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

CRIMINAL APPEAL NO.AAU 147 of 2020
[In the High Court at Lautoka Case No. HAC 100 of 2017]

BETWEEN	:	**JOSEVATA TUIVIWA**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Appellant in person**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**23 August 2023**
Date of Ruling	:	**24 August 2023**

RULING

[1] The appellant, aged 34, had been charged with one count of rape under the Crimes Act, 2009 at Lautoka High Court. The female victim was 10 years old. The charges were as follows:

> *'COUNT ONE*
> ***Statement of Offence***
>
> ***RAPE**: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*
>
> ***Particulars of Offence***
>
> ***JOSEVATA TUIVIWA** on the 4th day of May, 2017 at Nadi in the Western Division, penetrated the vagina of "SQ" a child under the age of 13 years, with his penis.*

[2] The assessors had unanimously opined that the appellant was guilty. The learned High Court judge also found the appellant guilty of rape and he was convicted accordingly. On 30 October 2020 the appellant was given 17 years' imprisonment

(effectively 16 years and 06 months after pre-trial remand period was discounted) with a non-parole period of 14 years.

[3] The High Court judge had summarised the facts in the sentencing order as follows.

> 2. *'The brief facts were as follows:*
>
> *On 4th May, 2017 the victim who was 10 years of age and a class 5 student came to the Nadi market in the morning she was accompanied by her mother and her baby sister Mereia to sell their produce.*
>
> *The first time the victim met the accused on this day was at the ladies washroom, the accused had followed her into the washroom. At this time, the victim heard the security officer Baka telling the accused to get out of the washroom.*
>
> *After a while the accused came at the victim's mother's market stall, he asked her if she had her breakfast, the victim replied she had. Upon hearing this, the accused invited the victim to have tea again, the victim refused.*
>
> *In the afternoon the victim went to the washroom when she came out the accused was standing at the door he gave her 20 cents then put his arm on her shoulder and both left the washroom.*
>
> *The accused told the victim to go with him to pick his daughter at his house. The victim refused but he kept on holding her hand and he insisted that she go with him.*
>
> *The accused took the victim to a cane field where he removed his clothes when the victim refused to remove her clothes the accused forcefully removed her skirt and panty, laid on top of her and then had sexual intercourse with her.*
>
> *The accused threatened the victim not to scream otherwise he will take a knife and cut her hands. It was painful so she pushed him away.*
>
> *When the victim returned to the Nadi market she told her mother about what had happened to her the matter was reported to the police upon investigations the accused was arrested and charged.*

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

[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 grounds of appeal urged by the appellant are as follows.

> ***'Conviction:***
>
> ***Ground 1***
>
> *THAT the learned trial Judge erred in law and fact when it convicted me on the charge of rape when the complainant's medical report cannot support it causing a substantial miscarriage of justice.*
>
> ***Ground 2***
>
> *THAT the learned trial Judge erred in law and fact when it failed to warn himself and the assessors the danger of accepting dock identification evidence of the complainant without any prior foundation of proper identification parade that should have been held during the investigation thus the failure has prejudice my fair trial causing substantial miscarriage of justice.*
>
> ***Ground 3***
>
> *THAT the learned trial Judge erred in law and fact when it failed to adequately direct the assessors on the alibi causing serious prejudice affecting my right to fair trial.*

Sentence:

Ground 4

<u>THAT </u>the learned sentencing Judge erred in his sentencing when he mistook the facts and applied the wrong principles of sentencing in ***<u>Gordon Aitchesion v State</u>*** *CAV 0012 of 2018 to sentence me.*

Ground 1

[7] The appellant submits that there was no penetration as according to medical evidence the superficial laceration seen on both sides of vestibule was likely to be sustained while the perpetrator was rubbing his penis over the victim's vulva. The hymen of the victim was intact with no active bleeding as the tears were superficial and therefor the appellant argues that there was no penetration of the vagina. Thus, according to him, medical evidence discredits the victim's evidence of penetration. The appellant submits that if at all he should have been convicted for sexual assault.

