

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

CIVIL APPEAL NO. AAU 0143 of 2020
[High Court at Lautoka Case No. HAC 110 of 2017]

BETWEEN : **THE STATE**

Appellant

AND : **MESULAME LESAVUA**

Respondent

Coram : **Prematilaka, RJA**
Qetaki, RJA
Heath, JA

Counsel : **Mr. R. Kumar for the Appellant**
: **Ms. A. Bilivalu for Respondent**

Date of Hearing : **08 July 2025**

Date of Judgment : **25 July 2025**

JUDGMENT

Prematilaka, RJA

[1] I agree that subject to the observations made by Heath, JA on the error of law by the trial judge appeal should be dismissed.

Qetaki, RJA

[2] I agree with the judgment of Heath, JA the reasoning and result.

Heath, JA

Introduction

[3] In July 2020, Mr Mesulame Lesavua was tried in the High Court at Lautoka on six charges of sexual offending:

- a. two counts of indecent assault;
- b. two counts of rape;
- c. one count of sexual assault; and
- d. one count of attempted rape.

[4] The trial took place before Morais J and three assessors. After the Judge summed up to the assessors, they deliberated and returned with unanimous opinions that Mr Lesavua was guilty on the rape, sexual assault and attempted rape charges. The assessors were not persuaded that the indent assault charges had been proved beyond reasonable doubt. Those charges were substituted by the lesser charge of indecently insulting or annoying any person. The assessors found those substituted charges proved. In a judgment delivered on 7 August 2020, Morais J confirmed the assessors' views and entered convictions on the same charges.

[5] Mr Lesavua was sentenced on 13 October 2020. The Judge imposed an end sentence of 12 years imprisonment, with a minimum non-parole period of nine years, reflecting 75% of the finite sentence.¹

The appeal

[6] The State sought leave to appeal on the grounds that the Morais J had erred in his decision not to apply the tariff range determined by the Supreme Court in *Aitcheson v The State*.² In that case, the Supreme Court had considered a tariff previously set by it in *Raj v The State*.³ In *Aitcheson*, the Court increased the range of end sentences

¹ See further, para [11] below.

² *Aitcheson v The State* [2018] FJSC 29.

³ *Raj v The State* [2014] FJSC 12.

for *juvenile* rape to 11 to 20 years imprisonment, instead of the 10 to 16 years, as it had decided in *Raj*. In sentencing on the *Raj* tariff, the Judge acted contrary to the agreed position between counsel for both the State and Mr Lesavua, both of whom accepted that the tariff for cases involving the rape of a *juvenile* should reflect the *Aitcheson* approach. The State's primary concern is with the point of principle: Has the *Aitcheson* tariff superseded the *Raj* tariff?

[7] On 16 June 2023, Prematilaka RJA granted leave to appeal to enable this question to be determined.⁴ There is no appeal in respect of the minimum non-parole period ordered.

[8] In the course of his leave judgment, Prematilaka RJA noted that the State had raised some broader points about whether *Aitcheson* constituted a satisfactory guideline judgment in respect of juvenile rape. The Judge recorded those as follows:⁵

“[16] ...the State 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).’”*

[9] As Prematilaka RJA observed, it may be necessary for this Court or (preferably) the Supreme Court to address those questions. But, this is not an appropriate case in which to do so. On this appeal, I confine myself to the specific question posed on the

⁴ *State v Lesavua* [2023] FJCA 225, at para 15.

⁵ *Ibid*, at para 17.

granting of leave and add some observations about the use, as a framework for analysis, of a method that may assist sentencing judges in determining which aggravating factors are relevant to the starting point and uplift respectively, to reduce the possibility of double-counting.

The High Court sentencing

[10] Because the State’s appeal is limited to a point of law and no increase in the sentence is sought, it is unnecessary to set out the facts on which sentencing was based. What follows is a short summary of the way in which the Judge constructed the end sentence that he imposed.

[11] Morais J, chose a starting point for sentence of 12 years imprisonment. That was uplifted by two years for aggravating factors,⁶ leaving a provisional end sentence of 14 years imprisonment. Personal mitigating factors led to a reduction of two years, leaving the end sentence as one of 12 years imprisonment. Morais J ordered that Mr Lesavua not be released on parole until he had served at least nine years of his sentence. Taking into account time served, Mr Lesavua was sentenced to 11 years and eight months imprisonment, with a minimum non-parole period of eight years and eight months.

