

**IN THE COURT OF APPEAL, FIJI**

[On Appeal from the High Court]

**CRIMINAL APPEAL NO. AAU 0147 OF 2020**

[Lautoka High Court Case No: HAC 100 of 2017]

**BETWEEN** : **JOSEVATA TUIVIWA**

***Appellant***

**AND** : **THE STATE**

***Respondent***

**Coram** : **Mataitoga, P**  
**Qetaki, RJA**  
**Winter, JA**

**Counsel** : **Appellant in Person**  
**Ms B Kantharia and Ms S Shameem for the Respondent**

**Date of Hearing** : **09 July 2025**

**Date of Judgment** : **25 July 2025**

**JUDGMENT OF THE COURT**

**Mataitoga, P**

[1] I concur with the reasons and the conclusion of Winter, JA's judgment.

## **Oetaki, RJA**

[2] I agree with the reasoning and conclusions of Winter, JA.

## **Winter, JA**

### **Background**

[3] Following the unanimous opinion of the assessors Mr Tuiviwa was convicted of raping a 10-year-old girl and sentenced on 30 October 2020 to 17 years' imprisonment with a non-parole period of 14 years.

[4] The appellant's timely appeal against conviction was refused and has not been renewed. His timely leave to appeal against sentence was granted. There have been no further submissions filed in support of his sentence appeal. Appearing in person Mr Tuiviwa relied on his earlier written 'leave submissions' to support his sentence appeal. Before the court he emphasised the sentence was manifestly excessive

### **Facts**

[5] On the morning of 4 May 2017, a 10-year-old girl (SQ), went to help her mother sell oranges at the Nadi market.

[6] The first time the child saw the offender that day was in the morning when she went to the lady's toilet. SQ heard the market attendant, Ms. Baka, scolding the 34-year-old Mr. Tuiviwa for following her inside the facilities telling him to come away from the ladies washroom as it was not a men's toilet.

[7] Later, whilst her mother was away from their stall. Mr. Tuiviwa approached and asked the child if she already had her breakfast or tea. SQ replied, she had. Undeterred, Mr. Tuiviwa invited her to have another tea with him. SQ refused.

- [8] Some hours later, in the afternoon, SQ complaining to her mother of a sore stomach went again to the lady's toilet. Mr. Tuiviwa stood by the door. As she left, he gave her 20 cents and he asked her to go with him to see his daughter, SQ told Mr. Tuiviwa she did not want to go. He insisted that the child go with him and held her hand. He put his arm on her shoulder.
- [9] After a short bus ride Mr. Tuiviwa took the victim to a cane field where he spread out flattened cardboard boxes he had collected along their walk. He invited SQ to watch a movie with him. They did. SQ then left him to go 'pee'. When she came back he had taken off all his clothes and asked the child to do the same. SQ said 'no'. Mr. Tuiviwa then forcefully took off her skirt and top and then her panty. He made her lie down on the spread-out cartons. He laid on top of her and forced his penis into her vagina. It was painful so she pushed him away. Mr. Tuiviwa then threatened the child not to scream otherwise he would take a knife and cut her hands. SQ was very scared of him.
- [10] When SQ returned to the Nadi market she told her mother about what happened, and the matter was reported to the police. SQ was medically examined and presented with injuries consistent with rape.

### **Sentence appeal principles**

- [11] An appeal court should only intervene if the sentencing court fell into error. If there has been an error, the appeal court can undertake the sentencing exercise afresh. Although a wide range of errors or irregularities may justify intervention by the appeal court there are no statutory criteria for allowing an appeal specified in section 23 (3) of the Court of Appeal Act. Accepted grounds include<sup>1</sup>:
- (a) *the sentence was manifestly excessive or lenient.*
  - (b) *the sentence was inappropriate in a particular case.*
  - (c) *the sentence involved an error of law or principle<sup>2</sup>*
  - (d) *the relevant facts before the sentencing court were incorrect or incorrectly assessed*

---

<sup>1</sup> *Naisua v State* [2013] FJSC 14; CAV0010.2013 (20 November 2013)

<sup>2</sup> *Ibid*: e.g., failing to apply or wrongly applying a statutory factor, or taking into account an irrelevant consideration.

- (e) *there was a marked disparity with the sentence given to a co-offender*<sup>3</sup>
- (e) *there are facts that existed at the time of sentence but were not before the sentencing court indicate that any of (a)–(e) apply.*
- (f) *the court had no jurisdiction to sentence the offender.*

[12] When a sentence is reviewed on appeal, it is the ultimate sentence rather than each step in the reasoning process that must be considered.<sup>4</sup> The approach 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 is consistent with statutory sentencing purposes and lies within the permissible range.<sup>5</sup>

### *Grounds*

[13] The appellant submits that the trial judge misapplied the sentencing tariff resulting in a manifestly excessive sentence. In addition, the State responsibly accept that the sentence was in error as the reasons for the 6 year uplift to the starting point were not explained.

