

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2016

STATE

V

AK

Counsel : Ms. Lavenia Bogitini for the State
Ms. Swarvana Prakash with Mr. Krisheel Chang for the Accused

Dates of Trial : 10-13, 16-17, 19-20 & 23 July 2018

Summing Up : 24 July 2018

Judgment : 25 July 2018

Sentence : 31 July 2018

The name of the accused and the complainant are suppressed. Accordingly, the accused will be referred to as "AK" and the complainant will be referred to as "LWN".

SENTENCE

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

AK on the 23rd of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of **LWN**, a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

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

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the mouth of **LWN**, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, penetrated the vagina of **LWN**, a child under the age of 13 years, with his tongue.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

AK on the 24th of December 2015, at Beqa Island, in the Central Division, unlawfully and indecently assaulted **LWN**, by fondling and sucking the breasts of the said **LWN**.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 9 days. The complainant, **LWN**, her aunt, Arieta Naikabisa, a Medical Officer, Dr. Sainimili Bulabu and four police witnesses; namely DC 4349 Tevita Naiteqe, Sergeant 2030 Tuaci Isaac Rasoqosoqo, WPC 4567 Maria Fane and PC 3633 Ravin Naicker gave

evidence on behalf of the prosecution. You gave evidence on your own behalf and also called witness Maikeli Tuwai.

- [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 count one. By a majority decision, the Assessors found you not guilty of counts two, three and four. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors, in respect of count one and found you guilty and convicted you of the said charge. Having reviewed the evidence, this Court was of the opinion that the majority decision of the Assessors in finding you not guilty in respect of counts 2, 3 and 4 to be perverse. Accordingly, this Court found you guilty and convicted you of the said charges.
- [4] It was proved during the trial that, on 23 December 2015, at Beqa Island, you penetrated the vagina of LWN, a child under the age of 13 years, with your tongue.
- [5] It was also proved during the trial that, on 24 December 2015, at Beqa Island, you penetrated the mouth of LWN, a child under the age of 13 years, with your penis.
- [6] It was further proved during the trial that, on 24 December 2015, at Beqa Island, you penetrated the vagina of LWN, a child under the age of 13 years, with your tongue.
- [7] And finally it was proved that, on 24 December 2015, at Beqa Island, you unlawfully and indecently assaulted LWN by fondling and sucking her breasts.
- [8] You are an older cousin of the complainant. The complainant was only 10 years of age, at the time you committed the above offences on her (her date of birth being 23 December 2005), and as such, she was a juvenile.
- [9] The complainant clearly testified that on 23 December 2015, you penetrated her vagina with your tongue.
- [10] The complainant further testified that on 24 December 2015, you penetrated her vagina with your tongue; you unlawfully and indecently assaulted her by sucking her breasts; and that you penetrated her mouth with your penis.
- [11] 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 action. It is stated that the complainant is unable to concentrate on her studies and school activities, she has dropped in her school examinations (her results have declined), she is suffering from loss of memory and there has been an adverse change to her life style (she has been writing love notes at such a tender age).
- [12] 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.

[13] 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.

[14] 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."

[15] 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."*

[16] 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."

[17] 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”.

- [18] 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.”

- [19] 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.

- [20] In determining the starting point within the said tariff, the Court of Appeal, in **Laisasa 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.”

- [21] 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 first count of Rape.

- [22] The aggravating factors are as follows:

- (i) You are an older cousin of the complainant. Being her older cousin 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 merely 10 years of age at the time you committed the

offences on her. At the time you were 36 years of age. Therefore, there was a difference in age of 26 years.

- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (iv) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- (v) You are now convicted of multiple offending.

[23] You are now 39 years of age, married and residing with your wife and 4 children. Your children are aged 11, 9, and 7 years (twins) respectively. You are a farmer by profession, earning around \$80.00 per fortnight. You submit that you are the sole breadwinner of your family. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[24] As per the Antecedent Report filed it was submitted by the State there are no previous convictions recorded against you. Therefore, this Court considers you as a person of previous good character.

[25] 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 3 years from your sentence. Your sentence is now 12 years imprisonment for count one.

[26] 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 imprisonment for the second count of Rape.

[27] 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 3 years from your sentence. Your sentence is now 12 years imprisonment for count two.

[28] 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 imprisonment for the third count of Rape.

[29] 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 3 years from your sentence. Your sentence is now 12 years imprisonment for count three.

[30] You have been convicted of one count of Sexual Assault in terms of Section 210(1) (a) of the Crimes Act (Count Four).

- [31] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [32] 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.
- [33] 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)."

- [34] In this case it has been proven that you sucked the complainant's breasts. This would clearly come under category 3 above, which refers to contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia). 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 2 years imprisonment for the offence of Sexual Assault, in terms of Section 210 (1) of the Crimes Act.

[35] Considering the aggravating factors aforementioned, I increase your sentence by a further 5 years. Now your sentence is 7 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 4 years imprisonment. Accordingly, I sentence you to 4 years imprisonment for the offence of Sexual Assault.

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

Count 1- Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act - 12 years imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act – 12 years imprisonment.

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

Count 4- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 4 years imprisonment.

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

[37] 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.

[38] 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.”

[39] You have been in remand custody for this case from 27 May 2016 to 29 July 2016, when you were granted bail by this Court. Thereafter, you have been in remand custody since 25 July 2018, the day on which I delivered the Judgment in this case. Accordingly, you have been in custody for a total period of about 2 months and 10 days. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 2 months and 10 days should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.


[40] 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 9 months and 20 days.

Non-parole period - 9 years and 9 months and 20 days.

[41] 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 31st Day of July 2018

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