[12] In his sentencing remarks of 13 October 2020, Morais J took into account (without specifically mentioning any individual aspects) the purposes of sentencing set out in s 4 of the Sentencing and Penalties Act 2009. In my view, the relevant parts of s 4 state:

“4. — (1) The only purposes for which sentencing may be imposed by a court are —

- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;*
- (b) to protect the community from offenders;*
- (c) to deter offenders or other persons from committing offences of the same or similar nature;*

...

⁶ See para [15] below.

- (e) to signify that the court and the community denounce the commission of such offences; or
- (f) any combination of these purposes.

(2) In sentencing offenders a court must have regard to —

- (a) the maximum penalty prescribed for the offence;
- (b) current sentencing practice and the terms of any applicable guideline judgment;
- (c) the nature and gravity of the particular offence;
- (d) the offender's culpability and degree of responsibility for the offence;
- (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
- (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
- (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
- ...
- (i) the offender's previous character;
- (j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and
- ... ”

(Emphasis added)

[13] Morais J took the two rape charges as the lead charges for sentencing purposes. The Judge reminded himself that the offence of rape carried a maximum penalty of life imprisonment.⁷ He referred also to statements made in both the Supreme Court and the Court of Appeal which had emphasised the need for sentencing judges to recognise and reflect understandable public outrage of serious offending of this type that was coming before the Court much too frequently⁸. The Judge was referred to and considered the tariffs set by the Supreme Court⁹ in *Aitcheson*¹⁰ and *Raj*.¹¹

⁷ Sentencing and Penalties Act 2009, s 4(2)(a).

⁸ *Ibid*, s 4(2)(b).

⁹ *Ibid*.

¹⁰ *Aitcheson v The State* [2018] FJSC 29.

¹¹ *Raj v The State* [2014] FJSC 12.

[14] The Judge did not accept counsel’s agreed position on the application of the *Aitcheson* guidance¹², Morais J said:

“10. ... I do not see that this falls within the [*Aitcheson*] category. The victim is just above the age of 13 years and the appropriate tariff as approved by ... *Raj v The State* ... is 10-16 years of imprisonment.”

[15] The Judge added two years to his starting point for “aggravating factors”. They were:¹³

- a. *The offending represented a “serious and abhorrent series of crime”;*¹⁴
- b. *There was “gross abuse and breach of trust”;*¹⁵
- c. *The perpetrator was the victim’s uncle;*¹⁶ and
- d. *The impact on the victim was traumatic.*¹⁷

[16] The Judge deducted a period of two years for prior good character and other (non-specified) mitigating factors put to the Court. That resulted in the end sentence of 12 years imprisonment.

Analysis

(a) The purpose of the appeal

[17] As previously indicated¹⁸, the State’s appeal has been brought purely to clarify application of the *Aitcheson* and *Raj* tariffs in the High Court. Mr Kumar, for the State, indicated that he was not seeking an uplift to either the end sentence or the minimum non-parole period. While he recognized the possibility that enhancement of the sentence was arguable, on the basis of the relatively low level of the end sentence, Mr Kumar confirmed that the State was predominantly concerned with the

¹² See para [6] above.

¹³ Sentencing Notes of Morais J, at paras 11-12.

¹⁴ Sentencing and Penalties Act 2009, s 4(2)b.

¹⁵ *Ibid*, s 4(2)(j)

¹⁶ *Ibid*, s 4(2)(j).

¹⁷ *Ibid*, s 4(2)(c).

¹⁸ See para [6] above.

question of principle that arises in this case, namely, the appropriate tariff for juvenile rape offending.

