

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 53 OF 2014**

**STATE**

**v**

- 1. AME TUIVITI (Juvenile)**
- 2. VANAVASA DAVE**
- 3. KELEMETE LEPANI YAMOYAMO**
- 4. PENI GUSUIVALU (Juvenile)**

<b>Counsel:</b>	<b>Ms R. Uce, Mr S. Seruvatu</b>	<b>for State</b>
	<b>Ms L. Volau</b>	<b>for 1<sup>st</sup> and 4<sup>th</sup> Accused</b>
	<b>Ms V. Diroi</b>	<b>for 2<sup>nd</sup> Accused</b>
	<b>Ms K. Vulimainadave</b>	<b>for 3<sup>rd</sup> Accused</b>

**Date of Judgment: 31<sup>st</sup> January, 2019**

**Date of Sentence: 22<sup>nd</sup> February, 2019**

**SENTENCE RULING**

1. Ame Tuiviti, Vanavasa Dave, Kelemete Lepani Yamoyamo, Peni Gusuivalu, on the 21<sup>st</sup> day of January 2016, you were convicted of raping a girl under the age of 18 years.

2. The victim in this case was not a stranger to you. She was doing vocational studies attending the same school with you. The victim was a child aged 16 years at the time of the offence.
3. Ame Tuiviti, you took the lead in committing this offence. You, during school lunch hour, invited the victim to have a talk under a tree. She accepted your invitation because she had trusted you as a friend. When she came to the nearby cassava plantation, you pushed her to the ground. You closed her mouth when she tried to shout. You then removed her panty and forcibly penetrated her vagina with your penis, without her consent. You were a juvenile at the time of the offence.
4. Vanavasa Dave, when Ame had finished, you came and held victim's hand and closed her mouth. You lifted her skirt and forcefully put your penis into her vagina, while she was struggling to release herself.
5. Kelemete, you took the next turn. When the victim was trying to get away, you came and pushed her back to the ground and held her, and inserted your penis into her vagina without her consent.
6. Peni, you are the last person to follow suit. When the victim was on her way after being raped by your school mates, you followed her. When she refused to have sex with you, you threatened to blackmail her and inserted your penis into her vagina. You had carnal knowledge of her without her consent. You also were a juvenile at the time the offence.
7. The maximum penalty for Rape is life imprisonment.
8. Tariff for juvenile rape offending has recently been increased by the Supreme Court in view of disturbing prevalence in Fiji of sexual offences aimed at children. A sentence in the range of 11-20 years' imprisonment has been prescribed in *Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) where Gates CJ held:

“The tariff previously set in *Raj v The State* [2014] FJSC 12 CAV0003.2014 (20th 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”.

9. In sentencing offenders, the courts must have regard to the Constitution of Republic of Fiji and the proportionality principle in sentencing enshrined in it. Sentencing and Penalties Act 2009 requires the courts to have regard to the maximum penalty prescribed for the offence, current sentencing practice and applicable guidelines issued by the courts to arrive at a sentence that is just and reasonable in all the circumstances of the offending and the personality of the offender.
10. Deciding on an appropriate sentence that is commensurate with the circumstances of offence and the personality of each one of you is a challenging task. It has become more challenging to decide a suitable punishment for two juveniles when their individual and societal needs for deterrence come into play. Fiji’s juvenile justice system places a special emphasis on diversion, restoration and rehabilitation in its dealings with young people. This emphasis is backed by several international instruments to which Fiji is a signatory, which require the prioritization of diversion and the best interests of the child and incarceration as an absolute last resort for the minimum time necessary (Convention on the Rights of the Child arts 37(b), 40(3)(b); Beijing Rules, rules 11, 17.1(b)–(c), 19.1). Under these instruments, criminal sanctions must serve some rehabilitative or restorative function (Beijing Rules, Rule 17.1(b). As Fiji is signatory to the Convention on the Rights of the Child, Courts in Fiji are required to act in accordance with provisions of the Convention unless legislation specifies otherwise.
11. In Section 2 of the Juveniles Act 1973 a juvenile is defined as a person who has not attained the age of 18 years and includes a child and a young person. A child is a person who has not reached 14 years and a young person is a person who has turned 14 but has not reached 18 years. According to these definitions,

Ame Tuiviti and Peni Gusuivalu (1<sup>st</sup> and the 4<sup>th</sup> accused), you were young persons and consequently juveniles at the time the offence was committed.

