

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO.: HAC 129 OF 2012**

**BETWEEN:**                      **THE STATE**

**A N D:**                              **NACANIELI YAVALA**

**Counsel**                            :        Mr. Nath S for the State  
   :        Mr. Sharma S for the Accused

**Date of Sentencing**        :        9<sup>th</sup> July 2013

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**SENTENCE**

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1. Name and the identity of the victim is hereby ordered to suppress permanently with the request of the Prosecution.
2. **Nacanieli Yavala**, you have been convicted for one count of **Rape**: contrary to **section 207 (1) and (2) (b) and (3)** of the **Crimes Decree No. 44 of 2009** and one count of **Sexual Assault**: contrary to **section 210 (1) (a)** of the **Crimes Decree No. 44 of 2009** on your unequivocal plea of guilty entered on **07<sup>th</sup> of June 2013**.
3. **First Count:**

*Statement of Offence (a)*

**RAPE:** Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009

*Particulars of Offence (b)*

**Nacanieli Yavala**, on the 19<sup>th</sup> day of March 2012 at Nadera, Nasinu in the Central Division penetrated the vagina of a girl namely **ANM**, a child under the age of 13 years, with his fingers.

## Second Count

### Statement of Offence (a)

**SEXUAL ASSAULT:** Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009

### Particulars of Offence (b)

**NACANIELI YAVALA**, on the 19<sup>th</sup> day of March 2012 at Nadera, Nasinu in the Central Division, unlawfully and indecently assaulted **ANM.**

4. The expressly admitted Summary of Facts revealed that on 19<sup>th</sup> of March 2012 you had asked the victim, who was just 9 years of age at the time of the alleged offences, to go inside your room and when she obliged to the request, you had followed her. After closing the door to the room and drew the curtains of the windows you had pulled the victim's tights and panty down. You had told the victim to turn around and show her buttocks to you.
5. Thereafter, you had pulled out your penis and rubbed on her buttocks. Later, you had used your finger to penetrate victim's vagina. It is said by the victim to the police that this is not the first time you had done this "*bad thing*" to her. Later in the afternoon, these incidents had been reported to Valelevu Police. The victim had been medically examined on the same day. You had made a full admission in committing the offences under caution as well.
6. The maximum penalty for the offence of Rape is life imprisonment. **Section 5** of the **Sexual Offence Act 2003** of the **United Kingdom** which is contextually similar to the definition of '**RAPE**' in the Crimes Decree 2009 specifically focuses on victims under the age of 13 years and denotes a maximum penalty of life imprisonment upon conviction on indictment. The tariff in the jurisdiction of Fiji Islands, for the offence ranges from 10 – 15 years imprisonment when a child victim is involved. (see **Mark Mutch v The State**, *Criminal Appeal No. AAU 0060 of 1999, Fiji Court of Appeal*; **State v Lepani Saitava**, *Criminal Case No. HAC 10 of 2007, High Court, Suva*; **The State v AV**, *Criminal Case No. HAC 192 of 2008, High Court, Suva*; **State v VV**, *Criminal Case No. 084 of 2009, High Court, Suva* and **State v Waqabaca**, *Criminal Case No. HAC 139 of 2008, High Court, Suva*) It was observed that in the United Kingdom, the tariff for the offence of Rape of a child under 13 years, contrary to section 5 of the Sexual Offences Act 2003,

ranges from 8-19 years depending on three (3) categories of “Harm factors” and the degree of “Culpability”.

7. It is worthy of reminding once again what was highlighted in the case of **Mohammed Kasim v State** (1994) FJCA 25; AAU 0021j.93S (27 May 1994):

*“It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”*

8. **Justice Gates**, as he was then, stated in **State v. Marawa (2004) FJHC 338**, that:

*“Rape is the most serious sexual offence. Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences” (paragraph 10)*

9. In **State v AV (2009) FJHC 24; HAC192.2008** (2<sup>nd</sup> February 2009) **Justice Goundar** noted that:

*“In this case a child was raped. Society cannot condone any forms of sexual assaults on children. Children are our future...Sexual offenders must be deterred from this kind of offences.”*

10. With the above legal precedents, it is quite clear how the criminal justice system of the country has attempted to address the public outrage over the offence of Rape and rape of children in particular.
11. In terms of **Section 210 (2)** of the **Crimes Decree**, the maximum penalty for the offence of “**Sexual Assault**” is 14 years imprisonment. **Justice Madigan**, in the case of **State v. Abdul Khaiyum** (Criminal Case No. 160 of 2010 – 10<sup>th</sup> August 2012) had introduced a tariff for this relatively new offence under the Crimes

Decree 2009, to be 2 – 8 years imprisonment. In that instance, the Accused had been charged under **Section 210 (1) (a)** of the **Crimes Decree** where the maximum penalty is 10 years imprisonment.

