

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 426 OF 2018S

STATE

Vs.

KEMUELI WAQA

Counsel: Ms. S. Serukai for State
Ms. T. Kean and Ms. S. Daunivesi for Accused
Hearing: 1 and 15 March, 2019
Sentence: 3 May, 2019

SENTENCE

1. On 1st March 2019, in the presence of your counsel, you pleaded guilty to the following information:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KEMUELI WAQA, on the 24th day of October, 2018, at Vatukalo, Ovalau, in the Eastern Division, penetrated the anus of PK, a child under the age of 13 years, with his finger.

COUNT TWO

Statement of Offence

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

Particulars of Offence

KEMUELI WAQA, on the 24th day of October, 2018, at Vatukalo, Ovalau, in the Eastern Division, unlawfully and indecently assaulted **PK**, by licking her vagina.

2. The matter was then adjourned to 15th March 2019 for the summary of facts to be presented, and then the sentence hearing. On 15th March 2019, the prosecutor presented the following summary of facts in court:

“...**BRIEF BACKGROUND:**

It was alleged that on the 24th of October, 2018, Kemueli Waqa, 36 years old of Vatukalo, Ovalau penetrated the anus of one PK, 8 years old of Vatukalo Ovalau with his finger.

The accused, Kemueli Waqa is related to the complainant, PK. He is her uncle.

OFFENCE:

On the 24th of October, 2018 at about 3pm, PK went to a cassava patch near the village to pick mangoes. As she arrived at the cassava patch Kemueli Waqa was there. He then forcefully pulled her by the hand towards the mango tree, made her sit on his lap and removed her under garment and inserted his finger into her anus.

When he inserted his finger into her anus, she felt pain. Kemueli told her not to scream.

CAUTION INTERVIEW AND THE CHARGE:

The accused was arrested on the 6th of November, 2018.

The accused was then interviewed under caution. The accused admitted to inserting his finger into the complainant's anus Q. 27 to Q. 30.

The accused also made admissions in Q. 11 of the Charge Statement on the 7th of November, 2018.

The accused was then charged for one count of Rape contrary to section 207(1) and 2(b) and 3 of the Crimes Act of 2009. And he was produced in Nausori Magistrates Court on the 8th of November, 2018..."

3. The Court then checked with defence counsels, on whether or not the accused was admitting all the elements of the offence of rape in count no. 1. Defence Counsel, on behalf of the accused, admitted that the accused inserted his finger into the complainant's anus, while she had her underwear on, on 24th October 2018. The accused admitted that his finger went into the complainant's anus, with part of her underwear, at the material time. The complainant was 8 years old, thus the prosecution does not need to prove non-consent by the complainant, nor guilty knowledge on the part of the accused. As a result of the above, the court found the accused guilty as charged on count no. 1, and convicted him accordingly.
4. The prosecutor then sought leave from the court to enter verbally a nolle prosequi against the accused on count no. 2. The defence had no objection. The court then terminated the proceeding against the accused on count no. 2, and discharged him accordingly on that count.
5. The accused did not agree with 4 previous conviction of forfeiture of bail bond, larceny, criminal trespass and absconding bail, submitted by the prosecution. The prosecution did not wish to go to a hearing on that, and thus the accused will be taken to have not offended in the last 10 years. He did not challenge the victim impact report. In his plea in mitigation, he said he was 36 years old, single with no child, reached class 3 education and was a

subsistence farmer. He said, he is related to the complainant. He had been remanded in custody for approximately 5 months 25 days.

6. The rape of children is always a serious matter, and Parliament had prescribed a maximum sentence of life imprisonment for the same: section 207(1) of the Crimes Act 2009. The Supreme Court of Fiji had set the tariff of 11 to 20 years imprisonment for the rape of children: see **Gordon Aitcheson v The State**, Criminal Appeal No. CAV 0012 of 2018, 2nd November, 2018. Of course the final Sentence will depend on the aggravating and mitigating factors.
7. The aggravating factors, in this case, were as follows:
 - (i) **Breach of Trust.** The female complainant was 8 years old on 24th October 2018, the date of the incident. She was related to you. You were her uncle. You two resided in the same village in Ovalau. You were 36 years old at the time. Because you are older than her by 28 years and her uncle, you were supposed to look after and care for her. This was especially so in a village setting. However, you breached the trust she had in you, by committing the offence of rape against her. You will have to be punished, for the crime you had committed against the complainant, and you must not complain of the same.
 - (ii) **Rape of a child.** The court had said in the past and will say again that it will not tolerate the abuse of children, the future of this country. It will keep on passing long prison sentences, as warning to would-be child rapist.
 - (iii) **By offending against the child,** you had no regard to her right as a child, her right as a human being and her right to live a peaceful and happy life. You have also caused heart ache and sadness to her family.
8. The mitigating factors, were as follows:
 - (i) You pleaded guilty to the offence 3 months 14 days after first call in the High Court, and thus saved some court time;
 - (ii) You had been remanded in custody awaiting sentence for approximately 5 months 25 days.

9. On count no. 1 (rape), I start with 12 years imprisonment. I add 3 years for the aggravating factors, making a total of 15 years imprisonment. For time already served while remanded in custody, I deduct 6 months, leaving a balance of 14 years 6 months imprisonment. For pleading guilty to the offence, although 3 months 14 days after first call in the High Court, I deduct another 3 years 6 months, leaving a balance of 11 years imprisonment. On count no. 1 (rape), I sentence you to 11 years imprisonment.
10. Mr. Kemueli Waqa, for inserting your finger into the 8 year old female complainant's anus on 24th October 2018 at Ovalau in the Eastern Division, I sentence you to 11 years imprisonment, with a non-parole period of 10 years imprisonment, effective forthwith.
11. The name of the 8 years old female complainant is permanently suppressed to protect her privacy.
12. In addition to the above, the court, of its own motion, make the Standard Domestic Violence Restraining Order against the Accused, in accordance with section 22 and 26 of the Domestic Violence Act 2009. If the above order is breached the accused is to be brought before the High Court, to be dealt with accordingly.
13. You have 30 days to appeal to the Court of Appeal.



Solicitor for State : Office of Director of Public Prosecution, Suva
Solicitor for Accused: Legal Aid Commission, Suva