12. Under section 30(1) of the Juveniles Act, no child can be ordered to be imprisoned for any offence and, under Section 30 (3), a young person shall not be ordered to be imprisoned for more than 2 years for any offence.
13. Ame Tuiviti and Peni Gusuivalu, although you were juveniles under the age of 18 years at the time of the offence, you are now adults. However, the Court of Appeal in *Komaisavai v State* [2017] FJCA 43; AAU154.2015 (28 April 2017) has held that for sentencing purposes the court should take into consideration the age of the offender at the time of the offence and not the age at the time of the sentence.

Justice Calanchini P observed:

“Under these definitions the second appellant was a young person and consequently juvenile at the time the offence was committed. Under section 30(1) of the Juveniles Act no child can be ordered to be imprisoned for any offence and a young person shall not be ordered to be imprisoned for more than 2 years for any offence. It stands to reason then, that the second Appellant could not have been sentenced to a term of imprisonment of more than 2 years. The sentence passed of 5 years and 6 months represents an arguable error in the exercise of the sentencing discretion since the appellant is entitled to be sentenced to the less severe sentence that applied to him as a juvenile at the time the offence was committed. Leave to appeal against sentence is granted”.

14. I give the benefit of this interpretation to Ame Tuiviti and Peni Gusuivalu, because you were young persons or juveniles at the time of the offence.

15. Sentencing a child or young person for sexual offences involves a number of different considerations from adults, the primary difference being the age and level of maturity. The law assumes that children and young people are less emotionally developed than adults; offending can arise through inappropriate sexual experimentation; gang or peer group pressure to engage in sexual activity; or a lack of understanding regarding consent, exploitation, coercion and appropriate sexual behaviour. The primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish. Children may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others [ vide: UK Sentencing Council's Definitive Guideline in relation to the sentencing of children and young people]
16. The age of the offender will be significant in the sentencing exercise in relation to non-consensual offences, especially if an offender is very young and the disparity in age between the offender and the victim is very small. The youth and immaturity of an offender must always be potential mitigating factors for the courts to take into account when passing sentence. However, where the facts of a case are particularly serious, the youth of the offender will not necessarily mitigate the appropriate sentence (*R v Paiwant Asi-Akram* [2005] EWCA Crim 1543, *R v Patrick M* [2005] EWCA Crim 1679).
17. For sentencing purposes, the law in Fiji recognizes the 18<sup>th</sup> birthday as the starting point of adulthood. However, it is well established by case law that the young age and /or lack of maturity of an offender do not cease to have any relevance on his or her 18<sup>th</sup> birthday. In *R v Balogun* [2018] EWCA Crim 2933 the English Court of Appeal observed:

“...the fact that the appellant had attained the age of 18 before he committed the offences does not of itself mean that the factors relevant to the sentencing of a young offender had necessarily ceased to have any relevance. He had not been invested overnight with all the understanding and self-control

of a fully mature adult. It is also relevant to note that if the appellant had committed his offences a few months earlier than he did and had therefore been under 18 at the time of the offending, a Court sentencing him at a later date would have been required by Section 6.2 of the Definitive Guideline to “take as its starting point the sentence likely to have been imposed on the date at which the offence was committed”.

18. In *Balogun* (supra) the English Court of Appeal, quashing a sentence imposed on a young adult of 18 years of age (at the time of offences) for very serious sexual offences with a number of aggravating features, quoted *Peters* [2005] 2Cr App R (s) 101) which was decided in the context of sentencing for murder. Although *Peters* was a murder case, the judgment of the Lord Chief Justice in *Clarke* [2018] 1 Cr. App R (s) 52 makes it clear that the principles there referred to are of general effect. In *Peters* stated at paragraph 11 of the judgment:

“Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual’s true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore, although the normal starting point is governed by the defendant’s age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender’s maturity.”

