

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 006 of 2016

[CRIMINAL JURISDICTION]

STATE

V

SULIO VUNIAMATANA TUINAYAU

Counsel : Ms. K. Semisi for State
Mr. J. Savou and Ms. A. Prakash for Accused

Dates of Hearing : 03rd to 05th October 2016

Date of Summing up: 06th October 2016

Date of Judgment : 07th October 2016

Date of Sentence : 11th October 2016

(The name of the complainant is suppressed. The complainant will be referred to as MLV)

SENTENCE

1. Sulio Vuniamatana Tuinayau, you stand convicted of the following offences;

COUNT ONE

Statement of offence

Rape: Contrary to section 207 (1) and (2)(c) and (3) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SULIO VUNIAMATANA TUINAYAU between the 1st day of July 2011 to the 31st day of July 2011, at Kadavu in the Central Division, penetrated the mouth of MLV a child under the age of 13 years with his penis.

COUNT TWO

Statement of offence

Sexual Assault: Contrary to section 210 (1)(a) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SULIO VUNIAMATANA TUINAYAU between the 1st day of July 2011 to the 31st day of July 2011, at Kadavu in the Central Division, unlawfully and indecently assaulted MLV by touching her vagina.

2. The assessors returned with a unanimous opinion that you are guilty of the two counts. This court decided to accept the unanimous opinion of the assessors and convicted you accordingly.
3. Brief facts are as follows. You are victim's grandmother's brother and the victim calls you "grandfather". The victim was living with you and your family in 2011. One day in the month of July 2011 after lunch, you penetrated the victim's mouth with your penis. A few days later, you removed her underwear and touched her vagina. At the time you committed the two offences you were 42 years old and the victim was 9 years old.
4. The victim was under your care and protection during the time you committed the two offences. You were in the position of a father figure to her and it was your responsibility to look after the victim. You have abused your position of authority and trust. You knew that your granddaughter was already a victim of a similar offence and yet decided to sexually exploit her.


5. Pursuant to section 207(1) of the Crimes Decree 2009 ("Crimes Decree") read with section 3(4) of the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree"), the maximum punishment for rape is life imprisonment. It is settled that the sentencing tariff for rape of a child victim is a term of imprisonment between 10 to 16 years (*Anand Abhay Raj v State* [2014] FJSC 12).
6. I select 10 years imprisonment as the starting point of your sentence in respect of the first count.
7. I consider the following as aggravating factors;
 - a) you abused your position of trust and authority;
 - b) the age gap between you and the victim which is 33 years; and
 - c) you exploited her vulnerability knowing that she is already a victim of a similar offence.
8. You have no previous convictions. Your previous good character will be considered as a mitigating factor.
9. Your counsel has highlighted the following as your personal circumstances;
 - a) you are 47 years old, married with 1 child; and
 - b) you are a farmer.
10. Considering the aggravating factors, your sentence is increased by 4 years and I deduct 2 years of your sentence considering your previous good character.
11. Accordingly, I sentence you to 12 years imprisonment for the first count of rape.
12. The offence of sexual assault under section 210(1) of the Crimes Decree carries a maximum sentence of 10 years imprisonment. Following the case of *State v*

Laca [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012), this court has been applying an imprisonment term between 2 to 8 years as the tariff for sexual assault.

13. You have touched the naked genitalia of the complainant. I select 2 years as the starting point of your sentence for the offence of sexual assault. Considering the aforementioned aggravating factors and the mitigating factor, I sentence you to an imprisonment term of 4 years.
14. I order that you serve the two sentences concurrently. Accordingly, your final sentence is 12 years imprisonment.
15. Your counsel requests this court to refrain from fixing a non-parole period in order for you to obtain the maximum benefit of the provisions with regard to remission given the present practice adopted by the Prisons and Corrections Service.
16. Section 18(1) of the Sentencing and Penalties Decree provides that *'when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole'*. The only exception where a court can refrain from fixing a non-parole period when sentencing an offender for an imprisonment term of two years or more is provided under section 18(2) of the Sentencing and Penalties Decree.
17. In terms of the said subsection, a court can decide not to fix a non-parole period when sentencing an offender for a term of two years or above, if the court considers that it is not appropriate to fix a non-parole period given the nature of the offence or the past history of the offender. According to the plain reading, the said section is applicable where a court considers that an offender should not be released on parole early and should serve the full sentence, given the nature of the offence or the past history of the offender.

18. Therefore, I am of the view that section 18(2) of the Sentencing and Penalties Decree cannot be applied in order to refrain from fixing a non-parole period considering the circumstances of this case. I order that you are not eligible to be released on parole until you serve 08 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Decree.
19. You have spent 05 days in remand pending your sentence. Considering the fact that I have deducted 2 years in view of the mitigating factor and the fact that the period in remand was only 05 days, I order that the said 05 days shall not be regarded as a period of imprisonment already served pursuant to the provisions of section 24 of the Sentencing and the Penalties Decree.
20. In the result, you are sentenced to an imprisonment term of 12 years with a non-parole period of 08 years.
21. 30 days to appeal to the Court of Appeal.




Vinsent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.