[8] There is nothing to suggest in the summing-up or the judgment that Dr. Mala Darshani had affirmatively ruled out penetration though she had agreed that there may not have been sexual intercourse. However, to constitute rape what is needed is not sexual intercourse but even slight penetration of vagina or vulva. She had seen that the urethral opening was mildly edematous (swollen) which could be due to urine infection or penis being rubbed on the urethral opening. Further, the laceration seen was beyond labia majora and labia minora to cause injury to vestibule [which is a part of the vulva between urinary meatus (urethral opening) and the vaginal opening]. The urethral meatus is located within the vestibule. The vestibule also known as the vulva vestibule is an interior part of the vulva. Therefore, the trial judge was right to conclude in the judgment that there was definitive vulva penetration, if not vaginal penetration.

[9] Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted (vide section 129 of the Criminal Procedure Act). The same applies to medical evidence as well. To constitute rape even slightest penetration of vagina or vulva is sufficient (**<u>Volau v State</u>** [2017] FJCA 51; AAU0011.2013 (26 May 2017). The victim's

evidence is clear that the appellant had penetrated her vagina with his penis causing pain but even if there is any doubt of full vaginal penetration there cannot be any reasonable doubt of vulvar penetration constituting rape. Medical evidence shows that superficial lacerations were seen on both sides of vestibule *i.e.* interior part of the vulva. Thus, medical evidence does not contradict the victim's evidence but supports it in some measure.

Ground 2

[10] The appellant submits that the trial judge was wrong to have allowed dock identification of him by the victim after 03 years. He had not refused any police ID parade though none was held. He cites **Sugu v State** [2016] FJCA 69; AAU44.2012 (27 May 2016) where the Court of Appeal said that establishing identity through dock identification of perpetrators must be viewed as detrimental to the due process and added that sheer lackadaisical attitude towards the conduct of proper investigations including failure to hold a Police ID or Photographic ID parade paves the way for criminals to take advantage of such gaping lapses.

[11] In **Lotawa v State** [2014] FJCA 186; AAU0091.2011 (5 December 2014) relied on by the appellant, having said that dock identification is completely unreliable in the absence of a prior foundation of identity parade or photograph identification because it then becomes the ultimate leading question, the Court of Appeal added that such an identification was not *per se* incompatible with a fair trial but other factors must too be considered such as whether the accused was legally represented, what directions the judge gave to the finders of fact on this identification and how strong the prosecution case was in all other respects. Moreover, it was held that it been decided in a line of English cases that first time dock identification should be refused by a trial judge except in situations where the accused has refused to participate in a formal identification parade or where he has otherwise avoided attempts at identification. Even then very strong directions must be given as to how little weight is to be placed on such identification.

[12] There is inherent danger in dock identification and that it is an unreliable practice. First time dock identification has been referred to as a 'serious irregularity' which should be permitted in exceptional circumstances and that it is in general an undesirable practice and other means should be adopted of establishing that the accused in the dock is the man who was arrested for the offence charged and that when the evidence had been admitted it was incumbent upon the judge to direct the jury to give it little or no weight (see **Edwards v. Queen** [2006] UKPC 23 (25 April 2006) and **Lawrence v The Queen** [2014] UKPC 2 (11 February 2014).

[13] Unless there is no dispute over identity, and the defence does not object to a dock identification**,** it should rarely, if ever, take place. If it takes place inadvertently, a strong direction is needed to the assessors to ensure that they do not take it into account (see **Naicker v State** CAV0019 of 2018: 1 November 2018 [2018] FJSC 24)

[14] It is not clear whether the defence had objected to the dock identification of the appellant. The trial judge had allowed the victim to identify the appellant in the dock but failed to caution the assessors to accord it little or no weight. However, the trial judge had given ample directions based on Turnbull guidelines on Rusila Bakabaka's identification of the appellant.

