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

CRIMINAL APPEAL NO.AAU 153 of 2020
[In the High Court at Lautoka Case No. HAC 02 of 2018]

BETWEEN	**:**	**THE STATE**
		Appellant
AND	**:**	**WAISAKE NACEUCEU RAVASUA**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Ms. S. Shameem for the Appellant**
	:	**Respondent in person**
Date of Hearing	**:**	**08 June 2023**
Date of Ruling	**:**	**09 June 2023**

RULING

[1] The respondent had been charged in the High Court at Suva on a single count of child rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 as follows:

*'**Statement of Offence***

***RAPE:** Contrary to section 207(1) and (2) (a) & (3) of the Crimes Act of 2009.*

Particulars of Offence

***WAISAKE RAVASUA**, on the 15th day of August 2017 at Lautoka, in the Western Division, inserted his penis into the vagina of VLC, an 11 year old girl.'*

[2] The respondent had pleaded guilty to the above count in the course of the trial. The testimony of the victim, whose evidence had been fully taken by that time, was that on 15 August 2017 while she was sleeping at her aunt Sainiana's house, her cousin Miji came and told her that Sai and the respondent were calling her. When she got up and went there they were sleeping in the kitchen. She laid down between them. Then the respondent started touching her and her cousin told her to go out with him. Then she went out with the respondent and he took her to the creek. At the creek, the respondent took off her clothes and inserted his penis into her vagina. When she told him that it is painful, he took his penis out and ran back to the house.

[3] The learned High Court judge had found that the above facts supported all elements of the charge, and considered the charge proved. Accordingly, the trial judge had found the respondent guilty on his plea and convicted him of rape contrary to section 207 (1), (2) (a) and (3) of the Crimes Act 2009.

[4] The learned High Court judge had sentenced the respondent on 04 November 2020 to 07 years of imprisonment with a non-parole period of 05 years.

[5] The appellant's timely appeal against sentence had raised three grounds of appeal as follows:

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in his sentencing discretion by imposing a manifestly lenient sentence in a child rape without giving any reasons as to why the final sentence had fallen far below the lower range of the applied tariff of 11 to 20 years imprisonment as per Aitcheson v State [2018] FJSC 29; CAV 0012.2018 (2 November 2018).*
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> ***Ground 2***
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> *THAT the Learned Trial Judge erred in his sentencing discretion by failing to take into the account relevant aggravation as provided per the victim impact statement.*
>
> ***Ground 3***
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> *THAT the Learned Trial Judge erred in principle by considering the Respondent to be remorseful and allowing an unjustified substantial discount of 1 year for a late plea.*

[6] Guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **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). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points (*i.e.* sentencing error) under the four principles of ***Kim Nam Bae's*** case namely whether the trial judge:

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

Ground 1

[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 rage from 10-16 years to 11-20 years. Therefore, for juvenile rape the minimum sentence now should 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 clearly well below the minimum sentence and not within the sentencing range.

[12] However, sentencing outside the bands is not forbidden, although it must be justified (vide: **Zhang v R** [2019] NZCA 507 as quoted in **Jone Seru v The State** AAU 115 of 2017 (25 May 2023). If the final term either falls below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range (vide: **Koroivuki v State** AAU 0018 of 2010 [2013] FJCA 15 (05 March 2013)].

[13] The trial judge had correctly identified the sentencing range as stated in ***Aitcheson*** and he cannot be faulted for selecting the starting point at 11 years either. However, the trial judge had not adduced reasons as to why the ultimate sentence came down to 07 years of imprisonment well below the tariff for this offending of child rape or justified it on a rational basis. But, I think the causes for this manifestly lenient

sentence could be attributed to the matters raised under the 02nd and 03rd ground of appeal. However, they cannot be considered as reasons for departing drastically from the accepted sentencing range.

[14] Guideline judgments emphasize that the sentencing judge should stand back and inquire whether the final sentence is correct in all the circumstances. In **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73], the New Zealand Supreme Court stated that:

> *[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.*

[15] The State has submitted 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).*

[16] 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.

