfluous as it was clear that the Appellant's counsel appeared to be very much alive to this possibility, perhaps having perused the Respondent's written submissions, as her oral submissions were confined to dealing with

this aspect in response to the State's request to this Court to act under section 23(3). It is abundantly clear from the supplementary written submissions of the Appellant that he was dealing with what he correctly identified as '*The Respondent's application is to enhance the sentence of the Appellant based on the new tariff imposed in Gordon Aitcheson v The State (supra)*'. Therefore, the Appellant and his counsel had sufficient notice that this Court was *inter alia* was going to consider in general enhancing the sentence as the Court is now seized of the matter of sentence and made elaborated submissions against that course of action. No application for the withdrawal of the sentence appeal has been made since then. Thus, the requirement of fairness has been well fulfilled.

- [84] It has been argued on behalf of the Appellant, mostly based on the decision in **The State v Timoci Silatolu and Josefa Nata and the Attorney General and the Human Rights Commission**, High Court Criminal Action No. HAC 0011 of 2001 that the new and a more severe penalty based on **Gordon Aitcheson** should not be applied as the presumption against retrospective legislation would stand in the way.
- [85] The Appellant also cites Section 11(1) of the Constitution in support of his argument that new and enhanced sentence would be disproportionately severe and should be avoided.
- [86] The State on the other hand argues that the decision in **Timoci Silatolu and Josefa Nata** is not applicable here as it had dealt with the retrospectivity of a statutory provision whereas in the present case there has been no change to the statutory regime. It argues that the presumption against retrospective legislation would not apply to the change of tariff for rape introduced by **Gordon Aitcheson**.
- [87] The State also seems to argue that setting a tariff is more to do with procedural law rather than substantive law and an exception to the common law rule that a statute ought not to

be given a retrospective effect. In **Singh v State** [2004] FJCA 27; AAU0009.2004 (16 July 2004), the Court of Appeal held;

“...It inevitably follows from these conclusions that the new section 220 became applicable to the Appellant when the Amendment Act came into force on 13 October 2003. In his case it had a retrospective effect. Plainly the new section 220 is a procedural provision. It prescribes the manner in which the trial of a past offence may be conducted. It is unquestionably, in our view, a provision which is an exception to the common law rule that a statute ought not be given a retrospective effect.”

[88] In **Roadway v The Queen** (1990) 169 CLR 515 emphasising the rule set by Dixon CJ in **Maxwell v Murphy** (1957) (9 CLR 261, 267) the High Court of Australia held, “*that the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. **It is said that statutes dealing with procedure are an exception to the rule and they should be given a retrospective operation.** It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of the statutes which affect mere matters of procedure”.*

[89] The Respondent also argues that if the Appellant’s argument is correct in the sense that tariff set by court has the force of a statutory provision (as argued by the Appellant) the sentencing judges will never be able to go outside the tariff whatever the circumstances of the case may be and cites **Gordon Aitcheson** as an authority which has held that a sentencing judge may exceed the tariff when assessing all the factors. In **Koroivuki v State** AAU0018 of 2010; 05 March 2013 [2013] FJCA 15 the Court of Appeal accepted that sentence may be outside the tariff range.

[90] A careful analysis of the above arguments on both parties demonstrates that there is little merit in the Appellant's arguments. A sentencing tariff set by common law, which has not been static, does not amount to a penalty prescribed by a statute but a mere procedural provision. Therefore even section 14(2) (n) of the Constitution which states that every person charged with an offence has the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing, has no application to tariff as it contemplates a change in the prescribed punishment. As pointed out already the punishment for rape has not changed. Therefore, there is much merit in the submission of the Respondent.

[91] In Gordon Aitcheson the Petitioner had pleaded guilty and been sentenced on 01 June 2015 to 16 years of imprisonment on the charge of rape with a non-parole period of 15 years. The Court of Appeal had reduced it to 13 years with a non-parole period of 11 years. He sought special leave against the sentence from the Supreme Court. The State had not filed a cross appeal seeking an enhancement of the sentence but has urged the Court to enhance sentence. At the outset he was given the warning that the court was considering enhancing the sentence. The Appellant sought permission to withdraw the petition but it was refused as the court was seized of the appeal. At the end, the Supreme Court increased the tariff previously set in Raj v. The State CAV 0003 of 2014: 20 August 2014 [2014] FJSC 12 to 11 to 20 years and based on the new tariff imposed a sentence of 17 years and 09 months with a non-parole period of 16 years on the Petitioner.

