

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

CRIMINAL APPEAL NO. AAU 143 of 2020
[In the High Court at Lautoka Case No. HAC 110 of 2017]

BETWEEN : **STATE**

AND : **MESULAME LESAVUA** **Appellant**
Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. S. Shameem for the Appellant**
: **Ms. Alanieta Bilivalu for the Respondent**

Date of Hearing : **13 June 2023**

Date of Ruling : **16 June 2023**

RULING

[1] The respondent had been charged in the High Court at Lautoka on two counts of indecent assault, two counts of rape, one count of sexual assault and one count of attempted rape. The charges were as follows.

'COUNT 1
Statement of Offence

INDECENT ASSAULT: *Contrary to section 212 (1) of the Crimes Act of 2009.*

Particulars of Offence

MESULAME LESAVUA, on the 25th of December 2016 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 2

Statement of Offence

INDECENT ASSAULT: *Contrary to section 212(1) of the Crimes Act of 2009.*

Particulars of Offence

MESULAME LESAVUA, *between the 01st of January 2017 and 31st of January 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.*

COUNT 3

Statement of Offence

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

Particulars of Offence

MESULAME LESAVUA, *between the 01st of April 2017 and 30th of April 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.*

COUNT 4

Statement of Offence

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

Particulars of Offence

MESULAME LESAVUA, *on the 13th of May 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.*

COUNT 5

Statement of Offence

SEXUAL ASSAULT: *Contrary to section 210 (1) (a) of the Crimes Act of 2009.*

Particulars of Offence

MESULAME LESAVUA, *on the 13th of May 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.*

COUNT 6
Statement of Offence

ATTEMPTED RAPE: *Contrary to section 44 and 207(1) and (2) (a) of the Crimes Act of 2009.*

Particulars of Offence

MESULAME LESAVUA, *on the 13th of May 2017 at Nadi, in the Western Division, attempted to penetrate the anus of VV with his penis, without his consent.'*

- [2] The assessors expressed a unanimous opinion that the respondent was guilty of all counts except the two counts of indecent assault instead of which they found him guilty of indecently insulting or annoying any person contrary to section 213 of the Crimes Act, 2009.
- [3] Having agreed with the assessors, the learned High Court judge had convicted and sentenced the respondent on 13 October 2020 to aggregate sentence of 12 years of imprisonment with a non-parole period of 09 years which became 11 years and 08 months with a non-parole period of 08 years and 08 months after the pre-trial remand period was discounted.
- [4] The appellant's timely appeal against sentence had raised a single ground of appeal as follows:

'That the learned Trial Judge erred in principle when he interpreted the tariff in Gorden Aitcheson CAV 0012 of 2018 only applied to child victims and not to victims who were above the age of 13 years.'

- [5] In terms of section 21(1) (c) of the Court of Appeal Act, the appellant could appeal against sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is 'reasonable prospect of success' [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019]

FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

- [6] Further guidelines to be followed 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].

Ground of appeal

- [7] 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'

- [8] 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."

[9] 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.

[10] 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.’*

[11] Therefore, it is reasonable to assume that what the Supreme Court did was only to enhance the sentence range from 10-16 years to 11-20 years. Therefore, for juvenile rape the minimum sentence should now logically 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 above the minimum sentence and within the sentencing range of ***Aitcheson***.

[12] However, the statement of the trial judge in the sentencing order that ‘*The victim was just above the age of 13 years and the appropriate tariff as approved by the case of **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) is 10 to 16 years of imprisonment*’ is wrong in law. Despite both counsel agreeing that the tariff set for rape of a juvenile is 11 to 20 years of imprisonment as per ***Aitcheson***, the trial judge had thought that the appellant did not fall within ***Aitcheson*** category. Therefore, it appears that the trial judge had thought that for a victim of rape under the age of 13 the tariff should be 11-20 years as per ***Aitcheson*** but for a victim of rape above 13 the tariff should be 10-16 years as per ***Raj***.

[13] Clearly, there is no legal or logical basis for such a distinction unless the Supreme Court makes any clarification to the existing ***Aitcheson*** tariff in the future. According to the Crimes Act, 2009, 13 years of age is the age of consent. A child is a person under the age under 14 years and a juvenile is a person under the age of 18 years and

a juvenile includes a child and a young person. Young person is a person between 14-18 years of age (vide section 2 of Juveniles Act, 1973). However, the Constitution under section 163 defines a child as an individual who has not reached the age of 18 years. Therefore, when the Supreme Court used the words ‘child’ or ‘children’ in **Raj** or **Aitcheson** it had meant an individual who has not reached the age of 18 years *i.e.* a juvenile.

[14] **Raj** sentencing tariff was applicable to a juvenile *i.e.* any person up to 18 years. **Aitcheson** tariff which simply enhanced the range of sentences from **Raj** tariff too should be applicable to juveniles *i.e.* any person up to 18 years. In order to correct this wrong reasoning by the trial judge, I am inclined to grant leave to appeal to the Full Court. In any event, the appellant has not sought any enhancement of the existing sentence.

[15] If the Full Court were to review the propriety of the current sentence it would be the ultimate sentence rather than each step in the reasoning process that would matter [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)]. Current sentence is within the sentencing range of **Aitcheson**.

[16] In addition, the State submitted that **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).'*

[17] The State may seek clarifications or modifications to *Aitcheson* to address the above concerns in due course either from the Court of Appeal or preferably from the Supreme Court itself in an appropriate case.

Order

1. Leave to appeal against sentence is allowed.



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