19. Similarly in the more recent case of *R v Clarke* (supra) the Lord Chief Justice, giving the judgment of the Court said at paragraph 5:

“Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear... Full maturity and all the attributes of adulthood are not magically conferred on young people on

their 18<sup>th</sup> birthdays. Experience of life reflected in scientific research ... is that young people continue to mature, albeit at different rates, for some time beyond their 18<sup>th</sup> birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision even if an offender has passed his or her 18<sup>th</sup> birthday.”

20. Apart from these considerations, in crafting an appropriate sentence in this case, the court is presented with difficult questions. Two of you were young persons within the meaning of the Juveniles Act at the time of the offence while the other two were adults and had just attained majority. The age gap between the adult and young offenders how small that may be will make a big disparity in the sentence. Two different sentencing regimes apply in each situation and the courts are bound to take into consideration Section 30 (3) of the Juveniles Act (as it was interpreted by the Court of Appeal) which limits the maximum sentence to two years’ imprisonment in punishing the young offenders and, in sentencing the adults, to give effect to the tariff set by the Supreme Court which attracts a sentence ranging from 11 years to 20 years’ imprisonment. In the strict application of these two different regimes to the present scenario, a huge disparity in sentence is inevitable although the culpability and the harm factors of the offence are almost the same.
21. The imposition of disparate sentences upon offenders convicted of the same crime might badly reflect on the administration of justice and hinder correctional methods. When an offender receives an unjustified sentence, his antagonism toward society is increased. Not only does disparity harm the prisoner and the prison system, but it is contrary to the basic concept of equal treatment under the law embodied in the Constitution. Therefore, to alleviate the sense of injustice that might create due to disparity in coming to your final sentence, I thought it fit to explain the legal framework within which this court operates.
22. Section 26(1) of the Constitution states:

"Every person is equal before the law and has the right to equal protection, treatment and benefit of the law".

23. Section 26(3) of the Constitution prohibits discrimination against a person on the ground of age. Section 26(4) of the Constitution states a law may not directly or indirectly impose a limitation or restriction on any person on a prohibited ground such as age. Section 26(7) states that treating one person differently from another on a prohibited ground is discrimination, unless it can be established that the discrimination is not unfair in the circumstances.
24. Distinctions in treatment therefore, should be neither arbitrary nor unreasonable; they should be based on rational distinctions rooted in significant factual differences which have a substantial relation to a legitimate governmental purpose.
25. Section 26(8) of the Constitution prescribes circumstances under which the right to equality and freedom from discrimination can be derogated. Disparity in sentence is justified if the rationale for these differences can be traced to relevant distinctions of character or behavior which bear a certain known relationship to the aims of punishment. A discriminatory law will survive a constitutional challenge if it exists to advance a legitimate purpose (Balkandali v UK EHRR 28/5/85 applied by Shameem J in *State v Baleinabuli & Ors* Cr Case No. HAC106/06) and adopted in *A.V., Kumar v. State* [2018 FJSC 30 2 November 2018]
26. In this case there is a rational basis for disparity; the disparity in the age and the maturity of the offender. The Juveniles Act recognizes this difference and aims to achieve a legitimate purpose of rehabilitation when it prescribes a lenient sentence for juvenile offenders. It follows that treating juvenile offenders under the age of 18 years differently for sentencing purposes is not unfair in the circumstances because it advances a legitimate purpose and therefore not inconsistent with the right to equality and freedom from discrimination.



27. Your counsel have filed helpful mitigation submissions and begged for a lenient sentence on account of your age and clean records. I have taken into consideration what they had said in their respective submissions. I have taken a progressive approach to make the sentence appear just and reasonable in the circumstances of this case.

28. I would like to venture into sentencing of Ame Tuiviti and Peni Gusuivalu Tui first because your sentences should be governed by the provisions of the Juveniles Act as it has been interpreted by the Court of Appeal. Both of you were 17 years old at the time of the offence thus juveniles.

