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

CRIMINAL APPEAL NO.AAU 165 of 2020
[In the High Court at Suva Case No. HAC 77 of 2020]

BETWEEN	:	**THE STATE**
		Appellant
AND	:	**ELIKI RAOMA**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. S. Shameem for the Appellant**
	:	**Respondent in person**
Date of Hearing	:	**11 January 2023**
Date of Ruling	:	**12 January 2023**

RULING

[1] The respondent had been indicted in the High Court at Suva with two counts of rape contrary to section 207(1) and (2) (b) and (3) of the Crimes Act, 2009 committed 10 February 2020 at Draubuta Village, Nausori in the Eastern Division by penetrating the anus with fingers and mouth with the penis respectively of SN (real name withheld) and two counts of indecent assault committed in 2019 & 2020 upon SN, a child below the age of 13 years. The appellant was 18 years and SN was a little over 05 years of age at the time of the incident. The charges read as follows.

*'**SECOND COUNT***

(Representative Count)

Statement of Offence

Indecent Assault: *contrary to Section 212 of the Crimes Act 2009.*

Particulars of Offence

ELIKI RAOMA *between the 1st September 2019 to the 9th February 2020 at Draubuta Village, Nausori, in the Eastern Division, unlawfully and indecently assaulted* ***SN,*** *a child under the age of 13 years, by touching her buttocks.*

THIRD COUNT

Statement of Offence

Rape: *contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

Particulars of Offence

ELIKI RAOMA *on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, penetrated the anus of* ***SN,*** *a child under the age of 13 years, with his finger.*

FOURTH COUNT

Statement of Offence

Rape: *contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.*

Particulars of Offence

ELIKI RAOMA *on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, penetrated the mouth of* ***SN,*** *a child under the age of 13 years, with his penis.*

SIXTH COUNT

Statement of Offence

Indecent Assault: *contrary to Section 212 of the Crimes Act 2009.*

Particulars of Offence

ELIKI RAOMA *on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, unlawfully and indecently assaulted* ***SN,*** *a child under the age of 13 years, by kissing her lips.*

[2] The respondent was acquitted of the 01st and 05th counts at the close of the prosecution case. After trial on other counts, the assessors unanimously opined that the he was guilty of all of them. The trial judge had convicted the respondent and sentenced him on 27 November 2020 to a term of 07 years of imprisonment with a non-parole period of 04 years. In view of the time spent in custody, time remaining to

be served was 06 years, 06 months and 08 days of imprisonment with a non-parole period of 03 years, 06 months and 08 days.

[3] The State's appeal against sentence is timely. In terms of section 21(2) (c) of the Court of Appeal Act, the State could appeal against a sentence only with the leave of the court unless it is fixed by law. For a timely appeal, the test for leave to appeal against 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)].

[4] 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 and **Chirk King Yam v The State** Criminal Appeal No.AAU0095 of 2011)].

[5] The victim (PW1), her mother (PW2) and her aunt (PW3) had given evidence for the prosecution. The respondent had given evidence in his defense.

[6] According to the sentencing order the facts are as follows.

> *2. The victim in this case was born on 02/10/2014 and you on 21/09/2001. Victim's father and you are cousin brothers. You are therefore called 'Ta Eliki' by the victim. In November 2019 (when the victim was about 05 years and one month and you were 18 years and 02 months old) during the victim's*

grandfather's birthday celebrations, you gave the victim ice cream and took her outside the house. Then you touched her buttocks after you kissed her on the mouth. Though the victim came out with certain other acts, you were charged only for the act of indecent assault by touching the victim's buttocks.

3. Then on 10/02/20 (when the victim was about 05 years and 04 months and you were 18 years and 05 months old), you went to the victim's house after school because her father wanted your assistance in relation to some work to be done. You then went with the victim underneath the house as the house was built on long posts. There you kissed the victim on the mouth, you penetrated her anus with your finger and then you penetrated her mouth with your penis. That day the victim's mother noticed that you were looking at the victim in an inappropriate manner and later on when the victim was questioned, the victim came out with regard to what you had done to her.

[7] The appellant's appeal against sentence is based on the following grounds of appeal. However, at the hearing the state pursued only the 01st and 03rd grounds of appeal.

Ground 1

THAT the Learned Trial Judge erred in principle when he interpreted that the tariff in ***Gordon Aitcheson CAV 0012 of 2018*** *did not confirm whether the said tariff was appropriate in respect of all forms of rape as captured by section 207 (2) of the Crimes Act.*

Ground 2

THAT the Learned Trial Judge erred in principle in exercising his discretion when he failed to provide a meaningful upwards adjustment of the sentence for the aggravating factors that were present in the circumstances of the case.

Ground 3

THAT the Learned Trial Judge erred in principle when he took a starting point of 6 years on account of the appellant's young age.

