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

CRIMINAL APPEAL NO.AAU 33 of 2020
[In the High Court at Suva Case No. HAC 233 of 2019]

BETWEEN	:	**STATE**
		Appellant
AND	:	**PAULA VOSATOKAERA**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Ms. P. Madanavosa for the Appellant**
	:	**Ms. S. Prakash for the Respondent**
Date of Hearing	:	**06 January 2023**
Date of Ruling	:	**09 January 2023**

RULING

[1] The respondent had been indicted in the High Court at Suva with one count of rape contrary to section 207(1) and (2) (b) and 3 of the Crimes Act, 2009 committed between 01 September 2018 and 26 April 2019 at Mokani Village in the Eastern Division by penetrating the anus of MT (real name withheld), a child below the age of 13 years, with his finger. The appellant was 25 years and MT was 12 years of age at the time of the incident.

[2] The respondent had pleaded guilty to the charge and admitted the summary of facts. The trial judge had accordingly convicted the respondent and sentenced him on 22 May 2020 to a term of 05 years and 04 months imprisonment with a non-parole period of 03 years. In view of the time spent in custody, time remaining to be served was directed to be 04 years and 11 months of imprisonment with a non-parole period of 02 years and 07 months.

[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 with the leave of 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] According to the sentence order the facts are as follows:

> *'**FACTS***
>
> *Between the 1st day of September 2018 to the 26th day of April 2019 at Mokani Village in Tailevu, after watching movies in the evening, the victim went to sleep on the bed.*
>
> *After a while the accused person laid down next to the victim on top of the bed which they normally share and started removing the victim's pants.*
>
> *After managing to do so, the victim was lying face down on the bed; when the accused spat on the victim's anus and inserted his finger into the victim's anus.*
>
> *The victim felt a lot of pain, when the accused person that the victim was in pain, and then the accused person stopped penetrating the victim's anus with his finger.*

On 21/4/2019, the incident only came to light when the victim told his grandmother namely on Watiaumoce Boginivalu what the accused person had done to him.

The matter was reported to the Nausori police station on 26/4/2019, whereby the accused person was arrested, interviewed under caution and charged for the offence of Rape. The accused had fully admitted to the offence in the caution interview in question and answer number 31 to 34. ***(Attached and marked as "A1" is the caution interview).***

The victim was medically examined by Dr. Elvira Ongbit on 27/04/2019 and it was specifically discovered in D12 of the medical findings that there was:

1. *1 x Hematoma noted on the 8 o'clock position of the victims anus*
2. *1 x scar Cheadle on skin top noted at 7 o'clock position of the victims anus.*

(Attached and marked as "A2" is the medical examination report of the victim).'

[6] The appellant's appeal is based on the following grounds of appeal:

(i) That the learned trial judge erred in principle when he took 07 years as a starting point for the offence of rape which is well below the tariff of 11 years to 20 years as per the Supreme Court decision in ***Aitcheson v State*** *[2018] FJSC 29; CAV0012.2018 (2 November 2018) for the rape of child victims.*

(ii) That the learned trial judge erred in principle when he interpreted the tariff in ***Aitcheson*** *(supra) to apply only to penile penetration of the vagina and not to other forms of rape.*

(iii) That the learned trial judge failed to take into account relevant aggravating factors

(iv) That the learned trial judge erred in fact and in law when he sentenced the respondent to 04 years and 11 months imprisonment which was manifestly lenient in the circumstances of the case.

[7] The trial judge 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.'*

[8] The form of rape referred to by trial judge at paragraph 09 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.

[9] I think the primary question in this appeal is whether the trial judge had erred in restricting the sentencing tariff in ***Aitcheson*** *(supra)* only to penile penetration of the vagina.

[10] There are enough 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.

[11] 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'*

[12] **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.'*

[13] 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.'

[14] 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."

[15] 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.

[16] The trial judge had stated 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.

[17] 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.'*

[18] Thus, 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 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.

[19] 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.'

[20] 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.'

[21] 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.

[22] Therefore, considering the above reasons, I am inclined to grant leave to appeal against sentence so that 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).

[23] All grounds of appeal could be considered by the full court under this main appeal point including the 03rd ground of appeal.

Order of the Court:

1. Leave to appeal against sentence is allowed.

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