

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 91 of 2016

STATE

V

JOSATEKI VAKACEGU

Counsel : Ms. Moumita Chowdhury for the State
Ms. Shantel Hazelman with Ms. Esiteri Radrole for the Accused

Dates of Trial : 18-20 & 23 April 2018

Summing Up : 24 April 2018

Judgment : 25 April 2018

Sentence : 30 April 2018

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

SENTENCE

[1] Josateki Vakacegu you were charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his penis.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 4 days. The complainant (AA), her grandmother, Mere Rokotuni, and a Medical Officer, Dr. Kelerayani Namudu, gave evidence for 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 guilty of the first count of Rape, and found you guilty for the alternative charge of Sexual Assault in respect of the second count. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors and accordingly found you guilty and convicted you for the offence of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 ("Crimes Act"), in respect of count one; and Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, in respect of count two.
- [4] It was proved during the trial that, on the 15 February 2016, you raped the complainant, who was a child under the age of 13 years, by penetrating her vagina, with your finger. It was also proved that, on the 15 February 2016, you unlawfully and indecently assaulted the complainant, by placing your penis on the complainant's external genitalia (her vulva), but without penetrating the external genitalia.
- [5] You are the granduncle of the complainant. The complainant was only 9 years and 11 and a half months 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 penetrating her vagina with your finger she had felt pain. She said your finger had been inside her vagina for a few minutes.
- [7] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the factors that a Court should take into account during the sentencing process. Section 4 (1) and 4 (2) of the Sentencing and Penalties Act is reproduced below.

"4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

(2) In sentencing offenders a court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option."

[8] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.

[9] 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."

[10] 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".

[11] His Lordship Justice 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”.

- [12] 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.”

- [13] 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.
- [14] 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.”

- [15] 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 imprisonment for the count of Rape.

- [16] The aggravating factors are as follows:

- (i) You are the granduncle of the complainant.
- (ii) Being her granduncle 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 merely 10 years of age and you were 47 years of age, at the time of the 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.
- [17] You are now 49 years of age, married with two children, who are aged 21 years and 18 years respectively. Your wife is said to be 3 months pregnant with your third child. You are said to be a construction worker, earning about \$160 weekly. You are the sole bread winner of your family. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [18] 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.
- [19] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 15 years imprisonment. 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 imprisonment. Accordingly, I sentence you to 12 years imprisonment for the offence of Rape.
- [20] You have been convicted of one count of Sexual Assault in terms of Section 210(1) (a) of the Crimes Act (Second Count).
- [21] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [22] 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.
- [23] 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)."

[24] In this case it has been proven that you placed your penis on the complainant's external genitalia (her vulva). This would clearly come under category 1 above, which refers to contact between the naked genitalia of the offender and naked genitalia of the victim. As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 4 years imprisonment for the offence of Sexual Assault, in terms of Section 210 (1) of the Crimes Act.

[25] Considering the aggravating factors aforementioned, I increase your sentence by a further 5 years. Now your sentence is 9 years imprisonment. 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 6 years imprisonment. Accordingly, I sentence you to 6 years imprisonment for the offence of Sexual Assault.

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

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

Second Count - Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act – 6 years imprisonment.

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

[27] 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.

[28] 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."

[29] You have been in remand for this case from 15 February 2016 up to the time you were enlarged on bail on 18 March 2016. Thereafter, you have been in remand custody since 25 April 2018, the day on which I delivered the judgment in this case. Accordingly, you have been in remand custody for a little over one month. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of one and a half months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[30] 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 and 10 and a ½ months.
Non-parole period	-	9 years 10 and a ½ months.

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



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 30th Day of April 2018

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