12. As defined in the United Kingdom's Legal Guidelines for Sexual offences, sexual assault is any form of non-consensual touching which ranges offending from touching of the victim over clothing to non-penetrative touching of the victim's genitals.
13. With the assistance of the said Legal Guidelines for Sentencing in the United Kingdom **Justice Madigan** in the case of ***State v Epeli Ratabacaca (Criminal Case No. 252 of 2011 – 14<sup>th</sup> November 2012)*** has divided Sexual Assault offending into three (3) categories.

**Category 1** (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

**Category 2**

- (i) Contact between the naked genitalia of the offender and another part of the victim's body;
- (ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;
- (iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

**Category 3**

Contact between parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)

14. With the existing decided authorities, it is evident that no tariffs have been set to the offence of **Sexual Assault** when the victim is a child. In this backdrop, I turn to the **Legal Guidelines for Sentencing in the United Kingdom. Section 7** of the **Sexual Offences Act 2003** of the United Kingdom especially denotes to **Sexual Assault** of a child under 13 years and it attracts a maximum penalty of 14 years imprisonment.
15. The **Sentencing Guidelines** had identified 3 “**Categories**” of offending with diminishing quantum of “**Harm**” to the victim and two levels of “**Culpability factors**” of the offender and recommended the tariff to be from “**High Level Community Orders to 9 years imprisonment.**” The higher end of the range is obviously for serious offending with use of violence, abduction or detention of the victim and forced entry into victim’s house. A sentence of middle range is recommended when the offending takes place with touching of genitalia, prolonged or sustained incident, additional degradation or humiliation and in a context of habitual sexual abuse. The lower range of sentencing is suggested when the “**Harm factors**” and the “**Culpability factors**” identified are not in existence.
16. There is no doubt that a unique set of issues and sensitivities do exist in a sexual offence when the victim is a child. Whereas there is no specific legislature to govern the sentences of child victims in “**Sexual Assault**” cases, victim being a child itself is an aggravating factor. The culpability of the perpetrator will be grave when the offender:
- **does a significant degree of planning,**
  - a member of group or gang during commission of the offence,
  - uses alcohol or drugs on the victim to facilitate the offence,
  - **uses gifts or bribes to coerce the victim,**
  - grooms the victim,
  - uses threat including blackmailing,
  - **abuses his/her position of trust,**
  - records the offence,
  - targets a vulnerable child,
  - has previous violence against the victim,
  - commits the sexual assault in the course of burglary,
  - uses a weapon to frighten or injure the victim and
  - offending whilst racially or religiously aggravated.

The factors stated above are not-exhaustive and the final sentence for an offence of **Sexual Assault** when a child victim is involved will depend on the facts of each case along with the Aggravating and Mitigating grounds.

17. After a careful consideration of the legal background on Sentencing for the offences of **Rape** and **Sexual Assault**, I now turn to identify the Aggravating and Mitigating grounds in this particular instance. The learned State Counsel submitted a comprehensive **Sentencing Submission** along with the **Victim Impact Assessment Report** and the **Antecedent Report** of the Accused. The learned Counsel for the defence filed extremely helpful and pertinent submissions in **Mitigation**. The **Victim Impact Assessment Report** reflects that the emotional or psychological effect to the victim over the alleged sexual acts is normal.
18. As correctly pointed out by the State, the **disparity in age** between the Accused and the victim aggravates the background of offending. The victim was **9 years** of age at the time of the commission of the offence whilst you were **35 years old**. The age gap was 26 years. This disparity makes worse, when it is revealed in the Mitigation that you also have a daughter of 6 years old. Your conduct it-self speaks for your respect towards the social values.
19. On the other hand, you had committed these offences whilst you were in a relationship with the aunty of the victim and living in the same compound. It is true that you did not have any blood relationship with the victim, but you were a family member within the family unit of the victim. Thus, this domestic background, naturally attracts more gravity to your offending. At the same time, any elder in the same household is supposed to get involved in caring for, training and supervising the victim. In that sense, you had blatantly breached the '**trust**' which was entrusted on you. Further, you had deployed a significant degree of **pre-planning** with the use of gifts or bribes to the victim. That is why you send the victim to buy a packet of biscuits from the shop and called her to your room upon her return. Thus, your act was a pre-planned and a calculated one. This background, undoubtedly **aggravates** your offending.
20. In **Mitigation**, you claim that you are 37 years of age and been educated only up to Form 5. You were in a relationship with Kirisi Ana, the Aunt of the victim prior to the offending. You have a 6 year old daughter from your previous marriage and you have to financially support her. It was averred that you did not apply any

