

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 346 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**ALANI TUBUNAVAU**

**Counsel** : Mr. M. Vosawale the State  
Ms. L. Ratidara with Mr. Gade for the Accused

**Hearing on** : 10 - 12 September 2019

**Summing up on** : 12 September 2019

**Judgment on** : 13 September 2019

**Sentenced on** : 30 September 2019

[[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TC". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

**SENTENCE**

1. Alani Tubunavau, you stand convicted of the following offences after trial;

**FIRST COUNT**

*Statement of Offence*

**Rape:** contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

*Particulars of Offence*

**ALANI TUBUNAVAU** on the 9<sup>th</sup> of September 2018 at Naimataga Settlement, Lami, in the Central Division, penetrated the vagina of **TC**, with his finger without her consent.

**SECOND COUNT**

*Statement of Offence*

**Sexual Assault:** contrary to Section 210 (1) (a) of Crimes Act, 2009.

*Particulars of Offence*

**ALANI TUBUNAVAU** on the 9<sup>th</sup> of September 2018 at Naimataga Settlement, Lami, in the Central Division, unlawfully and indecently assaulted TC, by fondling her breasts.

2. 09<sup>th</sup> September 2018 was a Sunday and the victim was on her way to a shop in Naimataga Settlement, Lami in the morning to buy potatoes as per her aunt's request. The victim came to live at Naimataga with this aunt in December 2017 in order for her to attend school. She was brought up in Nabudrau by her grandparents. You saw this young girl walking alone that morning and decided to make her your prey to satisfy your lowly desires. There were only 08 days left for her to turn 15. She was born on 17<sup>th</sup> September 2003. Your first step was to approach her and ask her few questions. Thereafter you followed her. You waited near the stairway to the shop till the victim return from that shop and then you grabbed her by her shoulders. You kissed her on her mouth and bit her lips. Then you slid your hands through the victim's clothes where you fondled her breasts from one hand and penetrated the victim's vulva with the other. You had to let her go when a couple walked towards the place you were molesting her.
3. At the time of offence you were 35 years old. You are married and you have a daughter who is four years now. It is submitted that you have reached up to Form 4 and you were employed as a carpenter.
4. Pursuant to section 207(1) of the Crimes Act 2009 ("Crimes Act") read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for rape is life imprisonment.
5. The sentencing tariff for rape of a child victim was settled to be a term of imprisonment between 10 to 16 years (*Anand Abhay Raj v State* [2014] FJSC 12) until the Supreme Court in *Aitcheson v State* [[2018] FJSC 29; CAV0012.2018 (2 November 2018) declared that the relevant tariff should be a term of

imprisonment between 11 to 20 years. This tariff is intended to be applied across the board in every case where the victim is below the age of 18 years.

6. It is pertinent to note that the Crimes Act appear to categorise the victims of penetrative sexual acts involving the genital organs into 03 categories based on the age of the victim at the time of offence and the relevance of 'consent'. That is;

a) Where the victim is below the age of 13 years

Section 207(3) provides that a child below the age of 13 years is incapable of giving consent. Therefore, an accused is convicted of rape if he penetrates the vulva, vagina or anus of a child below the age of 13 years or if he penetrates with his penis the mouth of a child below the age of 13 years; even with the consent of that child.

b) Where the victim is between the age of 13 years and 16 years

Section 215 provides that having carnal knowledge of a 'young person' between the age of 13 years and 16 years constitutes the offence of defilement. Accordingly, the penetration of the vagina or the anus of a young person between the age of 13 years and 16 years with the penis, with the consent of the person does not constitute rape which carries life imprisonment but does constitute defilement which is punishable by an imprisonment term of 10 years.

It should also be noted that the other forms of penetration except for what constitutes carnal knowledge, that would amount to rape if done without the consent of the victim, would only constitute the offence of indecent assault if done with the consent of a young person between the age of 13 years and 16 years [see section 212(2) of the Crimes Act].

c) Where the victim is above the age of 16 years;

Penetrating the vulva, vagina or the anus or the penile penetration of the mouth of a person who is above the age of 16 years with the consent of that person is not an offence.

7. Given the categorisation in the Crimes Act based on the age of the victim that could be construed as outlined above, (i.e. below 13 years, between 13 years and 16 years and above 16 years) it begs the question whether it is reasonable and appropriate to apply one tariff across the board when it comes to rape of victims below the age of 18 years.

