

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 57 of 2016

STATE

V

PITA COLASAWIRI

Counsel	:	Ms. Amelia Vavadakua for the State Ms. Talei Kean for the Accused
Dates of Trial	:	16-18 October 2017
Summing Up	:	20 October 2017
Judgment	:	20 October 2017
Sentence	:	24 October 2017

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "T.T."

SENTENCE

- [1] Pita Colasawiri you have been found guilty and convicted of the following offences for which you were charged:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, unlawfully and indecently assaulted T.T.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, penetrated the vagina of T.T., a child under the age of 13 years, with his tongue.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 3 days. The complainant (T.T.), a medical officer and one police witness gave evidence for the prosecution.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors, by a majority decision, found you guilty of the two counts of Sexual Assault and Rape for which you were charged. Having reviewed the evidence, this Court decided to accept the majority opinion of the Assessors and found you guilty and convicted you of the said two charges.
- [4] It was proved during the trial that, on the 15 October 2016, you unlawfully and indecently assaulted the complainant, by touching her vagina. It was also proved that, on the 15 October 2016, you raped the complainant, who was a child under the age of 13 years, by penetrating her vagina, with your tongue.
- [5] You are the maternal grandfather of the complainant. The complainant was only 8 years of age at the time you committed the above offences on her, and as such, she was a juvenile.
- [6] The complainant testified in Court that when you were licking her vagina it had been paining her. You had been licking her vagina for a long time. She had felt frightened. The complainant further testified that after the incident when she was wearing her clothes, which you had taken out, she had felt pain in her body. When asked which part of her body was paining, she specifically referred to her vagina.

[7] The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 ("Crimes Act") carries a maximum penalty of imprisonment for life.

[8] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of *Mohammed Kasim v. The State* [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

"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."

[9] In the case of *State v. Marawa* [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice Gates stated:

"Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences".

[10] The High Court in the case of *State v. AV* [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); stated:

"Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults 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".

[11] In the case of *Anand Abhay Raj v. The State* [2014] FJSC 12; CAV 03 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

[12] In determining the starting point within the said tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

- [13] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years for the count of Rape.
- [14] The aggravating factors are as follows:
- (i) You are the maternal grandfather of the complainant.
 - (ii) Being her grandfather you should have protected her. Instead you have breached the trust expected from you and the breach was gross.
 - (iii) There was a large disparity in age between you and the complainant.
 - (iv) You took advantage of the complainant's vulnerability, helplessness and naivety.
 - (v) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- [15] You are 54 years of age, married with one child. You are a farmer and use to plant cassava and root crops for your family. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [16] It is confirmed that you are a first offender. In terms of the Previous Convictions Report filed in Court, there have been no previous convictions recorded against you over the past 10 years. Therefore, this Court considers you as a first offender.
- [17] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 15 years. As I have stated above, considering that you are a first offender, I deduct 3 years from your sentence for your previous good character. Your sentence is now 12 years.
- [18] You have been convicted of one count of Sexual Assault in terms of Section 210(1) (a) of the Crimes Act (First Count).
- [19] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [20] In the cases of *State v. Abdul Khaiyum* [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012) and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.
- [21] It was held in *State v Laca* (supra) "The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks."

"A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three 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 part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

[22] In this case it has been proven that you touched the vagina of the complainant. This would clearly come under category 2 above. As such, in the light of the above guiding principles, and taking into consideration the above aggravating factors and also the fact that you are a first offender, I sentence you to 4 years imprisonment for the count of Sexual Assault under Section 210 (1) of the Crimes Act.

[23] In the circumstances, your sentences are as follows:

First Count - Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act – 4 years imprisonment.

Second Count – Rape in terms of Section 207 (1) and (2) (b) and (3) of the Crimes Act - 12 years imprisonment.

I order that both these sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 12 years.

[24] Accordingly, I sentence you to a term of imprisonment of 12 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 10 years of that sentence.

[25] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of

the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

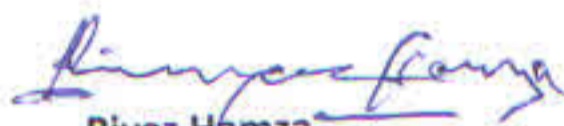
[26] You have been in custody for this case since 24 October 2016, the day you were arrested. Accordingly, you have been in custody for exactly 1 year to the day. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 1 year should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[27] In the result, you are sentenced to a term of imprisonment of 12 years with a non-parole period of 10 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 11 years.

Non-parole period - 9 years.

[28] You have 30 days to appeal to the Court of Appeal if you so wish.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT LABASA

Dated this 24th Day of October 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Labasa.
Solicitor for the Accused : Office of the Legal Aid Commission, Labasa.