

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

CRIMINAL APPEAL NO: AAU 0041/ 2012
(High Court Case No. HAC 28/ 2011)

BETWEEN : **THE STATE** *Appellant*

AND : **JAMALU DIN** *Respondent*

Coram : **Hon. Mr. Justice Daniel Goundar**

Counsel : **Ms P. Madanavosa for the Appellant**
Mr. A. Sen for the Respondent

Date of Hearing : **26 January 2016**

Date of Ruling : **29 January 2016**

RULING

- [1] On 21 May 2012, the respondent was sentenced to 3 years' imprisonment suspended for 7 years and a fine of \$2000.00 (in default of 6 months and 20 days imprisonment) after he pleaded guilty to a charge of attempted rape in the High Court at Lautoka.
- [2] On 13 June 2012, the State filed a Notice of Appeal, seeking leave to appeal against the respondent's sentence pursuant to section 21(2) (c) of the Court of Appeal Act, Cap. 12. The appeal is timely. The test for leave is whether there is an arguable error in the sentencing discretion.
- [3] The grounds of appeal are:
1. That the learned Sentencing Judge erred in law in failing to consider lack of remorse as an aggravating factor as is required pursuant to the provision at Section 492 of the Sentencing and Penalties Decree, 2009.
 2. That the learned Sentencing Judge erred in principle in giving undue weight to the factors pleaded in mitigation.

3. That the learned Sentencing Judge erred in principle in failing to adequately consider the seriousness of the offence committed; the grave breach of trust; lack of remorse; and the need to protect public confidence in the sentencing process when arriving at his decision to suspend the sentence.

[4] At the hearing, counsel for the State submitted that the gist of the State's complaint is that the suspension of the sentence was wrong in all circumstances of this case.

[5] The victim was a 12 year old boy. The alleged incident occurred in a religious institution. The victim was a boarder at the institution. The respondent was one of the instructors. According to the facts admitted by the respondent he forced the victim to go down on his knees, unzipped his trousers and tried to penetrate the victim's mouth with his penis. The victim resisted and escaped. He immediately complained to another person at the institution and then to his mother over the phone. The next morning the victim's parents confronted the respondent with the allegation. The respondent was apologetic and pleaded with the parents not to report the matter to the police. The parents withdrew their son from the institution and filed a police complaint.

[6] The respondent was arrested and interviewed under caution. He denied the allegation.

[7] In sentencing the respondent, the learned Judge cited the case of **Aunima v State** (2001) FJHC 105, where it was said that the tariff for attempted rape was 1 – 5 years' imprisonment. The learned Judge picked 3 years as his starting point and added 4 years to reflect the following aggravating factors:

1. The victim was a helpless boy aged 12 years;
2. Severe breach of trust, of Teacher and student relationship;
3. Because of your conduct the child has to move to another school;
4. You betrayed the position of a Teacher who teaches Islam.

[8] The sentence was then reduced by 4 years for the following mitigating factors:

1. You are a first offender;
2. You have pleaded guilty;
3. You are married with 3 children;

4. You are the sole bread winner of your family;
5. You have just obtained PSV licence and started working as taxi driver.

[9] The learned Judge referred to the relevant provision of the Sentencing and Penalties Decree 2009 that gave the power to suspend sentence, and based on that provision he exercised his discretion and suspended the sentence for the following reasons:

“Considering all your mitigating circumstances especially your young children I suspend your sentence for a period of 7 years. If you commit any offence within the operational period you will be serving this sentence together with the punishment in the subsequent offence”.

[10] It is arguable that the learned Judge exercised his discretion to suspend the sentence by taking into account irrelevant factors and/or he failed to take into account relevant considerations. The offence of attempted rape of a child is a serious offence. The sentence imposed on the respondent is clearly outside the established tariff and the learned Judge’s reasons for sentencing outside the range are arguably not cogent.


[11] Counsel for the respondent has made detailed submissions opposing leave. I have considered them. They are matters that the Full Court may consider when deciding whether a different sentence should be imposed on the respondent.

[12] If the appeal is arguable then leave should be granted. In the present case, I am satisfied that the State’s appeal is arguable.

[13] **Result**

Leave granted.




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Hon. Mr. Justice Daniel Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Director of Public Prosecutions for State
Messrs. Maqbool & Company for the Respondent