

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 399 of 2016

STATE

v

ANANAIASA QAQATURAGA

Counsel : Ms. Lavenia Bogitini for the State  
Ms. Talei Kean with Ms. Anisha Singh for the Accused

Dates of Trial : 3-5 December 2018

Summing Up : 6 December 2018

Judgment : 10 December 2018

Sentence : 17 December 2018

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

### SENTENCE

- [1] Ananaiasa Qaqaturaga, you have been found guilty and convicted of the following offence for which you were charged:

## COUNT ONE

### Statement of Offence

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

### Particulars of Offence

**ANANAIASA QAQATURAGA**, on the 15<sup>th</sup> of October 2016, at Gau Island, in the Eastern Division, penetrated the vagina of **MS** with his penis, without her consent.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 3 days. The complainant, MS, her first cousin, Elenoa Bainivalu, and her mother, Naina Qaranivalu, testified on behalf of the prosecution.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you not guilty of the charge. However, having reviewed the evidence, this Court decided that the unanimous opinion of the Assessors in finding you not guilty was perverse and not justified. Accordingly, this Court found you guilty and convicted you of the said charge.
- [4] It was proved during the trial that, on 15 October 2016, at Gau Island, you penetrated the vagina of MS, with your penis, without her consent.
- [5] It is admitted that you are the complainant's maternal uncle. She refers to you as 'Tu Ana'. The complainant was only 17 years of age, at the time you committed the above offence on her (her date of birth being 22 December 1998), and as such, she was a juvenile.
- [6] The complainant clearly testified as to how, on that fateful day, you penetrated her vagina with your penis, without her consent. At your request the complainant had come to your house to wash your clothes. Your wife was said to be in Suva at the time and you had sent your 12 year old daughter out of the house. Thus only you and the complainant were at your house at the time. The complainant had been washing clothes in your bathroom. You had come into the bathroom, pushed the complainant against the wall, pulled away her sulu, pulled down her panty, and forcefully inserted your penis into her vagina. By your shameful act you have robbed the innocence of a 17 year old child, who is your niece.
- [7] In terms of the Victim Impact Assessment Report filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. It is stated that the complainant has flashbacks of the painful experience and finds it very difficult to trust those around her, including family members. She is said to be

continuously fearful and anxious. The incident has caused the complainant to withdraw from socializing with family members.

- [8] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [9] 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.
- [10] 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."*

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

*"Parliament has prescribed the sentence of life imprisonment for rape. 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".*

*"A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public's disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly the sentence is set in order to protect women from such crimes: **Roberts and Roberts** (1982) 4 Cr. App R(S) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S."*

- [12] In *The State v Lasaro Turagabeci and Others* (supra) Pain J had said:

*"The Courts have made it clear that rapists 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 to 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 sentences."*

- [13] His Lordship Justice Daniel Goundar, in the case of **State v. AV** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

*"...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".*

- [14] In the case of **State v. Tauvoli** [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

*"Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and the Courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound."*

- [15] His Lordship Justice Goundar in **State v Apisai Takalaibau** – Sentence [2018] FJHC 505; HAC 154 of 2018 (15 June 2018); making reference to statistics of Aggravated Burglary cases filed in the High Court in 2017 and 2018, stated that "A factor that influences sentencing is the prevalence of the offence in the community.....The more prevalent is an offence, the greater the need is for deterrence and protection of the community."

- [16] This has been recently affirmed by the Supreme Court in **Alfaaz v. State** [2018] FJSC 17; CAV0009.2018 (30 August 2018); where it was recognized that the prevalence of cases of child rape calls for harsher punishments to be imposed by Courts. Their Lordships held:

*"According to the statistics released by the Director of Public Prosecutions Office it appears that a number of rape victims as well as victims under the age of 18 years and victims in domestic relationships or relatives were also victims of other serious sexual offences. The rape of children is a very serious offence and it is very frequent and prevalent in Fiji. The courts must impose harsh penalties dictated by the legislation. The courts should not leniently look at this kind of serious cases of rape of children of tender years when punishing the offenders."*

- [17] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 0003 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.

- [18] However, in the recent case of *Aitcheson v State* [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates stated that the sentencing tariff for the Rape of a juvenile should now be increased to between 11 and 20 years imprisonment. His Lordship held:

*"The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20<sup>th</sup> August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms."*

- [19] 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."*

- [20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 11 years imprisonment for the count of Rape.

- [21] The aggravating factors are as follows:

- (i) You were the maternal uncle of the complainant. Being so you should have protected her. Instead you have breached the trust expected from you and the breach was gross.
- (ii) There was a large disparity in age between you and the complainant. The complainant was 17 years of age at the time you committed the offence on her. At the time you were 39 years of age. Therefore, there was a difference in age of 22 years.
- (iii) You lured the complainant to your house to wash your clothes. Then you sent your 12 year old daughter out of the house, so that the complainant would be alone with you. This clearly indicates that there was pre-planning on your part to commit this offence.
- (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.

[22] Ananaiasa Qaqaturaga, you are now 42 years of age. You are said to be married and residing in Gau Island with your family. You have 8 children, aged from 4 years to 19 years. 5 of your children reside with you at Gau Island, while 3 of them reside in Suva. You are said to be the sole breadwinner of your family. You have been a farmer planting kava. You approximately earn \$10,000 per annum from the sale of kava. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[23] As per the Antecedent Report filed it was submitted by the State that there are no previous convictions recorded against you.

[24] The State submits that the fact that you do not have any previous convictions is of little value considering the circumstances of this case. However, this Court cannot agree with this contention of the State and considers you as a person of previous good character and will grant you an appropriate concession for same.

[25] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 16 years imprisonment. Considering your previous good character, I reduce 2 years from your sentence. Your sentence is now 14 years imprisonment for the count of Rape.

[26] Accordingly, I sentence you to a term of imprisonment of 14 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 12 years of that sentence.

[27] 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."*

[28] You were in remand custody for this case from 1 November 2016 to 27 January 2017, when you were granted bail by this Court. Thereafter, you have been in remand custody since 10 December 2018, the day on which I delivered the Judgment in this case. Accordingly, you have been in custody for a period of about 3 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[29] In the result, you are sentenced to a term of imprisonment of 14 years with a non-parole period of 12 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 13 years and 9 months.

Non-parole period - 11 years and 9 months.

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



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 17<sup>th</sup> Day of December 2018

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