02nd ground of appeal

[17] Having selected 11 years as the starting point, the trial judge had held that there were no fresh aggravating factors as the tariff of 11- 20 years was set in consideration of

the submitted aggravating factors by the state. While it is true that the tariff in juvenile rape cases reflect the objective gravity of such offences and many things which make them so serious have been already inbuilt into the tariff (per Keith J in **Kumar v State** [2018] FJSC 30; CAV0017 of 2018 (02 November 2018), I do not think that the subjective aggravating factors relating to the offender such as breach of trust (the respondent and the victim were distant relatives), disparity in age (victim 11 years while the respondent was 28 years) and the emotional impact of the rape on ***this*** victim (as opposed to psychological harm on all victims of rape) as revealed by the victim impact statement were meant to be part of the sentencing tariff. Therefore, the trial judge had clearly erred in not enhancing the sentence for the said aggravating features.

03rd ground of appeal

[18] The trial judge had stated that the mitigation factors were that the respondent was 28 years old and is a first time offender and in addition he had pleaded guilty before the conclusion of the trial showing his remorse. He had deducted 03 years for the said 'mitigating factors'. Another year had been deducted once again for plea of guilty before the conclusion of the trial. This downward adjustment had resulted in the final sentence of 07 years.

[19] In ***Raj*** (SC) the Supreme Court stated that:

> *'[61] However the suggestion that he was remorseful could count for nothing. He had pleaded not guilty, which was his right. But in doing so, he had put the complainant through the misery, fear, and embarrassment of having to give evidence and be cross-examined. ..... No value can be attached to such remorse.'*

[20] In this case also the respondent had pleaded not guilty and put the child victim through the trial until her evidence was concluded. Only then, had he changed his earlier plea and pleaded guilty to the charge. The respondent's plea of guilty appears to have been motivated not by genuine remorse but by the fear of inevitable conviction which amounted to no remorse. In any event, it is not an early guilty plea.

Thus, 03 years of discount was not warranted at all. Further, the trial judge had double-counted the mitigating factor of plea of guilty and one year deduction for the second time should be completely excluded. Thirdly, it is doubtful whether any discount should be accorded to the appellant for being a first time offender when then victim was a child and the respondent was a grown-up adult.

[21] Therefore, had the trial judge enhanced the starting point for subjective aggravating factors and afforded lesser discount for the late guilty plea and arguably for his previous character, the ultimate sentence would not have gone below the permissible sentencing range of 11-20 years.

Discount on guilty plea in general

[22] Madigan J in **Ranima v State** [2015] FJCA17: AAU0022 of 2012 (27 February 2015) identified a discount of 1/3 for a plea of guilty willingly made at the earliest opportunity as the 'high water mark'. The 33% discount for a guilty plea was expressed in the New Zealand case of **Hessell v R** [2009] NZCA 450, [2010] 2 NZLR 298 [*Hessell* (CA)] where the Court of Appeal established a sliding scale which permitted a discount of 33 per cent for a plea entered at first reasonable opportunity, reducing to 10 per cent for a plea entered three weeks before trial. In ***Hessell*** the court held that the maximum discount of 33 per cent included remorse, for which an additional allowance might be made only in exceptional cases where it had been demonstrated in a practical and material way. The Court justified bundling the guilty plea with non-exceptional remorse on four grounds: a guilty plea is the best evidence of remorse; an allowance for remorse is "automatically built in" to the guilty plea discount; remorse is easily claimed but not easily gainsaid; and the guilty plea discount would be more predictable if it incorporated remorse. However, the New Zealand Supreme Court in **Hessell v R** [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73] rejected the Court of Appeal's scaled discount approach, holding rather that a guilty plea discount requires an evaluative assessment reflecting all the circumstances of the case, including the strength of the prosecution case and the point at which the defendant had the opportunity to be informed of all implications

of the plea. It follows that an early plea need not earn a full discount. The Supreme Court capped the guilty plea discount at 25 per cent.

[23] It is clear that those remarks by Madigan J were not part of the main judgment and cannot be considered as part of *ratio decidendi* of the decision. In **Aitcheson v State** [2018] FJCA 29; CAV0012 of 2018 (02 November 2018) the Supreme Court stated that the principle in ***Rainima*** must be considered with more flexibility and the overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given and the one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably. Therefore, in Fiji there is neither 1/3 discount or 1/4 discount automatically granted to an early guilty plea.

Order is the Court:

1. Leave to appeal against sentence is allowed on all three grounds of appeal.

COURT OF APPEAL FIJI

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

Solicitors:

Office for the Director of Public Prosecutions for the Appellant
Respondent in person