[8] The trial judge in the sentencing order had followed his own reasoning in **State v Vosatokaera - Sentence** [2020] FJHC 334; HAC233.2019 (22 May 2020) where he had stated *inter alia* as follows.

'9. It should be noted that the sentencing tariff of 11 years to 20 years imprisonment has been established having regard to only the first form of rape listed above

10.All in all, I was unable to convince myself that, given the circumstances of the offending in this case, the sentence should be within the range of 11 years to 20 years imprisonment.
11.The discretion provided by the legislature to the sentencing court is to punish an offender who had committed the offence of rape contrary to section 207 of the Crime Act, 2009 with an imprisonment term up to life imprisonment. The legislature does not provide a minimum term of imprisonment. In my view, a sentencing tariff should not be understood as an instrument to sap the discretion provided by the legislature to a sentencing court.
12.Given the circumstances of the offending in this case, it is my considered view that the starting point of your sentence should be an imprisonment term of 7 years.'

[9] The form of rape referred to by trial judge at paragraph 09 in ***Vosatokaera*** is penile penetration of the vagina among other forms of rape identified by him as follows.

a. Section 207(2)(a);
i.Penile penetration of the vagina
ii.Penile penetration of the anus of a female
iii.Penile penetration of the anus of a male
b. Section 207(2)(b);
iv.Penetration by an object or a body part other than a penis, of the vulva
v.Penetration by an object or a body part other than a penis, of the vagina
vi.Penetration by an object or a body part other than a penis, of the anus of a female
vii.Penetration by an object or a body part other than a penis, of the anus of a male
c. Section 207(2)(c);
viii.Penetration of a female victim's mouth by the accused with his penis;
ix.Penetration of a male victim's mouth by the accused with his penis.

[10] The trial judge had also followed his own decision in **State v Tui - Sentence** [2020] FJHC 642; HAC03.2020 (14 August 2020). This court has already delivered a single judge ruling in **State v Vosatokaera** AAU 33 of 2020 (09 January 2023) allowing leave to appeal against sentence.

[11] One issue here is whether the trial judge had erred in concluding that the sentencing tariff in ***Aitcheson*** *(supra)* applies only to penile penetration of the vagina as stated by the trial judge in ***Vosatokaera*** (which, however, he seems to have disowned in this case**).** Though the trial judge had called in aid **State v Volaitui** [2019] FJCA 154; AAU 80 of 2015 (04 October 2018), it expressly accepted that sentencing tariff in ***Raj***

(prior to ***Aitcheson)*** was applicable in digital anal rape. ***Aitcheson*** only enhanced the tariff set in ***Raj*** for juvenile rape. Another issue is whether the judge erred in deciding that *'All in all, I am not persuaded that the* ***Aitcheson*** *tariff is appropriate to be applied as the sentencing tariff in this case'.*

[12] Further, the trial judge had thought that the legislature listed 09 modes of penetration in section 207(2) of the Crimes Act, 2009 in terms of descending level of gravity taking into account the level of harm and culpability caused to the victim due to the relevant mode of penetration. The learned judge had also opinioned that the body part which was used for the penetration and the orifice which was subjected to penetration during the relevant physical invasion do matter when it comes to the offence of rape. According to him, the physical harm caused due to the offence of rape is clearly and heavily dependent on the body part (penis or the finger) or the nature of the object that was used for the penetration and also the orifice of the victim's body that was penetrated. The trial judge had also expressed the view that the psychological and emotional harm caused by the relevant invasive conduct would be different based on the gender of the victim and noted that the psychological and the emotional harm inflicted due to vaginal penetration with the penis would not be the same as in the case of a vaginal penetration with a finger and the nature and the level of physical harm of penile penetration of the vagina of a female is different from that of penetrating the anus of a male with the penis. The judge had finally concluded in relation to the application of the doctrine of *stare decisis* that a palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made implying that sentencing tariff in ***Aitcheson*** are not to be followed but should be departed from in instances highlighted above. However, section 4(2)(b) of the Sentencing and Penalties Act, 2009 cast a mandatory statutory duty on the sentencing court to have regard to any applicable sentencing tariff such as ***Aitcheson*** sentencing guidelines and not simply due to the operation of the doctrine of *stare decisis.*

[13] The jurisprudence in Fiji is awash with remarks made in the High Court as well as in the Supreme Court that there should not be a difference in sentencing approach based on the forms of violation.

