

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 328 of 2016

STATE

V

KERESONI WAQATAIREWA

Counsel : Kimberly Semisi for the State
Ms. Talei Kean for the Accused

Dates of Trial : 16-17 May & 20-24 May 2019

Summing Up : 27 May 2019

Judgment : 29 May 2019

Sentence Hearing : 7 June 2019

Sentence : 19 June 2019

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

SENTENCE

[1] Keresoni Waqatairewa you were charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, had carnal knowledge of **IL** 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

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of **IL** without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1 and Count 2, had carnal knowledge of **IL** without her consent.

COUNT 4

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act 2009.

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, assaulted **IL** causing her actual bodily harm.

- [2] As could be noted you were charged with three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act.

- [3] You pleaded guilty to Count 4. However, you pleaded not guilty to the remaining three counts.
- [4] Court was satisfied that you fully understood the nature of the charge contained in Count 4 and the consequences of your guilty plea for the said count. Court found that you pleaded guilty on your own free will and free from any influence.
- [5] The Learned State Counsel submitted that she would not be filing Summary of Facts in respect of Count 4, but would be leading evidence of the complainant to establish the facts.
- [6] The ensuing trial in respect of the remaining three charges was held over a period of 7 days. At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you not guilty of Count 1; and by a majority decision the Assessors found you guilty of Counts 2 and 3.
- [7] Having reviewed all the evidence, this Court decided to accept the unanimous decision of the three Assessors in finding you not guilty of Count 1. Accordingly, you were acquitted of Count 1.
- [8] Furthermore, having reviewed all the evidence, this Court decided to accept the majority decision of the three Assessors in finding you guilty of Counts 2 and 3. Accordingly, you were convicted of the said Counts 2 and 3.
- [9] In respect of Count 4, this Court found you guilty on your own plea and convicted you for Count 4 as charged.
- [10] The prosecution, in support of their case, called the complainant and Dr. Elvira Ongbit. You gave evidence on your own behalf.
- [11] It is an admitted fact that you and the complainant were in a de-facto relationship at the time of the alleged offences. It is also admitted that the complainant used to reside with you at the Nabua Muslim League, for 11 years, with your four children. It is also admitted that at the time of the alleged offences, you had carnal knowledge of the complainant or that you admit to having sexual intercourse with her.
- [12] It was proved during the trial that, on the 31st day of August 2016, at Nabua, in the Central Division, on an occasion other than that mentioned in the first count, that you raped the complainant, by penetrating her vagina, with your penis, without her consent (Count 2).
- [13] It was also proved during the trial that, on the 31st day of August 2016, at Nabua, in the Central Division, on an occasion other than that mentioned in the first and second count, that you raped the complainant, by penetrating her vagina, with your penis, without her consent (Count 3).

- [14] It has also been proved that, on the 31st day of August 2016, at Nabua, in the Central Division, you assaulted the complainant causing her actual bodily harm (Count 4).
- [15] You and your de-facto partner, had been living together for 11 years. The two of you had 4 children together, which should have made both of you proud. From the testimony of the complainant it is evident that you had kept her in virtual captivity in your home after you indulged in sexual intercourse with her the first time. You have made 'love making' between you and your de-facto partner, which should have been a pleasurable act, a dreadful and outrageous act, merely to fulfil your carnal desires further.
- [16] Furthermore, you cut the complainant's hair in patches and also hit her left knee with a rolling pin when she attempted to leave you.
- [17] As per the Counsellors Report filed in Court, the complainant is said to be still fearful of you as she had been subjected to this traumatic experience. The traumatic ordeal has caused her to isolate and withdraw herself from her family members.
- [18] As per the Victim Impact Statement filed in Court, it is evident that the complainant has been emotionally and psychologically affected by your actions.
- [19] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the purposes for which sentencing may be imposed by a Court; and sets out 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.
- [20] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.
- [21] 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."

- [22] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice 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.”

[23] In **The State v Lasaro Turagabeci and Others** (supra) Pain J 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.”

[24] It was further held in **Mohammed Kasim v. The State** (supra):

*“.....We consider that in any rape case without aggravating or mitigating features **the starting point for sentencing an adult should be a term of imprisonment of seven years.....**We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”[Emphasis is mine].*

[25] It is settled that the tariff for a rape of an adult victim is a term of imprisonment between 7 years and 15 years-As per Fernando J in **State v. Naicker** [2015] FJHC 537; HAC 279 of 2013 (15 July 2015).

[26] 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.”

[27] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the second count of Rape.

