

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 81 of 2016

STATE

V

EMOSI LCAVI

Counsel : Mr. Taitusi Tuenuku for the State  
Ms. Sokoveti Daunivesi with Ms. Swarvana Prakash for the Accused

Dates of Trial : 21-24 May 2018

Summing Up : 25 May 2018

Judgment : 28 May 2018

Sentence : 30 May 2018

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

## SENTENCE

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

### COUNT 1

#### Statement of Offence

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

**Particulars of Offence**

EMOSI LCAVI, between the 1<sup>st</sup> day of August 2015 and 31<sup>st</sup> day of August 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of KC without her consent.

**COUNT 2**

**Statement of Offence**

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

**Particulars of Offence**

EMOSI LCAVI, between the 1<sup>st</sup> day of October 2015 and 31<sup>st</sup> day of October 2015, at Waikete Village, Nausori in the Central Division, had carnal knowledge of KC without her consent.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 4 days. The complainant, her aunt (Venina Rakau Wati), and a medical officer (Dr Bandana Priya Dharshani Prasad) 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 two charges of Rape. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors and found you guilty and convicted you of the said charges.
- [4] It was proved during the trial that, between 1 August 2015 and 31 August 2015, at Waikete Village in Nausori, you raped the complainant, by penetrating her vagina with your penis, without her consent, and at the time you knew or believed that the complainant was not consenting, or you were reckless as to whether or not she was consenting.
- [5] It was further proved during the trial that, between 1 October 2015 and 31 October 2015, at Waikete Village in Nausori, you raped the complainant, by penetrating her vagina with your penis, without her consent, and at the time you knew or believed that the complainant was not consenting, or you were reckless as to whether or not she was consenting.

- [6] You are a grandfather (actually granduncle) of the complainant. The complainant was only 13 years of age at the time you committed the above offences on her (her date of birth is 23 December 2001), and as such, she was a juvenile.
- [7] The complainant testified in Court as to how you showed her \$5.00 and lured her close to you and then forcibly had sexual intercourse with her at the pig pen, in August 2015. Similarly, she testified in Court as to how you threatened her and then forcibly had sexual intercourse with her at the pig pen, in October 2015.
- [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] 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 Sathyaa 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.

[16] 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."*

**[17]** 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 first count of Rape (Count 1).

**[18]** The aggravating factors are as follows:

- (i) You are the grandfather of the complainant (actually her granduncle). The complainant considered you as her grandfather.
- (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. The complainant was merely 13 years of age and you were 69 years of age, at the time of the offence. Therefore, there was a difference in age of 56 years.
- (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.
- (vi) The complainant has been emotionally and psychologically traumatised by this incident. During the course of her evidence the complainant testified to the emotional and psychological effects this incident had on her. She testified that the idea of killing herself or committing suicide comes to her mind. Her performance at school and her studies has been seriously affected. Her reputation in her village has also been tarnished. The Victim Impact Assessment Report submitted to Court by the State further confirms this position.
- (vii) You are convicted of multiple offending.

**[19]** You are now 71 years of age and said to be a widower. You have 5 children. You are employed on a contractual basis as a cleaner with the Suva City Council. These are all personal circumstances and cannot be considered as mitigating circumstances.

**[20]** As per the Antecedent Report filed it was submitted by the State that there are four previous convictions recorded against you, all dating back to the 1970's. There have

been no previous convictions recorded against you over the past 40 years. Therefore, this Court considers you as a person of previous good character.

- [21] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 15 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 13 years for Count 1.
- [22] Similarly, 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 second count of Rape (Count 2).
- [23] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 15 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 13 years for Count 2.
- [24] In the circumstances, your sentences are as follows:

Count 1- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 13 years imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 13 years imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 13 years.

- [25] The next issue for consideration is whether this Court should grant you any concessions due to your advanced age. Your Counsel made reference to the case of *State v. Spowart* [2013] FJHC 352; HAC 89 of 2011 (24 July 2013), where his Lordship Justice Madigan had sentenced a 74 year old man to a term of imprisonment of 5 years, with a non-parole period of 4 years, for the Rape of a 5 year old girl.
- [26] Similarly in *State v. Banuve* [2016] FJHC 320; HAC 183 of 2015 (25 April 2016), his Lordship Justice Aluthge sentenced a 72 year old man to a term of imprisonment of 8 years, with a non-parole period of 5 years, for the Rape of an 8 year old girl.
- [27] Having perused the said authorities, I am of the opinion that the said two cases must be distinguished from the present case. This is due to the fact that in both those cases the accused had entered a guilty plea at the first available opportunity, thereby showing genuine remorse and, more importantly, relieving the complainants in the said cases from giving evidence in Court.

- [28] In **State vs. Catil** [2016] FJHC 705; HAC 224 of 2015 (5 August 2016), his Lordship Justice Perera in sentencing a 74 year old man to 10 years imprisonment with a non-parole period of 6 years, for the causing the Rape of a 4 year old girl, held as follows:

*"It stands to reason that a term of imprisonment will bring you immense hardship given your old age and your impaired hearing. However, the harm you have done to the victim and to her future is not outweighed by the hardship you may endure in serving a prison term. The victim who is 8 years old now will suffer throughout her remaining lifetime due to your shameful conduct."*

- [29] Her Ladyship Madam Justice Nazhat Shameem in the case of **Rokota v. The State** [2002] FJHC 168; HAA 68 J of 2002S (23 August 2002) held as follows:

*"...However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character."*

- [30] Making reference to Principles of Sentencing (2<sup>nd</sup> Edition), by D. A. Thomas, Her Ladyship said:

*"Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released."*

- [31] Considering all the facts and circumstances of this case, especially the fact that the victim herself was merely 13 years of age at the time of the incident, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

- [32] Accordingly, I sentence you to a term of 13 years imprisonment.

- [33] However, in determining the non-parole period to be imposed on you, I have given due consideration to your advanced age. Accordingly, pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 9 years imprisonment.

- [34] In doing so I have taken into consideration the judgement of the Court of Appeal in **Tora v. State** [2015] FJCA 20; AAU 63 of 2011 (27 February 2015), which was upheld by the Supreme Court in **Tora v. State** [2015] FJSC 23; CAV 11 of 2015 (22 October 2015).

[35] 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."*

[36] However, in this case it is admitted that you were granted bail on the very first day you were produced in the Magistrate's Court for this matter (which was on 1 February 2016). Thereafter, you were remanded on 28 May 2018, the day on which I delivered the judgment in this case. Thus you have been in remand only for 2 days. For this reason, I will not be considering any period of time as served by you in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[37] In the result, you are sentenced to a term of imprisonment of 13 years with a non-parole period of 9 years.

Head Sentence - 13 years.  
Non-parole period - 9 years.

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

  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI



Dated this 30<sup>th</sup> Day of May 2018

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