[92] When Gordon Aitcheson was sentenced by the High Court the applicable tariff for child rape was 10 to 16 years. It may have been the same or even less when he committed the offence. Nevertheless, the Supreme Court (obviously knowing that the common law rule is that a statute ought not to be given a retrospective effect but that it had no application to tariff) not only set a new tariff of 11-20 years but also enhanced Aitcheson's sentence

to 17 years and 09 months with a non-parole period of 16 years. Had the presumption against retrospective legislation been applicable to tariff for rape this would not have been possible. Similarly, had tariff been considered to be having the force of a statutory provision this enhancement would not have been possible.

[93] Therefore it could be safely assumed that the new tariff would be applicable to all the accused in the original courts and appellants or petitioners in appellate courts whose sentences come up for consideration or decision after the date of the Judgment in **Gordon Aitcheson** i.e. 02 November 2018. To hold otherwise, means that the effect of the enhanced tariff in **Gordon Aitcheson** would be rendered insignificant. The appellant cannot argue that he may not have committed the acts of rape had he known that the tariff would be increased in the future. His conduct was anyway criminal at the time of its commission. However, I must mention that this does not mean that this court would *ipso facto* increase sentences in every appeal just to be in parity with **Gordon Aitcheson**.

[94] However, I think that the Appellant in this appeal is liable to be dealt with under the new tariff introduced by the Supreme Court in **Gordon Aitcheson**. I am convinced that it does not violate his rights under section 11(1) of the Constitution to freedom from disproportionately severe treatment or punishment.

[95] The only question to be yet answered is whether the Court could act under section 23(3) of the Court of Appeal Act in the absence of an appeal against sentence by the State. It is clear that an appeal against sentence can come up before the Court of Appeal under section 21(1) (c) [by the convicted person) and 21 (2) (c) [by the State]. Therefore, the words '*On an appeal against sentence*' in section 23(3) includes both such appeals and is not confined to appeals by the State. Such a restrictive interpretation is not warranted or justified but only defeats the legislative intention. Thus, when the matter of sentence is in appeal, irrespective of who has brought it up, the Court of Appeal is seized of the matter of sentence and could act under section 23(3). **Waisele v State** AAU0081 of 2013:30

- [96] Now the question is considering the new tariff what the appropriate sentence ought to be in this case. The facts and circumstances of the instant case as described in detail above warrant this court to act under Section 23(3) of the Court of Appeal Act. Accordingly, in the instant case, I am of the view that the punishment meted out to the accused is not commensurate with the gravity of the crime and having regard to the seriousness of the offence, enhancement of the sentence is appropriate. This is so with or without considering the enhanced tariff in Gordon Aitcheson. The decision to enhance the sentence is not solely based on Gordon Aitcheson's but on the circumstances of the case.
- [97] Since the arrival of the complainant at the accused's house, he lusted after her, and continuously made untoward sexual advances to her. The accused tried to take advantage of the complainant's secret habit of smoking and drag it into a situation of blackmailing her. The complainant was forced to smoke marijuana which in her opinion was done to make her "drowsy" and take physical advantage of her.
- [98] In the morning of the day the complainant decided to inform the incident to her Form teacher, the accused having dropped the complainant at school had told her "not to come home if she can't make up her mind" to have sex with him. She was determined not to surrender herself to the sadistic sexual desires of the Appellant and told him that she would not be coming home and decided to complain the matter to her form teacher as the last resort. The Appellant grossly abused the trust he should have borne as the complainant's de-facto step father.
- [99] Having regard to the seriousness of the offences committed the Learned High Court Judge should have at least taken 12 years as the starting point of the sentencing without relying on the lowest end of the then existing tariff (10 years). The incident of the

Appellant in forcing the complainant to smoke marijuana should have been considered as an aggravating factor.

[100] In **Koroivuki v State** AAU0018 of 2010: 05 March 2013 [2013] FJCA 15 the Court of Appeal said as follows

'[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.' (Emphasis added)

[101] Thus, the Learned High Court Judge has acted upon a wrong principle of sentencing. In my view, the error that had been committed by the Learned High Court Judge is well within the guidelines for challenging a sentence stated in **House v The King** [1936] HCA 40; (1936) 55 CLR 499), **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14.