### *Was there error*

[14] In *Qurai v State*<sup>6</sup> the Supreme Court endorsed the ‘two-step’ process for sentencing and since 2015 while the use of the methodology is not mandatory it is preferred as best sentencing practice by this court. The process commences by calculating the starting point, incorporating the aggravating, and mitigating factors of the offence. Here the sentencing judge must ask how serious the offending is compared to other offending of that type by considering relevant guideline judgments and other consistent authorities.

---

<sup>3</sup> Ibid: i.e. that would lead a reasonable, independent observer to think that something had gone wrong with the administration of justice.

<sup>4</sup> *Koroicakau v The State* [2006] FJSC 5; CAV0006U.2005S (4 May 2006)

<sup>5</sup> *Sharma v State* [2015] FJCA 178; AAU48.2011 (3 December 2015). See also *Navuki v State* [2022] FJCA 25 at [25], Prematilaka RJA explained these purposes.

<sup>6</sup> *Qurai v State* [2015] FJSC 15; CAV24.2014 (20 August 2015) at [48] – [49]

[15] In sentencing the judge correctly adopted a two-step approach. His honour first assessed the objective seriousness of the offending using the various aggravating circumstances found in the current tariff case.

[16] Deciding on a starting point of 12 years imprisonment, his honour then went on to simply state he added a further 6 years for unspecified aggravating factors. The risk is that in doing so without explanation the judge may inadvertently have ‘double counted’ similar inherent offence factors as additional aggravating factors. That is an error. As a result, we must resentence to determine if the sentence was indeed manifestly excessive.

*Was the sentence manifestly excessive.*

[17] Whether a sentence can be said to be manifestly excessive turns on the maximum sentence prescribed by law for the offence; the level of sentencing customarily observed with respect to that offence; the place which the conduct in question assumes on the scale of seriousness of offences of that type; and the personal circumstances of the offender, to the extent that they are relevant with respect to the particular kind of offending. In cases of child sexual offending *Aitcheson*<sup>7</sup> remains, for now, the lead authority.

[18] Aitcheson faced six 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. He pleaded guilty before trial and was sentenced by the High Court to 16 years’ imprisonment with a non-parole period of 15 years.

[19] The Court of Appeal reduced the total sentence to 13 years’ imprisonment with a non-parole term of 11 years.

---

<sup>7</sup> *Aitcheson v State* (2018) FJSC 29; CAV0012.2018 (2<sup>nd</sup> of November 2018)

[20] The Supreme Court enhanced the sentence to 18 years with a non-parole period of 16 years by stating that the increasing prevalence of these crimes, characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children.

[21] For the appellant, the trial judge reasonably used 12 years as the starting point and added 06 years for aggravating factors without identifying what those aggravating circumstances were in the context of the conviction. There is nothing excessive about the starting point.

[22] The aggravating circumstances inherent for this offending are:

*a) Age and power difference*

The victim was 10 years of age, an immature child and the accused a 34-year-old adult male. The age and power difference between the child and the man is substantial.

*b) Exposing a child to sexual abuse and emotional and psychological damage*

The accused exposed the victim to sexual activity at a very young age he basically robbed her of her innocence by exposing her to an unexpected sexual encounter. The emotional and psychological damage will remain with her for a lifetime.

*c) Breach of trust*

The victim innocently trusted the accused, and so she went along with him to an unknown place, child-like, doing as she was asked by an older adult male. The accused breached the child's trust in him.

*d) Victim was alone and vulnerable*

The victim was alone, vulnerable and naive, the accused took advantage of this.

e) *Planning, persistence, and premeditation*

There is a high degree of planning, persistence, and premeditation. Mr Tuiviwa targeted his victim early in the day, why else would he have followed her into the ladies' toilets. Then, later, he tried to lure her away with the promise of another morning tea. Even when his invitation for tea was rebuffed by the child, he clearly watched and when SQ went to the toilet again he waited outside for her to falsely befriend his victim. He must have known of the hidden place where he intended to, rape her. He lied to the victim that he wanted her to go with him to pick up his daughter. SQ did not want to go with him, but he insisted. Taking a hold of her arm and then placing his arm around her shoulder he then took her by bus nearby to the preplanned place. As they walked, he collected cardboard to lay down upon ground.

[23] The aggravating features of the offence clearly make it more serious. However, any adjustment for these additional aggravating features must keep in mind the statutory principles and a sense of proportionality. In our view an uplift of fifty percent from the selected starting point cannot be justified. A three-year uplift can be.

