

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 205 of 2017

STATE

V

MALAKAI VULI

Counsel : Ms. Kimberly Semisi for the State  
Ms. Litiana Ratidara with Ms. Ruci Nabainivalu for the Accused

Dates of Trial : 2-5 September and 16-19 September 2019

Summing Up : 20 September 2019

Judgment : 14 October 2019

Sentence Hearing : 30 October 2019

Sentence : 12 November 2019

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

## SENTENCE

- [1] Malakai Vuli, as per the Information, filed in Court on 31 October 2017, you were charged with the following offences:

### FIRST COUNT

#### *Statement of Offence*

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

#### *Particulars of Offence*

**MALAKAI VULI** on the 19<sup>th</sup> day of May 2017 at Suva in the Central Division had carnal knowledge of **TTM** without her consent.

## SECOND COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 19<sup>th</sup> day of May 2017 at Suva in the Central Division unlawfully and indecently assaulted **TTM** by sucking her breast.

## THIRD COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 9<sup>th</sup> day of June 2017 at Suva in the Central Division had carnal knowledge of **TTM** without her consent.

## FOURTH COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 9<sup>th</sup> day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted **TTM** by sucking her breast.

## FIFTH COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 18<sup>th</sup> day of June 2017 at Suva in the Central Division had carnal knowledge of **TTM** without her consent.

## SIXTH COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 18<sup>th</sup> day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted **TTM** by touching her vagina.

## SEVENTH COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 23<sup>rd</sup> day of June 2017 at Suva in the Central Division had carnal knowledge of **TTM** without her consent.

## EIGHTH COUNT

### *Statement of Offence*

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

### *Particulars of Offence*

**MALAKAI VULI** on the 23<sup>rd</sup> day of June 2017 at Suva in the Central Division unlawfully and indecently assaulted **TTM** by sucking her breast.

- [2] You pleaded not guilty to the charges and the ensuing trial was held over 8 days.
- [3] At the end of the case for the prosecution, Court found you not guilty of Count 6 and acquitted you of that count.
- [4] 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 remaining seven counts. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors in respect of all charges, except their decision in respect of Count 8. Accordingly, this Court found you guilty and convicted you of Counts 1, 2, 3, 4, 5 and 7.

- [5] Therefore, you now stand convicted of four counts of Rape (Counts 1, 3, 5 and 7), and two counts of Sexual Assault (Counts 2 and 4).
- [6] The prosecution, in support of their case, called the complainant (TTM), her mother, Elina Senirewa, witness Lona Heilana and Medical Officer, Dr. Shelvin Kapoor. The prosecution also tendered the Birth Certificate and the Medical Examination Report of complainant TTM as Prosecution Exhibits **PE1 & PE2**.
- [7] At the time of the offending you were legally married to the complainant's mother. Thus, you were the complainant's step-father. The complainant's date of birth is 12 April 2001. Therefore, at the time you committed these offences, the complainant would have been 16 years old, and as such a juvenile.
- [8] The complainant clearly testified to all the acts you perpetrated on her. She testified as to how you had raped her by forcibly inserting your penis into her vagina on four occasions; namely on 19 May 2017, 9 June 2017, 18 June 2017, and 23 June 2017. The complainant also testified as to how you had sexually assaulted her by unlawfully and indecently sucking her breast on 19 May 2017 and 9 June 2017.
- [9] The Victim Impact Statement of the complainant has been filed in Court. Therein, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. The impact of your actions on the victim is said to be continuing, as it is reported that the complainant is still distressed and traumatized by the incident.
- [10] Section 4(1) 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. The factors are as follows:

*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.*

[11] I have duly considered the above factors in determining the sentence to be imposed on you.

[12] 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.

[13] 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."*

[14] 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."*

[15] 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."*

[16] 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”.*

- [17] In the case of **State v. Mario 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.”*

- [18] 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.”

- [19] This has been 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.”*

- [20] 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.

- [21] 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.”*

- [22] 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.”*

- [23] 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 first count of Rape.

- [24] The aggravating factors (which would be relevant to all six counts) are as follows:

- (i) You were the step-father 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 16 years of age at the time you committed these offences on her. At the time you were 45 years of age. Therefore, there was a difference in age of nearly 29 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.

- [25] Malakai Vuli, you are now 47 years of age (Date of Birth 24 April 1972). You have stated that prior to being remanded for this case you were residing with your cousin at Jittu Estate, Raiwaqa and was employed as a Security Officer at Carpenters, Walu Bay.

However, these are all personal circumstances and cannot be considered as mitigating circumstances.

- [26] Malakai Vuli you cannot be considered as a first offender. As per the Antecedent Report filed by the State it is confirmed that there are 4 previous convictions recorded against you, which includes 2 convictions for Indecent Assault, for which you have been sentenced to 18 months and 4 years imprisonment respectively. However, I concede that the said 4 convictions were imposed on you during the period 1 September 1997 and 19 September 2005. Therefore, this Court considers you as a person of recent good character. However, the weight I would be attaching to this factor and the concession to be granted to you would be very minimal.
- [27] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 16 years' imprisonment for the first count. Considering your recent good character, I deduct only one year from your sentence. Now your sentence would be 15 years' imprisonment for Count 1.
- [28] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentence at 11 years imprisonment for the third, fifth and seventh counts of Rape. Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years for each count. Now your sentence is 16 years' imprisonment for the third, fifth and seventh counts. For your recent good character I reduce one year from your sentences. Now your sentence is 15 years' imprisonment for each of the third, fifth and seventh counts of Rape.
- [29] You have been convicted of two counts of Sexual Assault in terms of Section 210(1) (a) of the Crimes Act (Counts 2 & 4).
- [30] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [31] 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.
- [32] 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)."