[15] The Supreme Court in ***Naicker*** went on to state in paragraph 38 that the critical question is whether ignoring the dock identifications of the appellant, there was sufficient evidence, though of a circumstantial nature, on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Going further, the Supreme Court formulated a test to be applied when dock identification evidence had been led and no warning had been given by the trial judge namely whether the judge would have convicted the accused if there had been no dock identification of him at all, as opposed to whether the judge could have convicted the accused without the dock identification.

[16] In **<u>Korodrau v State</u>** [2019] FJCA 193; AAU090.2014 (3 October 2019) the Court of Appeal said that:

> *'Thus, the Supreme Court appears to formulate a two tier test. Firstly, ignoring the dock identification of the appellant whether there was sufficient evidence on which the assessors could express the opinion that he was guilty, and on which the judge could find him guilty. Secondly, whether the judge would have convicted the appellant, had there been no dock identification of him. In my view, the first threshold relates to the quantity/sufficiency of the evidence available sans the dock identification and the second threshold is whether the quality/credibility of the available evidence without the dock identification is capable of proving the accused's identity beyond reasonable doubt. Of course, if the prosecution case fails to overcome the first hurdle the appellate court need not look at the second hurdle. However, if the answers to both questions are in the affirmative, it could be concluded that no substantial miscarriage of justice has occurred as a result of the dock identification evidence and want of warning and the proviso to section 23(1) of the Court of Appeal Act would apply and appeal would be dismissed.'*

[17] The evidence of witness Rusila Bakabaka is that she saw the appellant gaining entry to the ladies' washroom after the victim went in but was asked by her to go the men's washroom and later after the victim came out, the appellant had also come out and instead of giving 20 cents to her, gave 20 cents to the victim and took her away. The witness had known the appellant from her school days as Jay Jay. About 15 minutes later the victim's mother Seinimili Bawale had come looking for the victim and the witness had told her that she left with Jay Jay which is confirmed by the victim's mother. This is very strong circumstantial evidence on the appellant's identity as a perpetrator of the sexual abuse committed on the victim.

[18] According to mother Seinimili Bawale, when she was about to go to the police station the victim appeared panicked and looking scared and run away. When the mother approached her she had told where she was and what a man had done to her including sexual abuse causing pain in her vagina.

[19] In my view, Rusila Bakabaka's circumstantial evidence coupled with the victim's and her mother's recent complaint evidence is not only sufficient but also credible enough for the assessors and the judge to convict the appellant. In other words, ignoring the dock identification the assessors could have convicted the appellant on the rest of the

evidence. I also believe that excluding dock identification evidence, the assessors and the trial judge would have convicted the appellant as they did.

Ground 3

[20] **Ram v State** [2015] FJCA 131; AAU0087.2010 (2 October 2015) the Court of Appeal said;

> *"[29] When an accused relies on alibi as his defence, in addition to the general direction of the burden of proof, the jury (in Fiji the assessors) should be directed that the prosecution must disprove the alibi and that even if they conclude that the alibi was false, that does not by itself entitle them to convict the accused (**R v Anderson** [1991] Crim. LR 361, CA; **R v Baillie** [1995] 2 Cr App R 31; **R v Lesley** [2006] EWCA Crim 2000; [1996] 1 Cr App R 39; **R v Harron** [1996] 2 Cr App R 457). ."*

[21] The trial judge had adequately directed on the appellant's alibi evidence at paragraphs 81-89 & 101-104 and dealt with it at paragraphs 26-37 and 48-55 of the judgment. Those directions are in line with ***Ram.*** No redirections had been sought on any perceived inadequacies.