[102] As discussed above, there is also no bar either in the statutory law or in the common law for this court to retrospectively apply the new tariff set as between 11 – 20 years by **Gordon Aitcheson** to the instant case.

[103] Having regard to the above, I am of the view that the facts and circumstances of this case warrant this court to invoke Section 23(3) of the Court of Appeal Act and enhance the sentence imposed on the accused by the High Court. In doing so I have had due regard to the new tariff set out in **Gordon Aitcheson** and the disturbing circumstances of the case and I may also add that the existing sentence is liable to be enhanced even within the previous tariff given the facts and circumstances of this case. Therefore in my view the

sentence imposed on the Appellant is not harsh and excessive but inadequate. I therefore reject the first ground of appeal.

[104] In Gordon Aitcheson the Supreme Court said

'[66] At this juncture, it would be pertinent to cite the principle of law enunciated by Justice Gates (as he then was) in State v Marawa [2004] FJHC 338, having cited with approval Mohammed Kasim v State; Roberts and Roberts (1992) 4 Crim.App. (s) 8, State v Turagabeci (1996) FJHC 173 and Koroi v State [2002] FJHC 152 at 10-11:-

"Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and by meting out harsh sentences".'

[105] Accordingly, having regard to the new tariff and all other circumstances and the gravity of the case I take the starting point as 12 years and add a further 6 years for the aggravating factors found by the sentencing Judge and one other aggravating factor not considered by him. From the total of 18 years I allow 4 years discount for mitigating circumstances found by the Sentencing Judge.

[106] The sentence of the High Court is set aside. In its place there will be for the convictions:

- (a) A head sentence of 14 years;
- (b) With a non-parole period of 11 years.

[107] The Appellant also argues that the non-parole period fixed by the High Court Judge is too close to the head sentence depriving him of his 1/3 remission provided under section 27 of the Prisons and Correction Act 2006. Similar ground of appeal has been dealt with in detail in Prasad v State AAU0010 of 2014: 4 October 2018 [2018] FJCA 152 and Rarasea v State AAU0118 of 2014: 4 October 2018 [2018] FJCA 156 by the Court of Appeal. In my view though the ground of appeal raised by the Appellant regarding the

wrong exercise of discretion in fixing the non-parole period too close to the head sentence without reasons may come under the criteria adopted by the Court of Appeal in **Bae v State** AAU0015u of 98s: 26 February 1999 [1999] FJCA 21 and approved by the Supreme Court in **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14 following **House v The King** [1936] HCA 40; (1936) 55 CLR 499), as a result of the Trial Judge not taking into account relevant considerations under section 4 of the Sentencing and Penalties Decree 2009, I do not think that in this case it has resulted in any substantial miscarriage of justice and I would apply the proviso to section 23 (1) of the Court of Appeal Act and dismiss this ground of appeal. I fact I have given due consideration to section 4 of the Sentencing and Penalties Decree 2009 in fixing the non-parole period at 11 years to go with head sentence of 14 years. As observed in **Gordon Aitcheson** one of the main purposes for which sentencing may be imposed by a court is to protect the community from offenders (vide section 4(1) (b) of the Sentencing and Penalties Decree 2009.

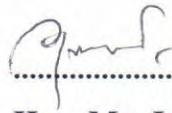
The Orders of the Court are:

1. *Appeal against sentence is dismissed.*

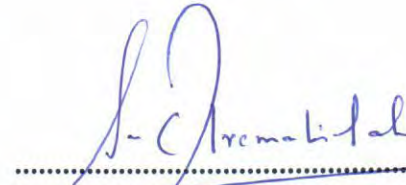
(By Majority)

2. *Sentence imposed on the Appellant by the High Court is set aside.*

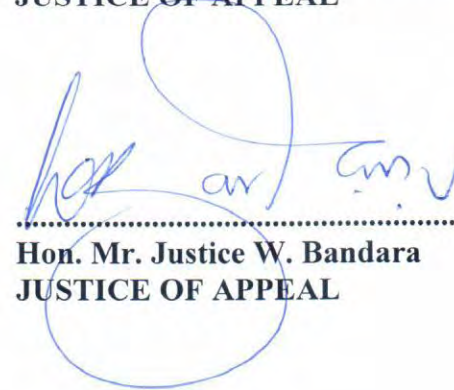
3. *An aggregate sentence of 14 years is imposed on the accused with a non parole period of 11 years.*



Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL



Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL



Hon. Mr. Justice W. Bandara
JUSTICE OF APPEAL