- [33] In this case it has been proven that you unlawfully and indecently assaulted complainant TTM by sucking her breasts. In my opinion, this would clearly come under category 3 above. 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 second count of Sexual Assault, in terms of Section 210 (1) of the Crimes Act.
- [34] Considering the aggravating factors aforementioned, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 7 years imprisonment. Considering your recent good character, I deduct one year from your sentence. Now your sentence would be 6 years' imprisonment for Count 2.
- [35] On the same basis, I impose on you a sentence of 6 years' imprisonment for Count 4 as well.
- [36] In the circumstances, your sentences are as follows:
- Count 1 - Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years' imprisonment.
  - Count 2 - Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years' imprisonment.
  - Count 3 - Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years' imprisonment.

- Count 4 - Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years’ imprisonment.
- Count 5 - Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years’ imprisonment.
- Count 7 - Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years’ imprisonment.

[37] I order that all six sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 15 years.

[38] Accordingly, I sentence you to a term of 15 years’ imprisonment.

#### The imposing of a non-parole period

[39] In the recent case of *Nacani Timo v State* [2019] FJSC 22; CAV0022.2018 (30 August 2019); the Supreme Court discussed, inter alia, the issues pertaining to the fixing of non-parole periods on convicted persons.

[40] Having analyzed Section 18 of the Sentencing and Penalties Act, which stipulates the provisions for fixing a non-parole period by the sentencing Court, and also the above judgment of the Supreme Court, this Court in *State v. Ratu Sela Dradra Matia* [2019] FJHC 1004; HAC259.2018 (21 October 2019) came to the following finding:

*“[47] Although, as I have mentioned earlier, the provisions of Section 18 of the Sentencing and Penalties Act were clear and unambiguous and required no further interpretation, the Supreme Court, the highest Court in our land, has interpolated further conditions which a sentencing Court should now consider prior to fixing a non-parole period. I am of the view that I am bound by this judgment of the Supreme Court.*

*[48] Therefore, considering the provisions of the legislation (Section 18 of the Sentencing and Penalties Act) and the judgment of the Supreme Court cumulatively, the following factors emerge:*

- 1. Fixing of a non-parole period should be exercised by the Courts in exceptional cases.*
- 2. The decision to fix or decline to fix a non-parole period must be taken by a Court after hearing the convict.*
- 3. The decision to fix or decline to fix a non-parole must be accompanied by reasons.*

[49] As to the first factor, the Supreme Court has not provided any guidance as to what would fall under the category of "exceptional cases". Thus, the sentencing Court would have a wide discretion in deciding on this. In my view, there would be no prohibition in Court considering the very same factors that it considered in arriving at the final sentence against the convict. This could include, inter-alia, the nature and gravity of the particular offence, the offender's culpability and degree of responsibility for the offence, the impact of the offence on any victim and the injury, loss or damage resulting from the offence, and the aggravating circumstances relevant to the commission of the offence.

[50] As to the second factor, the hearing of the convict or his or her counsel can be done during the course of the sentencing hearing. In my view, no separate hearing would be required.

[51] As to the final factor, the Supreme Court has itself dictated that the accompanying reasons should be set out with an economy of words, as a part of a just, fair and reasonable procedure, keeping the interests of the convict and society (including the victim) in mind. Where the Court determines that the fixing of a non-parole period is inappropriate, the provisions of sub-section 18 (2) of the Sentencing and Penalties Act could be referred to as justification for doing so. The sub-section provides that the Court may decline to fix a non-parole period under sub-section 18 (1), if the Court considers that the nature of the offence, or the past history of the offender, deems it appropriate to do so.

[52] Further, it is also my opinion that the factors that a Court would be taking into account or considering in determining the first and third factors above, would usually overlap."

[41] I am of the opinion that considering all the facts and circumstances of this case, especially the aggravating factors referred to above, this is an appropriate case to fix a non-parole period to be served by you. Accordingly, pursuant to the provisions of Section 18 (1) of the Sentencing and Penalties Act, I fix your non-parole period as 12 years' imprisonment.

[42] 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."*

[43] I find from the record that you were arrested for this case on 4 July 2017 and had been in remand custody until 20 September 2018, when this Court granted you bail.

Thereafter, this Court cancelled your bail on 24 May 2019, and remanded you back into custody. You have been in remand since that day. Accordingly, I consider that you have been in custody for a total period of about 20 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 20 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[44] In the result, your final sentence is as follows:

Head Sentence - 15 years' imprisonment.

Non-parole period - 12 years' imprisonment.


Considering the time you have spent in remand (20 months), the time remaining to be served is as follows:

Head Sentence - 13 years and 4 months imprisonment.

Non-parole period - 10 years and 4 months imprisonment.

[45] 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 12<sup>th</sup> Day of November 2019

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