physical force to the victim during the commission of the offence. You are a 1<sup>st</sup> offender for the purposes of sentencing. You pleaded guilty to the charges without going for a full Trial. It is true that you took over one year to inform this decision to court. But, I do believe the learned Counsel's contention that you pleaded guilty to the charges on the very first opportunity after receiving legal advice from the Legal Aid Commission. This, I consider as true colours of remorse. Further, I observe that you had co-operated with the police at the Investigation level with a full admission to the charges. You had already sought apology from the victim and her family. You seek forgiveness from court and an opportunity to reform and rehabilitate. Finally, you are asking for a lenient sentence.

21. Having considered the legal and factual background, I take a **starting point of 10 years imprisonment** for the charge of '**Rape**'. I add **4 years** for all the **Aggravating factors** stated in paragraphs 18 and 19. I then **deduct 2 years** from the interim period of 14 years imprisonment for all the **mitigating factors** averred in paragraph 20 inclusive of your early plea of guilty and previous good character. Your final sentence for the count of **Rape** is **12 years imprisonment**.
  
22. According to **Justice Madigan's** categorization in **Epeli Ratabacaca**, the 2<sup>nd</sup> count of "**Sexual Assault**" falls within the 2<sup>nd</sup> category. Acts of this nature attracts more severity followed by the acts of 1<sup>st</sup> category. Hence, having based on the category of "**Harm factor**", the degree of Culpability and mainly on the existed circumstances of offending, I take a **starting point of 6 years imprisonment** for the offence of **Sexual Assault**. I add **3 years** imprisonment for all the **Aggravated factors** mentioned earlier and **deduct 2 years** for all the **Mitigating factors**. Your final sentence for the offence of '**Sexual Assault**' is **7 years imprisonment**.
  
23. Your final sentences stand as follows.
  - Count No. 1 – Rape – 12 years imprisonment.
  - Count No. 2 – Sexual Assault – 7 years imprisonment.
  
24. Finally, coming back to your request for a lenient sentence, this court wishes to stress that this is definitely not a fit and proper instance for a court of law to be mellowed with sympathy. It is rather unfortunate to note that the respect for womanhood in the society is on the decline and incidents of sexual molestation

and rape in custody are steadily growing. The alarming factor is that the younger generation, especially girls of tender years, are increasingly at a risk of sexual exploitation. If we are to eradicate this notion of small girls been victims of the lust of perverse and uplift the decency and morality in public life, the administration of Criminal Justice System has to be strict and firm on those who violate the social norms. Thus, you will receive an immediate custodial sentence.

25. The sentence for the 2<sup>nd</sup> count of Sexual Assault is ordered to be served concurrently with the sentence for the 1<sup>st</sup> count of Rape. Thus, your final sentence is 12 years imprisonment with a non-parole period of 10 years.
26. You have been in remand custody since **22<sup>nd</sup> March 2012**, that is 1 year, 3 months and 16 days. In terms of **Section 24** of the **Sentencing and Penalties Decree**, I order that period of time be reduced from your final sentence of 12 years imprisonment.
27. Having considered the Domestic nature of the relationship you had with the victim, I order a permanent **Domestic Violence Restraining Order (DVRO)** in place, identifying **Ms. ANM**, the victim as the protected person. You are hereby ordered not to have any sort of a contact with the victim directly or by any other means, unless otherwise directed by this court.
28. You have 30 days to Appeal to the Fiji Court of Appeal.

Janaka Bandara  
**JUDGE**

**At Suva**  
9<sup>th</sup> July 2013

Office of the Director of Prosecutions for the State  
Office of the Legal Aid Commission for Accused