[14] In **State v Singh** [2016] FJHC 267; HAC53.2014 (14 April 2016) it was said:

> *'[9] This Court does not accept Mr. Paka's attempt to distinguish those cases on the basis that they were penile rapes while the instant case is a case of digital rape. There is no distinction in the legislation, and therefore no distinction in sentence, nor should there be. Any uninvited invasive sexual assault on a person be he/she a child or adult is a trauma of the most serious kind, and no distinction can be made in sentence be it a penis, a finger or an object'*

[15] **State v Jabbar** [2011] FJHC 778; HAC17.2011 (29 November 2011) it was remarked:

> *'[7] All forms of offending proscribed in section 207 of the Crimes Decree carry sentence of discretionary life imprisonment. Under the new law, rape involves a range of sexual penetration of a person. Further, unlike the old law, rape is now defined in a gender neutral manner so to include boys and men as victims.*
>
> *[8] In sentencing offenders under section 207 of the Crimes Decree, I do not think there should be a difference in sentencing approach based on the forms of violation. Whether it is penile penetration of mouth, vulva, vagina or anus, or digital penetration of vagina or anus, the approach to sentencing should be the same.*
>
> *[9] An approach to treat these forms of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms that have taken place under the Crimes Decree. Clearly, one of the objects of the rape law reform was to recognize that any act of sexual violation to the body of another must suffer the same punishment. After all, any form of sexual violation is an invasion of privacy and loss of personal dignity for the victim.*
>
> *[10] Sexual offences against children are becoming too prevalent in our society. Most of these offences are committed by persons who are in position of trust. The courts have a duty to protect the most vulnerable members of our society and to denounce any form of sexual violation of children.'*

[16] In **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) the Supreme Court held that:

> *'[20] The sentencing judge no doubt did not wish to lessen the gravity of digital over penile rape.*
>
> *[21] The casting of the offence of rape in the Crimes Decree is such that no distinctions are drawn as to gravity of offending dependent on the object used to penetrate or of the orifice of the victim penetrated. No separate penalties are*

prescribed. Sufficient no doubt is the unwanted invasion, the violation of the person, the forcible intrusion into the privacy and body of another.

[22] This is not the occasion for a guideline judgment. In an appropriate case this court, upon invitation pursuant to section 6(1) of the Sentencing and Penalties Decree, will look more deeply into the issue. It is a task not to be undertaken lightly. Whilst bearing in mind statutory variations between England and Fiji, courts will nonetheless derive useful assistance and persuasive directions from the UK Sentencing Guidelines in the approach to sentencing philosophy and the calculation of sentence.'

[17] In ***Ram*** (supra) the Supreme Court also quoted from **Regina v Ismail** [2005] The Times, March 7th 205 where Lord Woolf CJ said:

"The fact that the present offence was oral rape did not mean that it was any less serious than vaginal or anal rape. It was true that there would be no risk of pregnancy in the case of oral rape, that was a relevant factor, but there were dangers in oral rape of sexually transmitted diseases, particularly when no protection was adopted by the assailant.

In the court's judgment, it could not be said that in approaching the question of sentencing any distinction should be made because of the category of rape.

In some cases one would be more offensive than another to the victim. It was very much a subjective matter."

[18] Unfortunately, the trial judge had not considered any of the above words of wisdom in unilaterally deciding to draw a distinction among different acts of rape in terms of the sentence plainly against the intention of Parliament which has prescribed a single sentence for rape irrespective of the manner in which it is committed.

[19] The trial judge had stated in ***Vosatokaera*** that in his view, a sentencing tariff should not be understood as an instrument to sap the discretion provided by the legislature to a sentencing court. While one would not seriously challenge this view, no sentencing judge can totally undermine section 4(2)(b) of the Sentencing and Penalties Act, 2009 which mandatorily requires a sentencing court to have regard to any applicable sentencing tariff. No departure should be attempted without most compelling and convincing reasons. This is absolutely required *inter alia* to maintain the required and

satisfactory degree of uniformity in sentencing and in deference to the principles of judicial precedent.

[20] The Court of Appeal in **Kumar v State** [2022] FJCA 164; AAU117.2019 (24 November 2022) said as much.

> *'[75] However, in Fiji section 4(2)(b) states that a sentencing court must have regard to inter alia any applicable guideline judgment. Therefore, the sentencing judges in Fiji are not bound by law to follow sentencing guidelines but is obliged to have regard to them. Therefore, the sentencing judges in Fiji enjoy greater freedom and wider discretion in sentencing offenders after having regard to the guidelines.'*

[21] The trial judge also seems to have thought [possibly following the minority judgment of Keith, J in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) that sentencing tariff in ***Aitcheson*** should be only for child rape - below 13 years of age when it is in fact for all types of juvenile rape - below 18 years of age.

[22] Equally wrong is the trial judge's apparent reliance on the purported burden upon Fiji tax payers to maintain offenders for long periods of incarceration, again implying that application of sentencing tariff in ***Aitcheson*** across all forms of juvenile rape would indirectly contribute to that scenario. I agree with the state that the trial judge had erroneously placed disproportionately more weight on the age of the respondent to the extent of taking a starting point at 06 years resulting in the final sentence which I think is far too lenient and inadequate to the gravity of the crimes.