(b) *The Aitcheson or Raj tariff?*

[18] Any potential confusion in the minds of sentencing judges about the overlap of the *Aitcheson* and *Raj* tariffs might arise from way in which the terms “child” and “juvenile” are used in the two judgments. The terms are defined differently. The term “child” is defined as a person under the age of 18 years,¹⁹ while a “juvenile” is a person under the age of 17 years,²⁰ including both a child and a young person. A “young person” is someone between the ages of 14 and 18 years.²¹

[19] By increasing the range of end sentences for “juvenile rape” to 11 to 20 years imprisonment, the Supreme Court in *Aitcheson* undoubtedly intended to capture, within that tariff, rape of both children and juveniles, as defined.²² In doing so, the Supreme Court implicitly altered its “child” focused guidance in *Raj* in favour of one directed to all juveniles rapes. In that way, *Aitcheson* recognises the added seriousness of the crime of rape when perpetrated against both children and juveniles, whether female or male. In my view, the sentencing judge fell into error in applying the *Raj* tariff.

[20] I agree with Prematilaka RJA’s observations when granting leave to appeal:

“There is no legal or logical basis for ... a distinction between application of the Aitcheson tariff for children under the age of 13 years but the lower Raj tariff for juveniles between 14 years and 18 years.”

(c) *Constructing a juvenile rape sentence.*

[21] The Supreme Court has mentioned, on a number of occasions, the problems that can arise through double-counting aggravating circumstances, by adding an uplift for

¹⁹ Constitution of the Republic of Fiji, s163 (1), definition of “child”.

²⁰ Juveniles Act 1974, s 2, definition of “juvenile”.

²¹ *Ibid*, s 2(1) definition of “young person”.

²² See para [18] above.

aggravating factors that have already been taken into account in determining a starting point. Further, the Supreme Court has observed that a mechanistic approach to sentencing can create its own problems.²³ While my comments are not to be taken as binding guidance, I take this opportunity to offer some thoughts on how the problem of double-counting aggravating factors might best be avoided.

[22] I start with the concerns that have been voiced in the Supreme Court. In 2018, it referred specifically to the way in which aggravating factors were to be taken into account under the current Fijian sentencing regime. In *Kumar v The State*²⁴ Keith J, by reference to the *Raj* tariff, observed:

“35. *The shift from the approach in Drotini (adopting a starting point which can be increased or reduced to reflect the aggravating and mitigating factors) to the approach in Raj (identifying a range within which the sentence should normally fall) is significant. We do not know whether the change in mechanism was deliberate, and I shall return to that later. But it is important to remember that a tariff is no more than a guideline, and it has frequently been said that guidelines are different from tramlines. By that is meant that although the ultimate sentence would usually fall within the tariff, there may be exceptional aggravating or mitigating factors which justify a sentence outside the appropriate range. So although judges are expected to pass a sentence within the range of 10-16 years’ imprisonment for the rape of a child or juvenile, it is, of course, open to them in an exceptional case to go outside that range if that is necessary.*

...

55. *The appropriate starting point. I return to the topic I flagged up earlier in this judgment. We have moved away from the mechanism in Drotini of adopting a starting point which should be increased or reduced to reflect the factors which aggravate and mitigate the offence to the approach in Raj of identifying the range within which the sentence should fall. That begs the question of where within the appropriate sentencing range the judge should start. ...”*

[23] Some assistance might usefully be gained from the New Zealand jurisprudence on the determination of a starting point for sentence. In saying that, I acknowledge that the New Zealand approach cannot readily be transplanted into the Fijian

²³ See para [32] below.

²⁴ *Kumar v The State* [2018] FJSC 30, at paras 35 and 55. Coincidentally, the Supreme Court’s judgment in *Aicheson v The State* [2018] FJSC 29 was delivered on the same day as *Kumar*; 2 November 2018, but by a differently constituted Bench.

environment. While Fiji, like New Zealand, has elected not to follow the “instinctive synthesis” approach to sentencing favoured in Australia, there are a number of problems in fully adopting the New Zealand model.

[24] The first is that the maximum penalty in Fiji for rape (which includes various types of conduct which come within the definition of “unlawful sexual connection” in the New Zealand legislation) is life imprisonment, whereas in New Zealand it is 20 years imprisonment.²⁵ The second arises out of differences in the way in which tariffs are set in New Zealand and what happens in Fiji. In cases such as *Aitcheson* and *Raj*, the Supreme Court identifies a range of end sentences which will ordinarily be imposed. Assessment of a sentence will include the need to identify what aggravating circumstances have been included in the starting point before adding anything else for other aggravating factors. The New Zealand Courts identify a “starting point” in a different way.