[24] As a first-time offender a modest one-year discount for his previous good character is appropriate.

[25] An end sentence of 14 years imprisonment compares well with other sentences for similar offending. For example:

In the case of *State v Kautanainimakibau*<sup>8</sup> - The accused a 49-year-old uncle of his 13-year-old niece pleaded guilty to digital rape, sexual assault, and indecent assault. The child did not have to give evidence. The starting point was 13 years. The sentence was uplifted by 6 years for unspecified aggravating factors other than the obvious psychological trauma of such a horrendous event for the lifetime of the child victim. After general mitigation of the impact upon his family and previous good character, three years was deducted. An early guilty plea discount of a further 3 years saw the

---

<sup>8</sup> *State v Kautanainimakibau* - Sentence [2025] FJHC 161; HAC228.2024 (18 March 2025)

sentence finally settle at 13 years imprisonment. Following time served adjustments the end sentence was 12 years 8 months 22 days imprisonment with a non-parole period of 10 years imprisonment.

In the case of *State v Inoke*<sup>9</sup> the accused a 50-year-old uncle of his 10-year-old niece pleaded guilty to digital rape. The child did not have to give evidence. The starting point was 11 years. The sentence was uplifted by 5 years for breach of trust, age disparity, vulnerability, loss of innocence and the prevalence of this type of offending. After general mitigation of this a first offence and genuine remorse 2 years was deducted. An early guilty plea discount of a further 4 years saw the sentence finally settle at 10 years with remand discounts leaving a 9 year and 2 ½ months of imprisonment, with a non-parole period - 7 years and 2 ½ months imprisonment.

In the case of *State v Pita*<sup>10</sup>, the accused a 49-year-old uncle of his 12-year-old niece pleaded guilty to a representative charge of oral rape, and two charges of penile rape. He repeatedly sexually abused the child over a year. The child did not have to give evidence. The starting point was 12 years. The sentence was uplifted by 3 years for breach of trust, age disparity, vulnerability, planning and multiple vaginal injury confirmed by medical reports. General and early guilty plea mitigation of 3 years saw the sentence finally settle at 12 years with a non-parole period of 11 years.

In the case of *State v Tora*<sup>11</sup>, the accused a 40-year-old uncle of his victim, a girl, aged 10 pleaded guilty to oral and penile rape. He lured the child to his home and raped her in the bedroom. The child did not have to give evidence. The starting point was 11 years. The sentence was uplifted by 5 years for breach of trust, age disparity, vulnerability, planning and loss of innocence together with the prevalence of such offending. This was Mr Tora's second similar conviction, so no general mitigation was available to him. However remorse mitigation of 1 year and an early plea of 3 years saw the sentence finally settle at 12 years with a non-parole period of 10 years.

---

<sup>9</sup> *State v Inoke* - Sentence [2024] FJHC 613; HAC07.2024 (11 October 2024)

<sup>10</sup> *State v Pita* - Sentence [2024] FJHC 413; HAC150.2023 (8 July 2024)

<sup>11</sup> *State v Tora* - Sentence [2024] FJHC 304; HAC25.2022 (17 May 2024)

[26] These cross-check cases assist in finding whether the sentence under appeal was manifestly excessive. The State while not conceding this issue at sentencing remained benevolently neutral.

### **Analysis**


[27] The appellant's offending, very serious as it was, is not as serious or as culpable or harmful as found in *Aitcheson*. However, as opposed to *Aitcheson* and the cross-check cases referred to the appellant did not tender an early guilty plea but contested the charge all the way. In *Aitcheson* the starting point was 14 years plus a further six years for nine aggravating factors *Aitcheson* was given a two year reduction for his guilty plea.

[28] The sentence appeal is granted. The trial judges starting point was correct. In addition to those 12 years a further 3years for breach of trust, age disparity, vulnerability and planning is added. Before a deduction of one year for this a first offence with some good characteristics. The sentence is reduced to one of 14years. The accused was remanded for 5 months and 15 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 6 months as a period of imprisonment already served. The final sentence is now 13 years and six months.

[29] Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to others and for the protection of the community. We impose 11 years as a non-parole period to be served before the accused is eligible for parole.


### **Orders:**

- [1] The sentence appeal is granted.
- [2] The original sentence is quashed.
- [3] And substituted with a sentence of 13 years and six months.
- [4] Together with a non-parole period of 11 years.



---

**Hon. Mr Justice Isikeli Mataitoga**  
PRESIDENT OF THE COURT OF APPEAL



---

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



---

**Hon. Mr Justice Gerard Winter**  
JUSTICE OF APPEAL