

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 146 OF 2012

STATE

-v-

PENISONI WAQANILIVA RAVUTUBANANITU

Counsel : **Ms. L. Latu for the State**
 Ms. S. Nasedra for the Accused

Dates of Trial: **3rd August 2015 - 04th August 2015**
Date of Judgment: **7th August 2015**
Date of Sentence **19th August 2015**

SENTENCE

[1] On the 7th August, 2015, the Accused was found guilty after trial and was convicted by this Court of one representative count of penile Rape of a 17 year girl. The Accused now comes before this Court for sentence on conviction.

[2] The facts of the case were that:

The victim of this case was 17 years of age at the time of the incident. After a dispute with her mother she decides to leave home. Having contacted a friend, she leaves for Tavua on the 20th of October. She could not find Meli in Tavua. She meets Seruwaia who was known to her. In search of Meli she goes to a church in Yasiyasi with Seruwaia but never meets Meli. Seruwaia introduces the victim to the Accused and they get acquainted with each other.

She goes to Seruwaia's friend, Alumita's place. Accused comes there in night and attempts to talk to her. She smells liquor on him and is reluctant to talk. Accused forcibly gets hold of her, grabs her hands and takes her to a nearby house. In the kitchen of the house, Accused puts her down, undresses her and inserts his penis into her vagina. He does it twice without her consent. He leaves her thereafter. Police

comes and takes her to a hospital where she is medically examined in a distressed condition. Doctor finds fresh lacerations on upper vaginal wall, multiple bruises around the neck, extra ordinarily pulling of large amount of blood in vagina.

- [3] The maximum penalty for Rape is life imprisonment. It is now well settled, and confirmed by the Supreme Court in **Anand Abhay Raj** CAV003.2014 that the tariff for rape of a juvenile is 10-15 years of imprisonment.
- [4] The accused at the time of the rape was 18 years, an adult in law and the victim was only 17, a juvenile.

Mitigating Factors

- [5] In a comprehensive written submission, Counsel for the Accused submits that the Accused is married and he is a father of three year old son. He is presently working as a security officer and supports his siblings and his parents on his salary. He was in New Zealand on a rugby scholarship and has returned to Fiji upon completion of the scholarship. He has plans to migrate to New Zealand to provide his family a better future.
- [6] In the sentencing hearing, Deacon of the Methodist Church at Tavua, Mr. Ratuovini Bokini was called by the Accused to substantiate facts his Counsel had submitted already to this Court. The Deacon said that the Accused was closely associated with the church and looking after not only his family but the extended family and neighbours as well. He further said he had noticed a change in Accused's way of life for better after his marriage and becoming a father.
- [7] According to the Accused's marriage certificate and his child's birth certificate tendered to Court, Accused has committed this offence after his marriage and when his child was only three months old. He has engaged himself in an extra marital sexual conduct for which he is now convicted as a husband and a father, against the teachings of the church. I am unable to agree with the Deacon.
- [8] Three year old son will now be looked after by his domestic worker wife. Long prison sentence of his father will undoubtedly be detrimental to child's upbringing.
- [9] The Accused is the first offender and has a clear record hitherto and is young. He has co-operated during Police investigations.

Aggravating Factors

- [10] The Accused has pleaded not guilty to the charge and maintained that position right throughout the trial. By doing so, he has not saved the young girl from giving evidence and reliving the ordeal. He has thereby not shown remorse and repentance.
- [11] The Accused knew of victim's vulnerability as a running away girl from home and also her vulnerability as a stranger in Tavua. Victim was a juvenile at the time of the rape. He exploited her vulnerability to satisfy his lustful desires even though he was a married man with a baby at the time of the incident.
- [12] In view of Accused's personal circumstances and his prospects of bright future as a young rugger player and also his three year old son's wellbeing, I considered, before proceeding to sentence, the following authorities cited by the Defence Counsel in mitigation.
- [13] In **Moses Nariva v the State** (2006) FJHC;HAA 0148J 2005, the accused was a young offender of 17 years old, juvenile. He was a first offender who pleaded guilty without wasting time of court and was remorseful. Madam Justice Shameem stated;

"the courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment"

- [14] In **State v Nayate Vatu** (2015) FJHC 263; HAC 231.2011 (23 April 2015) Justice Madigan sentenced a 21 year old for seven years of imprisonment for two counts of juvenile rape with non-parole period of five years. In rationalizing his finding Justice Madigan stated;

".....It appears to be extremely important in this case that a balance be struck between expectations of the community that such activity be punished and retribution be afforded the victim with the need to recognize the folly of such a young man with a clean record and the destruction that a long sentence would wreak on his entry into adulthood. Whilst every attempt must be made to keep a young offender from prison and to rehabilitate him (her) when faced with a serious crime or crimes, a Court must act in the interests of the public and their expectations and act to deter others who might want to follow the same course of action...."

[15] In his concluding remarks Justice Madigan said;

“... I am aware that this final sentence of seven years is below the tariff for rape of a child and it is in no way meant to distort the tariff already recognized by the Supreme Court. It is a lenient sentence in recognition of the youth of the accused and his remorseful plea of guilty saving the child from giving evidence.

[16] In **State v Seniqai** (2011) FJHC 375; HAC 010.2011 (8th July 2011) Justice Gounder sentenced a 18 year old rape accused for 5 years of imprisonment, below tariff. Justice Gounder imposing imprisonment without fixing a non- parole said;

“...You are 18 years old. Unfortunately, you are unemployed without any meaningful purpose in life. You left school after completing Form 4. The International Convention on the Rights of a Child applies to you because of your age. I bear in mind that a prison sentence should be the last resort for a child.

....I sentence you to 5 years imprisonment. The purpose of your sentence is to denounce your offence and to deter you and others from committing this type of offence. Due to your youth I do not fix a non-parole period...”

[17] There have been instances where Judges of the High Court have deviated from existing tariff when they find that the sentencing within tariff either disproportionately excessive or unjust in all the circumstances of the case.

[18] There is no victim impact assessment report before me filed by the State. Victim is now married.

Sentence

[19] Having considered all the aspects, now I proceed to sentence the Accused as follows;

[20] To reflect the gravity of offending, not the offender, I take a starting point of 10 years at the bottom of the tariff for this offence. To reflect the aggravating features of lack of remorse and exploitation of vulnerability of a young juvenile, I add three years to that starting point. In recognition of his strong mitigation of clean record, time he spent in remand, his personal circumstances and his duty to family, I deduct those three years bringing the interim sentence back to ten years. For his youth and his prospects as a rugger player trained in New Zealand on a Scholarship I deduct a further two years, bringing his sentence down to one of **eight years.**

- [21] Having considered the Accused's future prospects and desire for rehabilitation, I order that he serve only five years before he is eligible for parole.
- [22] I concur with the reasoning given by Justice Madigan in **State v Nayate Vatu** in my selecting a sentence under Tariff. I also considered the age of the victim in sentencing the Accused under tariff.

Summary

Accused is convicted for eight years imprisonment. He will serve a minimum of five (5) years before being eligible for parole.




Aruna Aluthge
Judge

At Lautoka
19th August 2015

Counsels:

- **Office of the Director of Public Prosecution for State**
- **Office of the Legal Aid Commission for Accused**