[25] The term “starting point” is understood, in New Zealand, as a sentence which would “appropriately [reflect] the intrinsic seriousness” of the offending. From that starting point, the sentence is “adjusted up or down to reflect circumstances which are personal to the offender,”²⁶ including any guilty plea. This approach does not fit easily into the Fijian sentencing regime, which uses a range of end sentences for a tariff: see Keith J’s comments in both *Senilolokula v The State*²⁷ and *Kumar v The State*.²⁸

[26] The choice of a starting point must reflect the way in which the Fiji sentencing regime operates. I suggest that, generally speaking, the lower end of the relevant range identified in *Aitcheson* should be reserved as the starting point to reflect intrinsic elements of the offence in relation to juveniles.²⁹ That starting point will include an allowance for the inherent vulnerability of children and young persons.³⁰ The extent to which vulnerability may be a relevant factor may depend upon the age of the victim, his or her intellectual capacity, and whether she or he is part of the

²⁵ The maximum sentence available for an offence must be taken into account under s 4(2)(a) of the Sentencing and Penalties Act 2009.

²⁶ *R v AM (CA27/2009)* [2010] 2 NZLR 750 (CA) at para [14].

²⁷ *Senilolokula v The State* [2018] FJSC 5 at paras [19] and [20].

²⁸ *Kumar v The State* [2018] FJSC 30 at para [55].

²⁹ See also para [28] below.

³⁰ Sentencing and Penalties Act, s4 (3)(c).

family group of which the offender is a member. The point is this: the age of the juvenile goes to his or her vulnerability and is factored into sentencing through the starting point. The more vulnerable the victim, the more the inherent seriousness of the offending increases. In this context, abuse of trust (on the part of the offender) be added as part of the starting point, so long as it is not used later for the purpose of an uplift.³¹

[27] *R v AM* (CA27/2009)³² is a judgment in which the Court of Appeal of New Zealand provided sentencing guidelines for the crimes of rape and unlawful sexual connection. It may be helpful in identifying potential aggravating factors relating to the offending that are relevant to any uplift from the starting point for the particular offence. Delivering the judgment of the Court of Appeal in *R v AM*, William Young P and Ellen France J identified: planning and pre-meditation;³³ the use of violence beyond that inherent in any act of sexual violation;³⁴ the extent of the harm caused to the victim (both physical and emotional);³⁵ the presence of multiple offenders;³⁶ the scale of the offending, in the sense of the number of times in which it occurred and the duration of repeated sexual violation, and carrying associated degradation or indignities.³⁷

[28] In applying an uplift, it is important not to introduce any of the aggravating factors inherent in the rape of a juvenile which have been taken into account in determining the starting point.³⁸ The method I have discussed focuses a sentencing judge's mind on the risk of double-counting, the comprehensibility of the sentencing remarks and promotes transparency of reasoning for both the media and the general public.

[29] If a sentencing judge carefully identifies those aggravating factors that are inherent in the rape of a juvenile and set the starting point at a level that reflects that consideration, he or she can then decide whether there are any other aggravating

³¹ See para [29] below.

³² *R v AM* (CA27/2009) [2010] 2 NZLR 750 (CA).

³³ *Ibid*, at para [37].

³⁴ *Ibid*, at paras [38]-[41].

³⁵ *Ibid*, at para [44].

³⁶ *Ibid*, at paras [45]-[46].

³⁷ *Ibid*, at para [47]-[49].

³⁸ See para [26] above.

factors pertaining to the offence or personal to the offender which should be added to the starting point before deductions are made for mitigating circumstances. Aggravating factors identified by William Young P and Ellen France J in *R v AM* should assist sentencing judges to determine those which are not specifically mentioned in s4 (3) of the Sentencing and Penalties Act 2009.³⁹ Even in assessing additional aggravating factors, Judges must be alive to the risk of double-counting. By way of example, in this case Morais J referred to “gross abuse and breach of trust” and the fact that Mr Lesavua was the victim’s uncle independently of each other.⁴⁰ In fact, the two factors are not discrete: the gross breach of trust arose out of Mr Lesavua’s position as the victim’s uncle.