[23] The state also submits that in a number of important respects sentencing tariff in ***Aitcheson*** can be regarded as unsatisfactory in that it is not clear whether they are applicable only for offenders convicted after trial or irrespective of whether they plead guilty early in the proceedings or go to trial; whether it is applicable only for offenders with previous convictions or for all offenders with no exception to first offenders. State submits that most importantly, ***Aitcheson*** has not addressed the issue of the appropriate starting point with a broad permissible range for juvenile rape in line with UK sentencing guidelines approach as highlighted by Keath, J in **Kumar v State** (supra) leading to complains of 'double counting'. I think the same issues can

be raised with regard to ***Raj*** sentencing guidelines (10-16 years) on juvenile rape as well inasmuch as ***Aitcheson*** only enhanced ***Raj*** sentencing tariff to 11-20 years.

[24] However, if any change to ***Aitcheson*** tariff for juvenile rape is to be done, it should be done most preferably by the Supreme Court itself as clearly stated in ***Ram***. That task, if necessary could be undertaken in an appropriate case including ***Vosatokaera*** or this appeal subject to the procedure laid down in the Sentencing and Penalties Act, 2009 for a guideline judgment with the benefit of full submissions and arguments of the Director of Public Prosecutions, Legal Aid Commission and the appellant or his counsel as the case may be. Anything short of that would be bordering on judicial adventurism and must be avoided at all costs.

[25] Keith, J made some remarks towards revisiting sentencing tariff for child and juvenile rape in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) as follows.

> *'[54] In my opinion, the current tariff of 10-16 years' imprisonment for all offences of the rape of children and juveniles is too blunt an instrument. We should distinguish between the rape of children and juveniles under the age of 18 and the rape of children under the age of 13. I would increase the tariff for the rape of children under the age of 13 to 11-17 years' imprisonment…… I would leave the tariff for the rape of children and juveniles under the age of 18 undisturbed, in the confident expectation that judges will depart from the tariff, as they do now, in those truly exceptional cases where greater punishment is called for, especially those cases where the offending amounts to a campaign of rape. That is, as I originally understood it, the effect of the last paragraph of Chitrasiri J's judgment.*
>
> *[59] For these reasons, I would have varied the tariff for the rape of children and juveniles to the extent set out in this judgment. However, Ekanayake and Chitrasiri JJ take a different view. Chitrasiri J has told me that what he wanted to get across in the last few paragraphs of his judgment was that it was premature to give a guideline judgment in this area when (a) we had only received submissions from the State, and (b) when we had not had the benefit of the views of non-legal professionals, such as sociologists and criminologists, about the appropriate level of sentence in cases of this kind. He would therefore leave the tariff undisturbed for the time being, and make no distinction in the tariff dependent on the age of the victim, until a suitable opportunity arose for it to be considered in the way he thinks it ought to be considered. Their majority view must prevail, of course, and it follows that the court declines the invitation to give a guideline judgment.*

[26] However, Chitrasiri, J with whom Ekanayake, J agreed (forming the majority) said

> *'[112] Having looked at the draft judgment of Keith, J I observe that His Lordship has partly allowed the application of the State. In that judgment, Keith, J is inclined to have the tariff range increased from 11 to 17 years only in respect of the victims who are under the age of 13 years and to have the tariff to remain undisturbed when it comes to children between 13 to 18 years of age.*
>
> *[113] In my view, such a division depending on the age of the child may prevent the Court imposing a sentence over and above the present tariff when it comes to children over 13 years of age. Judges may think it is not appropriate to increase the sentence for the children over 13 because the increase is only with regard to the victims under 13 years. Accordingly I must state that I am not in agreement to have the tariff increased as suggested by Keith J. I will leave it for the judges to exercise their discretion and to impose a greater punishment according to law where necessary and appropriate, depending on the circumstances of each case.*

[27] Chief Justice Anthony Gates (as His Lordship then was) in ***Aitcheson*** (where too Ekanayake, J was a member) delivered on the same day as **Kumar** (supra) did not take the approach suggested by Keith J in **Kumar** (supra) but increased the sentence for juvenile rape to 11-20 years. Thus, until and unless the Supreme Court revisits this issue ***Aitcheson*** tariff will and should remain.

[28] In the light of the above discussion, I am inclined to grant leave to appeal against sentence on the 01st and 03rd grounds of appeal so that the full court may more fully consider all matters highlighted above.

[29] The full court can rectify the sentencing error and objectively decide the appropriate sentence that fits the crime in the context of ***Aitcheson*** sentencing guidelines for juvenile rape. 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). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them 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).

Order:

1. Leave to appeal against sentence is allowed.

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