#### **Sentence for Ame Tuiviti (1<sup>st</sup> Accused)**

29. Mr. Ame Tuiviti, you took the lead in committing this offence. Your offence is serious. The victim impact statement indicates that the victim has suffered emotionally. A starting point of one year is warranted to reflect the seriousness of the offence. It is aggravating that you have breached the trust of an innocent girl who studied with you at the same school. You also applied a degree of force on the victim. I increase your sentence by two years to reflect aggravating circumstances.

30. I have considered your personal circumstances to mitigate the sentence. You were grown up in a broken family environment when your mother left home and you should not be punished for that. You are now an adult and married and your wife has just given birth to a child. It appears that you have learnt a lesson from your immature past and taken yourself to the road to rehabilitation. The certificates attached to your mitigation submission show that you have completed two years' certificate course in carpentry and joinery and done an Automotive Electrical and Electronics course at the Technical College. You are a first offender and have maintained a blameless record. The character references filed on your behalf are indicative of your good standing in your community.

31. I deduct one year for mitigating features. When considered the nature of the offence and your personal circumstances, an imprisonment period of two years

is sufficient to achieve the sentencing purpose of this court. You have not been remorseful. Your offending is serious and therefore, within the bounds of the Juveniles Act, an immediate custodial sentence is inevitable to denounce your action and also for general deterrence.

#### **Sentence for Peni Gusuivalu Tui (4<sup>th</sup> Accused)**

32. Mr. Peni Gusuivalu Tui, you were also a juvenile at the time of the offence. Your offence is serious and the circumstances of the offence are the same. The victim impact statement indicates that the victim has suffered emotionally. A starting point of one year is warranted to reflect the seriousness of the offence.
33. You have breached the trust of an innocent girl who studied with you at the same school. You blackmailed a vulnerable victim to take sexual gratification. I increase your sentence by two years to reflect aggravating circumstances.
34. I have considered your personal circumstances to mitigate the sentence. You are now an adult and you look after your parents by earning an income as a farmer. The character certificates tendered on your behalf show that you are a hardworking person engaged in community development. It appears that you have learnt a lesson from your past mistake and taken a positive approach towards rehabilitation. The certificates attached to your mitigation submission show that you have completed two years' certificate course in carpentry and joinery and undergone training with the Ministry of youth and sports. You are a first and young offender with an unblemished record. When considered the nature of the offence and your personal circumstances, an imprisonment period of two years is sufficient to achieve the sentencing purpose of this court. You have not been remorseful. Your offending is serious and therefore, within the bounds of the Juveniles Act, an immediate custodial sentence is inevitable to denounce your action and also for general deterrence.

#### **Sentence for Vanavasa Dave (2<sup>nd</sup> Accused)**

35. Mr. Vanavasa Dave, you are 22 years of age and were 18 years and 3 months old at the time of the offence. I have no option but to apply the sentencing principles that are applicable to an adult although you committed the offence under same circumstances as juveniles. When you saw Ame Tuiviti having sexual intercourse with the victim, you also wanted to try out what your friend was doing without having any regard to the consequences of your offence or suffering of your schoolmate. Your offence is serious. The victim impact statement indicates that the victim has suffered emotionally. I select a starting point of 10 years to reflect the seriousness of the offence.
36. You have breached the trust of an innocent schoolmate. You also applied a degree of force on the victim. I increase your sentence by two years to reflect aggravating circumstances.
37. I have considered your personal circumstances to mitigate the sentence. As a farmer, you look after your parents. I read the Statutory Declaration your father has filed. I feel sorry for the predicament that has befallen on your family after this incident. However my hands are tight and I will do the maximum at my disposal.
38. You were awarded a Certificate in Agriculture after vocational studies. Now you are in a *de-facto* relationship and a father of one year old child. You were only three months beyond the age at which you would have been sentenced in accordance with the principles applicable to young persons. You are a first and young offender. Having considered all these factors, I deduct five years to arrive at a sentence of seven years' imprisonment.

**Sentence for Kelemete Yamoyamo (3<sup>rd</sup> Accused)**

39. Mr. Kelemete Yamoyamo, you are currently 23 years of age and had just attained the age of majority at the time of offence. Your offence however is serious. The victim impact statement indicates that the victim has suffered emotionally. I select a starting point of 10 years to reflect the seriousness of the

offence. You have breached the trust of an innocent schoolmate. You also applied a degree of force on the victim. You have not been remorseful. I increase your sentence by two years to reflect aggravating circumstances.