[30] Personal aggravating factors should be included among those used to fix the length of an uplift. They will include (without being exhaustive) an offender’s prior criminal history, whether for the same or other offences. This goes to prior character.⁴¹ Mitigating factors will include prior good character⁴², remorse⁴³, and guilty pleas⁴⁴, as well as any mental or intellectual impairments which might require the offending to be treated more leniently than others of the same type.⁴⁵

[31] Importantly, after calculating an end sentence, a sentencing judge will need to stand back to assess (as a matter of judgment) whether the proposed end sentence does or does not reflect the totality of the offending. The “totality principle” is used to ensure that a just sentence is imposed to meet the purposes of sentencing listed in s4 (1) of the Sentencing and Penalties Act 2009: punishment,⁴⁶ protection of the community,⁴⁷ specific and general deterrence,⁴⁸ and denunciation.⁴⁹ In an appropriate case,

³⁹ *R v AM (CA27/2009)* [2010] 2 NZLR 750 (CA), at paras [37]–[46], to which reference is made in para [27] above. See also s 4(2) of the Sentencing and Penalties Act 2009, the relevant parts of which (for the purpose of the instant appeal) are set out at para [12] above.

⁴⁰ See para [15] above.

⁴¹ Sentencing and Penalties Act 2009, s 4(2)(i).

⁴² *Ibid*, s4 (2)(i).

⁴³ *Ibid*, s4 (2)(j).

⁴⁴ *Ibid*, s4 (2)(f).

⁴⁵ This all goes to prior character: Sentencing and Penalties Act 2009, s4 (3)(i).

⁴⁶ Sentencing and Penalties Act 2009, s 4(1)(a).

⁴⁷ *Ibid*, s 4(1)(b).

⁴⁸ *Ibid*, s 4(1)(c).

⁴⁹ *Ibid*, s 4(1)(e).

application of the totality principle may also reflect the need to promote or facilitate the rehabilitation of the offender.⁵⁰

[32] It is quite possible that, using a starting point at the lower end of the *Aitcheson* range, aggravating factors might be minimal and outweighed considerably by mitigating factors. While that could result in an end sentence that falls below the range articulated by the Supreme Court in *Aitcheson*, that consequence is merely a result of the exercise of good judicial judgment in sentencing. This point was made ably by Keith J (with whom both Gates CJ and Chandra J agreed), in *Senilolokula v The State*,⁵¹ in the context of His Lordship’s observations that “Sentencing is an art, not a science” and a “too mechanistic approach” should be avoided.⁵² In concluding his judgment in that case, Keith J said:⁵³

“30. *I should add just one thing to that. It is always useful for the judge to stand back at the end of the process to see whether the sentence he proposes to pass feels right. Judges tend to develop a strong sense of what the appropriate sentence should be. Asking themselves at the end of the process whether the sentence they propose to pass feels right is a sensible way for the judge to check whether the decision which he has reached by a more analytical process is likely to be correct. Had the trial judge done that, it may be that he would not have passed a sentence which was as long as the one he ended up passing.*”

Result

[33] I would dismiss the appeal on the grounds that no adjustment to the end sentence and minimum non-parole period is required, notwithstanding that the sentencing judge erred in applying the *Raj* rather than the *Aitcheson* tariff.

⁵⁰ Ibid, s 4(1)(d).

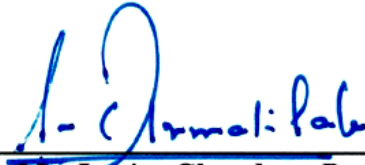
⁵¹ *Senilolokula v The State* [2018] FJSC 5.

⁵² Ibid, at paras [21] and [22].

⁵³ Ibid, at para [30].

Order of the Court:

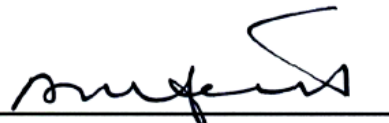
1. *Appeal is dismissed.*



The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



The Hon. Mr. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL



The Hon. Mr. Justice Paul Heath
JUSTICE OF APPEAL

Solicitors:

Office of the Director of Public Prosecution for the Appellant
Legal Aid Commission for the Respondent