

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 121 of 2017

STATE

V

EPARAMA TEKEI

Counsel : Ms. Lavenia Bogitini for the State
Mr. Aseri Vakaloloma for the Accused

Dates of Trial : 13, 15-17 and 21-22 November 2017

Summing Up : 27 November 2017

Judgment : 29 November 2017

Sentence : 11 December 2017

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "APLT also known as PV" or simply as "PV"

SENTENCE

[1] Eparama Tekei you were charged with the following offences:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the vagina of **APLT also known as PV**, a child under the age of 13 years, with his finger.

COUNT TWO

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the anus of **APLT also known as PV**, a child under the age of 13 years, with his finger.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 6 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by an unanimous decision, the three Assessors found you not guilty of the two charges of Rape brought against you. However, by an unanimous decision, the three Assessors found you guilty for the alternative charge of Sexual Assault in respect of count one, and not guilty for the alternative charge of Sexual Assault in respect of count two.
- [4] Having reviewed all the evidence, this Court agreed with the unanimous opinion of the Assessors finding you not guilty of the two charges of Rape. This Court also agreed with the unanimous opinion of the Assessors finding you guilty of the lesser or alternative count of Sexual Assault in respect of count one. Accordingly, you were convicted for the offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act), in respect of count one.
- [5] Considering the totality of the evidence in this case, it has been established beyond reasonable doubt that you unlawfully and indecently assaulted the complainant by touching her vagina with your finger and therefore, committed the offence of Sexual Assault.
- [6] The complainant was only 3 years and 10 months of age at the time you committed the above offence on her, and as such, she was a juvenile.

- [7] The offence of Sexual Assault in terms of Section 210 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [8] 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.
- [9] 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)."

- [10] In this case it has been proven that you touched the vagina of the complainant with your finger. This is contact with the genitalia of the complainant using part your body other than the genitalia, and would clearly come under category 2 (ii) above.
- [11] In the case of **State v. Bulivakarua** [2014] FJHC 928; HAC 54 of 2013 (17 December 2014); His Lordship Justice Rajasinghe held:

"This is a case of sexually abusing of a child under the age of 13 years old by a close family member within the family environment. Sexually assaulting children by close family members in manipulating the family environment and the relationship they have with the victim is a prevalent offence in the society, which needs greater judicial intervention with responsibility in order to demonstrate that such offences are condemned and denounced by the civilised society without any reservation."

- [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 2 years for Sexual Assault.

[14] The aggravating factors are as follows:

- (i) You were the intended adoptive father of the complainant. You were in a de-facto relationship with the intended adoptive mother of the complainant.
- (ii) The complainant considered you as her own father. Being the intended adoptive father 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. The complainant was only 3 years and 10 months of age at the time; whereas you are 32 years of age.
- (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 32 years of age, and was living in a de-facto relationship for the past 7 years. You are said to be a graduate of TPF (Trade Productivity of Fiji), and was employed at the Sustainable Forest Industries Limited (SFIL) at Pacific Harbour. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.

[16] In terms of the Previous Convictions Report filed in Court, there are four previous convictions recorded against you. However, none of those convictions are for an offence of a sexual nature. Therefore, this Court considers you as a person of previous good character.

[17] You have also submitted in mitigation that you are remorseful of your actions. This Court accepts your show of remorse as genuine.

[18] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 7 years. Considering the above mentioned mitigating factors, I deduct 3 years from your sentence. Your sentence is now 4 years.

[19] In the circumstances, your sentence is as follows:

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

[20] Accordingly, I sentence you to a term of 4 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act No. 42 of 2009, I order that you are not eligible to be released on parole until you serve 3 years of that sentence.

[21] 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.”

[22] You have been in custody for this case since 7 April 2017, the day you were arrested. Accordingly, you have been in custody for 8 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 8 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[23] In the result, you are sentenced to a term of imprisonment of 4 years with a non-parole period of 3 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 3 years and 4 months.

Non-parole period - 2 years and 4 months.

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



Dated this 11th Day of December 2017


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Vakaloloma & Associates, Suva.