8. In the case of *Kumar v State* [2018] FJSC 30; CAV0017.2018 (2 November 2018) Keith J expressed His Lordship's views in relation to the request by the State to increase the tariff for child rape to 11 years to 19 years relying on the UK Sentencing Guidelines, thus;

*[54] In my opinion, the current tariff of 10-16 years' imprisonment for all offences of the rape of children and juveniles is too blunt an instrument. We should distinguish between the rape of children and juveniles under the age of 18 and the rape of children under the age of 13. I would increase the tariff for the rape of children under the age of 13 to 11-17 years' imprisonment. That would reflect the community's abhorrence of the sexual abuse of really young children. I would leave the tariff for the rape of children and juveniles under the age of 18 undisturbed, in the confident expectation that judges will depart from the tariff, as they do now, in those truly exceptional cases where greater punishment is called for, especially those cases where the offending amounts to a campaign of rape. That is, as I originally understood it, the effect of the last paragraph of Chitrasiri J's judgment.*

9. I am mindful of the fact that the judgment of Keith J in *Kumar* (supra) became the minority judgment with Chitrasiri J disagreeing to increase the tariff in relation to cases where the victim is below the age of 13 years as suggested by Keith J. However, the fact remains that, having heard the same submission made by the State in *Aitcheson* (supra) during the same session with regard to the prevalence of child rape in Fiji, the full bench in *Kumar* (supra) was unanimous in the decision not to increase the tariff for rape of child victims who are above the age of 13 years. It is pertinent to note that the two judgments were delivered on the same day. In the case of *Prasad v State* [2019] FJSC 3; CAV0024.2018 (25 April 2019) the Supreme Court has pointed out at paragraph 40 that the Director of Public Prosecutions had specifically asked the court in *Kumar* (supra) to review sentences for the rape of children and juveniles and to give a guideline

judgment on the topic pursuant to section 6(1) of the Sentencing and Penalties Act, and that no such request under section 6 was made in *Aitcheson* (supra).

10. The main difference that would make to a sentence when applying the tariff of 11 to 20 years imprisonment as opposed to applying the 10 to 16 years tariff is that the starting point should be (at least) 11 years instead of 10 years. It should be noted that 10 years itself is a substantially long period when compared with the average life expectancy of a person in Fiji.
11. All in all, given the victim's age at the time of offence, I have decided to apply the tariff of 10 to 16 years imprisonment in this case.
12. The offence of sexual assault under section 210(1) of the Crimes Act carries a maximum sentence of 10 years imprisonment. The sentencing tariff for this offence is an imprisonment term between 2 to 8 years [*State v Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012)].
13. The offences you are convicted of forms a series of offences of similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment for the two offences you are convicted of.
14. I consider the following as aggravating factors in this case;
  - a) The age gap between you and the victim which is 20 years; and
  - b) You exploited the victim's vulnerability and naivety.
15. I have perused the victim impact statement. However, I was unable to find evidence of any extraordinary psychological, physical or other harm suffered by the victim other than the harm expected to be caused in any rape case in the said statement that would justify a further increase of the sentence, bearing in mind that I have to select 10 years as the starting point of your sentence given the


sentencing tariff. The said starting point invariably reflects those factors that are generally associated with the offence of rape.

16. Your last conviction was in 2008. I will consider you as a person without previous convictions for the purpose of sentencing and will accordingly regard the said fact as a mitigating factor. This is in fact the only mitigating factor.
17. I would select 10 years imprisonment as the starting point of your aggregate sentence. Considering the above aggravating factors I would add 03 years to your sentence and would deduct 02 years in view of the above mitigating factor. Accordingly, I sentence you to a term of 11 years imprisonment. This is your aggregate term of imprisonment for the two offences you are convicted of.
18. In this case no specific submissions were made by either the prosecution or the defence in relation to the fixing of the non-parole period. There is nothing wrong with that for two reasons. Firstly, whether parties make submissions or not, the sentencing court should conform to the clear provisions in section 18 of the Sentencing and Penalties Act in relation to the fixing of a non-parole period. In fact, as far as the prosecutor is concerned, the prosecutor is not expected to canvass for a specific punishment or a non-parole term. The duty of the prosecutor at the sentencing stage is to assist the court to identify the applicable sentencing tariff, the facts and circumstances relevant to sentencing and the relevant sentencing principles. Secondly, the factors that are required to be considered in fixing the non-parole term are the nature and the circumstances of the offending, the aggravating factors, the mitigating factors and the personal circumstances of the accused which are the same factors that are submitted to the court in order to determine the appropriate term of imprisonment.
19. Hence, I order that you are not eligible to be released on parole until you serve 07 years of your sentence pursuant to the provisions of section 18(1) of the Sentencing and Penalties Act. I have considered all the factors referred to above

in fixing the said non-parole term. The overall sentence should serve as a deterrence given the prevalence of the offence of rape. But at the same time, considering that the level of harm inflicted on the victim in this case is relatively not that significant and the fact that you were regarded as a person without previous convictions would justify you to be released on parole after you serve a considerable portion of your term of imprisonment.

20. It is submitted that you were in custody in relation to this matter from 10/09/18 till you were granted bail on 13/06/19. Thereafter you are in remand from 12/09/19 to date. The period you have been held in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act. Accordingly, I hold that the period to be regarded as served should be 09 months and 21 days.
21. In the result, you are sentenced to an imprisonment term of 11 years with a non-parole period of 07 years. In view of the time spent in custody, time remaining to be served is as follows;
- Head Sentence - 10 years; 02 months and 09 days  
Non-parole period - 06 years; 02 months and 09 days
22. Thirty (30) days to appeal to the Court of Appeal.



  
Vinsent S. Perera  
JUDGE

**Solicitors;**  
**Office of the Director of Public Prosecutions for the State**  
**Legal Aid Commission for the Accused**