

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 025/2013

BETWEEN: THE STATE

AND: TOMASI TAVAKATOGA TUIWAILEVU MATENI

COUNSEL: Ms. P. Low for the State
Ms. M. Lemaki for the Accused

Dates of Trial: 22-24/04/2014

Date of Summing Up: 24/04/2014

Judgment: 25/04/2014

Sentence: 28/04/2014

[Name of the victim is suppressed. She will be referred to as M.M]

SENTENCE

[01] The Director of Public Prosecution had preferred the following charges against the above named accused.

FIRST COUNT

Statement of Offence

INDECENT ASSUALT: Contrary to section 212(1) and (2) of the Crimes Decree No: 44 of 2009.

Particular of Offence

TOMASI TAVAKATOGA TUIWAILEVU MATENI, on the 06th day of August 2012, at Savusavu, in the Northern Division, unlawfully and indecently assaulted M.M a 9 year old.

SECOND COUNT

Statement of Offence

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

Particular of Offence

TOMASI TAVAKATOGA TUIWAILEVU MATENI on the 07th day of August 2012, at Savusavu, in the Northern Division, penetrated the vagina of M.M a 9 year old, with his finger.

- [02] After trial on the charges, the accused was found guilty on all the counts. Accordingly he was convicted on all the charges.
- [03] The victim said that the accused came to her house on 6th and 7th August 2012 in the night and touched her body and inserted his finger into her vagina. She had identified the accused through the solar light which was on at that time. She knew the accused earlier as he too lived in Nakama Heights. She was not forced by anybody to implicate the accused in this case. She said that the accused was the person who entered her house on 6th and 7th of August 2012 and performed unpleasant acts on her. The accused wore a wig on both days but he removed it when he touched and inserted his finger into victim's vagina. The victim was a 9 year old girl when she encountered these unpleasant acts.
- [04] As per Section 212(1) and (2) of the Crimes Decree No: 44 of 2009 the maximum sentence for an offence of Indecent Assault is to imprisonment for 5 years.

- [05] As per section 207(1) and (2) and (3) of the Crimes Decree No: 44 of 2009 the maximum sentence for the offence of Rape is to imprisonment for life.

Tariff for Indecent Assault

- [06] In the case of **Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002), Justice Shameem highlighted the tariff for this offence:

“From these cases a number of principles emerge. Sentences for indecent assault range from 12 months to 4 years imprisonment. The gravity of the offence will determine the starting point for the sentence. The indecent assaults of small children reflect on gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapon or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence”.

- [07] In the case of **State v Simione Talenasila**, Criminal Case No: HAC 11 of 2010L (12 March 2010) Justice Madigan highlighted the gravity of the offence and stated in paragraph 10:

“The maximum penalty for indecent assault is 5 years imprisonment and in the case of State v Kumar [2003] FJHC 71 Shameem J said that the indecent assaults on children should attract sentence of 3 years imprisonment”

Tariff for Rape

- [08] In the case of **Chand v State** [2007] AAU005. 2006S (25 June 2007), the court referred to the case of **Mohammed Kasim v The State** Appeal 14 of 1993 where the same court observed:

“We consider that any rape case without aggravating or mitigating feature the starting point for sentencing an adult should be a term of imprisonment of 7 years. It must be recognized by the courts that the crime of rape has become altogether too frequent. The sentences imposed

by the courts for that crime must reflect an understandable public outrage”

- [09] In **Sireli v State** [2008] FJCA 86; AAU0098 of 2008S (25 November 2008). The court also referred to the case of **State v Lasaro Turagabeci & others** HAC 0008 of 1996, the court observed:

“The courts have made it clear that rapist will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences of the victim are likely to be severe. The courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentence”.

- [10] In the case of **Drotini v The State** [2006] FJCA 26; AAU0001.2005 (24 March 2006); the court noted following:

“There are few more serious aggravating circumstances than where the rape is committed on a juvenile girl by a family member or someone who is in a position of special trust. The seriousness of the offence is exaggerated by the fact that family loyalties and emotions all too often enable the offender or other family members to prevent a complaint going outside the family. If the child then remains in the family home, the rapist often had the opportunity to repeat the offence and to hope for the same protection from the rest of the family.”

- [11] In this case the complainant was a 9 year old child at the time of the incident. Hence the tariff for the rape of a child is a sentence between 10 to 15 years. See **Mark Mutch v The State** Criminal Appeal No. AAU 0060 of 1999, Fiji Court of Appeal; the actual sentence will depend on the mitigating and aggravating factors.

[12] In **State v AV** [2009] FJHC24: JAC 192.2008 (2 February 2009) the court stated:-

“Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assault on children. Children are our future. The courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences.”

[13] The accused is 25 years of age living with his parents and his siblings. He works as a construction worker and earns an income of \$80.00 weekly. He has completed form 4 level of education.

[14] In **O’Keefe v State** [2007] FJHC: 34 the Fiji Court of Appeal held that the following principle of sentencing:

“When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person”

[15] I have carefully considered these submissions in light of the sections 4(1), 4(2) and 15(3) of the Sentencing and Penalties Decree No: 42 of 2009.

[16] The accused is a relation of the victim. The accused seriously disregarded and breached the trust between him and the victim. Accused was 23 years old and victim was 9 years old at the time of the incident. The act done to the victim by the accused person took away the victim’s dignity in the society. The accused took advantage of the trust that the victim had placed on him. The accused made the victim to re-live the ordeal again in court in its raw form. He has not expressed any remorse during the trial.

- [17] The accused is a first offender and is 25 years of age. He is living with his parents and his siblings. He supports his siblings in their education. He is engaged to be married. He is a construction worker and earns \$80.00 weekly and contributes to the welfare of his siblings.
- [18] Considering all aggravated and mitigating circumstances I sentence you as follows:
- For the 1st count I take 02 years imprisonment as the starting point. I add 02 years for aggravating factors to reach the period of imprisonment at 04 years. I deduct 01 year for the mitigating factors.
 - For the 2nd count I take 12 years imprisonment as the starting point. I add 03 years for aggravating factors to reach the period of imprisonment at 15 years. I deduct 02 years for the mitigating factors.
- [19] I order that you serve all the sentences concurrently to each other. In summary you are sentenced to 13 years imprisonment.
- [20] You have committed the offence on a girl who was 9 years old at the time of the offending. She is psychologically affected and lives in fear at present.
- [21] Considering all and acting in terms of Section 18(1) of the Sentencing and Penalties Decree, I impose 10 years as non-parole period.
- [21] 30 days to appeal.


P Kumararatnam

JUDGE



At Labasa
28/04/ 2014