[28] The aggravating factors are as follows:

- (i) You were the de-facto partner of the complainant at the time of the offending.
- (ii) Being her de-facto partner you should have protected her. Instead you have breached the trust expected from you and the breach was gross.
- (iii) Since you were in a de-facto relationship with the complainant at the time, this tantamount to a domestic violence offence.
- (iv) Use of force and violence on the complainant, thereby causing physical injury to her.
- (v) You are now convicted of multiple offending.

[29] You are 38 years of age. You and the complainant have four children together, who are now between 5 to 13 years of age. You were formally working as a Security Officer and had to leave the job because of this trial. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.

[30] In terms of the Previous Convictions Report filed in Court it is confirmed that there two previous convictions recorded against you (for Assault Causing Actual Bodily Harm and Indecently Annoying Any Person). Therefore, this Court cannot consider you as a first offender.

[31] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence is 10 years. There are no valid grounds to grant you any concession in mitigation.

[32] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the second count of Rape.

[33] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 3 years. Now your sentence is 10 years. There are no valid grounds to grant you any concession in mitigation.

[34] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an Assault Causing Actual Bodily Harm." The prescribed penalty for this offence is a term of imprisonment for 5 years.

[35] In *State v. Tugalala* [2008] FJHC 78; HAC 25S of 2008S (29 April 2008); Her Ladyship Madam Justice N. Shameem said:

"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in Elizabeth Joseph v. The State [2004] HAA 030/04S and State v. Tevita Alafi [2004] HAA073/04S,

*that it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases, sentences of 18 months imprisonment have been upheld (**Amasai Korovata v. The State** [2006] HAA 115/06S)."*

- [36] In **Jonetani Sereka v. The State** [2008] FJHC 88; HAA 27 of 2008 (25 April 2008); His Lordship Justice Daniel Gounder held:

*"The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of provocation and no weapon used, to 9 months imprisonment for the more serious cases of assault (**State v Anjula Devi**, Criminal Case No. 04 of 1998 Lab.)."*

- [37] His Lordship Justice Vincent Perera in **Anaiasa Naqialawa v. State** [2017] FJHC 484; HAA 15 of 2017 (29 June 2017); stated thus:

"It is pertinent to note that 12 months is only a one fifth of a 5 year imprisonment which is the maximum sentence for the offence of assault causing actual bodily harm under section 275 of the Crimes Act. All in all, I am of the view that it is appropriate to have 12 months imprisonment as the higher end of the tariff for the said offence.

Needless to say, the selecting of a starting point is not that difficult where the relevant sentencing tariff indicates the lower end of the imprisonment term applicable to a particular offence as opposed to other sentencing options that may be considered.

If the sentencer decides that an imprisonment term is the appropriate punishment for an offender who is convicted of the offence of assault causing actual bodily harm under section 275 of the Crimes Act and not to opt for an absolute or conditional discharge, it is important for the sentencer to have a clear opinion on the minimum imprisonment term the offence should attract considering its objective seriousness. In my view, an imprisonment term of 3 months would appropriately reflect the objective seriousness of the offence of assault causing actual bodily harm under section 275 of the Crimes Act."

- [38] In **State v McPherson** [2017] FJHC 890; HAC 42 of 2016 (22 November 2017); this Court held that the tariff for the offence of Assault Causing Actual Bodily Harm should range from 3 months to 12 months imprisonment.

- [39] Having regard to the above authorities, I consider the tariff for the offence of Assault Causing Actual Bodily Harm in the instant case too to range from 3 months to 12 months imprisonment.

[40] Accordingly, considering the objective seriousness of the offence and taking into consideration all other factors relevant to this case, I impose a sentence of 12 months imprisonment for Count 4.

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

Count 2- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 10 years imprisonment.

Count 3- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act - 10 years imprisonment.

Count 4- Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act – 12 months imprisonment.

I order that all the above 3 sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 10 years.

[42] Accordingly, I sentence you to a term of 10 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 8 years of that sentence.

[43] 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.”

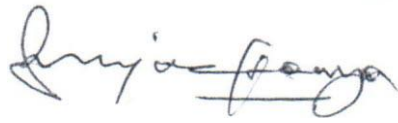
[44] Prior to this trial commencing, you have been in remand custody for 1 year and 2 months. Thereafter, you were remanded into custody on the 29 May 2019, the date on which this Court pronounced its Judgment and convicted you. Accordingly, you have been in custody for approximately 15 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 15 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[45] In the result, you are sentenced to a term of imprisonment of 10 years with a non-parole period of 8 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 8 years and 9 months.

Non-parole period - 6 years and 9 months.

[46] 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 19th Day of June 2019

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