40. I have considered your personal circumstances to mitigate the sentence. You are residing with your *de-facto* partner and you earn a living as a market vendor. You are a first and young offender. I deduct five years to arrive at a sentence of seven years.

41. In setting the current sentencing tariff for juvenile rape, Gates CJ in *Aitcheson* at paragraph [24] observed:

“The increasing prevalence of these crimes, crimes characterized by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. **It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled.** But it is obvious to state that crimes like these on the youngest children are the most abhorrent” (emphasis added)

42. When compared, the seriousness and the aggravating circumstances of the offending in *Aitcheson* (*supra*), are far greater than the aggravating circumstances of your offending. In the present case, the victim was 16 years old at the time of the offence and the age gaps between each one of you and the victim are very small. The Sentencing and Penalties Act does not, in appropriate cases, stifle the hands of the trial judge thus taking away the judicial discretion to sentence an offender below tariff. There are instances where Judges deviated from existing tariff when they found the sentencing within tariff either disproportionately excessive or unjust in all the circumstances of the case.

43. In *State v Nayate Vatu* [2015] FJHC 263; HAC 231.2011 (23 April 2015) Madigan J sentenced a 21 year old for seven years’ imprisonment for two

counts of juvenile rape with a non-parole period of five years. In justifying his finding Madigan J stated;

".....It appears to be extremely important in this case that a balance be struck between expectations of the community that such activity be punished and retribution be afforded the victim with the need to recognize the folly of such a young man with a clean record and the destruction that a long sentence would wreak on his entry into adulthood. Whilst every attempt must be made to keep a young offender from prison and to rehabilitate him (her) when faced with a serious crime or crimes, a Court must act in the interests of the public and their expectations and act to deter others who might want to follow the same course of action...."

44. In his concluding remarks Madigan J said;

"... I am aware that this final sentence of seven years is below the tariff for rape of a child and it is in no way meant to distort the tariff already recognized by the Supreme Court. It is a lenient sentence in recognition of the youth of the accused and his remorseful plea of guilty saving the child from giving evidence".

45. In *State v Seniqai* [2011] FJHC 375; HAC 010.2011 (8th July 2011) Justice Gounder sentenced an 18 year old rape accused for 5 years of imprisonment, below the tariff. Gounder J imposing imprisonment without fixing a non-parole said;

"...You are 18 years old. Unfortunately, you are another unemployed without any meaningful purpose in life. You left school after completing Form 4. The International Convention on the Rights of a Child applies to you because of your age. I

bear in mind that a prison sentence should be the last resort for a child....."

46. Each one of you are young and first offenders with clear records having a high potential for rehabilitation. Therefore avenues for rehabilitation should be kept open without jeopardizing other purposes of sentencing. I impose a non- parole period of two years for Ame Tuiviti and Peni Gusuivalu and five years each for Vanasa dave and Kelemete Lepani to facilitate your rehabilitation.

**Summary**

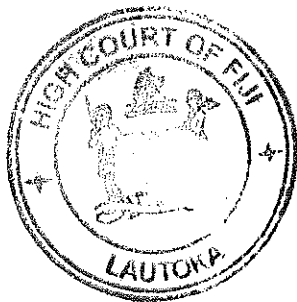
AME TUIVITI (1<sup>st</sup> Accused) – 2 years' imprisonment with a non-parole period of 2 years.


VANAVASA DAVE (2<sup>nd</sup> Accused) 7 years' imprisonment with a non-parole period of 5 years.

KELEMETE LEPANI YAMOYAMO (3<sup>rd</sup> Accused) 7 years' imprisonment with a non-parole period of 5 years.

PENI GUSUIVALU (4<sup>th</sup> Accused) 2 years' imprisonment with a non-parole period of 2 years.

47. 30 days to appeal to the Court of Appeal.



  
Aruna Aluthge  
Judge

**At Lautoka**  
**22<sup>nd</sup> February, 2019**

**Solicitors: Office of the Director of Public Prosecution for State  
Legal Aid Commission for Accused**