[22] As a general principle it is counsel's duty at trial to draw the attention of the trial judge to deficiencies in the summing up and that a failure to do so may debar the accused from taking the point on appeal: **Singleton v. French** (1986) 5 NSWLR 425,440, per McHugh J; **Evans v. R** [2007] HCA 59; (2007) 241 ALR 400,459-460 [236], per Heydon J. However, where an appellate court is satisfied that, despite counsel's failure to object to the summing up, an injustice may have occurred at the trial, it may quash the convictions: **R v. Glover** (1928) 28 SR (NSW) 482,487, per Street CJ (with whom Ferguson and Campbell JJ concurred).
[See **Tikoniyaroi v State** [2011] FJCA 47; AAU0043.2005 (29 September 2011) and **Nakato v State** [2018] FJCA 129; AAU74.2014 (24 August 2018)].

Ground 4 (sentence)

[23] The appellant submits that the trial judge had misapplied sentencing tariff for juvenile rape of 11-20 years (vide **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) to the facts of his case.

[24] Aitcheson faced 06 charges of rape and one charge of indecent assault of his two biological daughters in what was described as a campaign of rape for many years and upon his guilty plea he was sentenced by the High Court to 16 years' imprisonment with a non-parole period of 15 years. The Court of Appeal reduced the total sentence to 13 years' imprisonment with a non-parole term of 11 years. The Supreme Court enhanced the sentence to 18 years with a non-parole period of 16 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. It was further held that it will be for judges to exercise their discretion taking into account the age group of these child victims and judicial discretion should not be shackled but it is obvious that crimes like these on the youngest children are the most abhorrent. The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) was reset as between 11-20 years of imprisonment.

[25] The appellant is asking whether his offending falls into ***Aitcheson*** category in comparison and if not whether 17 years imprisonment is justified. Obviously, the appellant's offending, very serious as it was, is not in the same abhorrent league in terms of culpability and harm as ***Aitcheson***. However, as opposed to ***Aitcheson*** the appellant did not tender an early guilty plea but contested the charge all the way. ***Aitcheson*** got two years of reduction for his guilty plea. In ***Aitcheson*** the starting point was 14 years and further 06 years for 09 aggravating factors. For the appellant, the trial judge had taken 12 years as the starting point and added 06 years for 05 aggravating factors. The appellant got 01 years for his previous good character (first time offender). Needless to say that no two cases cannot be safely compared for establishing a sentencing error as the facts and attendant circumstances are dissimilar in two cases.

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

1. *It is unclear whether the permissible range of 11-20 years is for offenders convicted after trial.*

2. *There is lack of clarity as to whether 11 years' imprisonment is the minimum permissible sentence for a child rapist after trial (or after plea).*

3. *It is not clear whether tariff is applicable to first offenders arguing that many sentencing judges approach* ***Aitcheson*** *as if it only applies to offenders with prior convictions when it is far from clear why a rapist should be entitled to a discount merely because he has no prior convictions.*

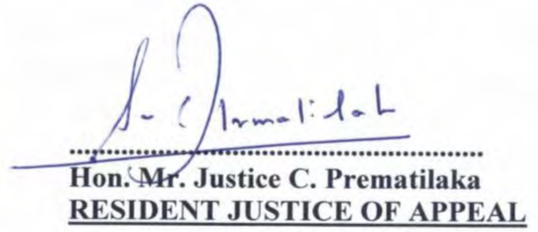
4. ***Aitcheson*** *does not address the issue of the appropriate starting point within the broad permissible range and refers to Justice Keith's remarks in* ***Kumar v State*** *[2018] FJSC 30; CAV0017 of 2018 (02 November 2018).*

[27] When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered [vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006)]. The approach taken by the appellate court in an appeal against sentence is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range [**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015)]; if outside the range, whether sufficient reasons have been adduced by the trial judge. However, merely because a sentence is within the accepted range it does not necessarily mean that it fits the gravity of the crime in the same way a sentence outside the sentencing range is not necessarily inadequate or harsh & excessive.

[28] Therefore, I think that in all the above circumstances it is best that the matter of sentence is left to the full court to revisit to see its propriety and assess whether it fits the gravity of the crime. Every convict should be punished adequately but not more than adequately. Otherwise, it might become either grossly inadequate or excessive and harsh.

Orders

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



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