IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 445 of 2018

STATE

V

JOSUA DIGITAKI KOTOBALAVU

Counsel	**:**	Ms. Unaisi Tamanikaiyaroi for the State Ms. Vuli Savou for the Accused
Dates of Trial	**:**	10-14 February 2020
Summing Up	**:**	17 February 2020
Judgment	:	20 February 2020
Sentence Hearing	:	26 February 2020
Sentence	:	12 March 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LNK". The name of the complainant's sister is also suppressed. Accordingly, she will be referred to as "LBL".

SENTENCE

[1] Josua Digitaki Kotabalavu, you have been found guilty and convicted of the following offences for which you were charged:

COUNT 1

Statement of Offence

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

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, penetrated the vulva of **LNK**, a child under the age of 13 years with his finger.

COUNT 2

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, with intent to insult the modesty of **LNK**, exhibited his penis to **LNK** intending that his penis be seen by **LNK**.

[2] You pleaded not guilty to Count 1 and pleaded guilty to Count 2.

[3] This Court was satisfied that you pleaded guilty to Count 2 on your own free will and free from any influence. Court was satisfied that you fully understood the nature of the charge contained in Count 2 and the consequences of your guilty plea for the said count.

[4] The Learned State Counsel submitted that she would not be filing Summary of Facts in respect of Count 2, but would be leading evidence of the complainant to establish the facts.

[5] The ensuing trial in respect of the charge of Rape was held over 5 days. The complainant (LNK), her sister, LBL, and Medical Officer, Dr. Nikotimo Bakani, testified on behalf of the prosecution. You testified on your own behalf.

[6] 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 Count 1. Having

reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors. Accordingly, this Court found you guilty and convicted you of Count 1.

[7] In respect of Count 2, this Court found you guilty on your own plea and convicted you of Count 2 as charged.

[8] It was proved during the trial that, on 11 October 2018, at Nasinu, you penetrated the vulva of LNK, with your finger, and at the time LNK was a child under 13 years of age.

[9] It has also been proved that on 11 October 2018, at Nasinu, with the intention to insult the modesty of LNK, you exhibited your penis to her, intending that your penis will be seen by her.

[10] The complainant is your first cousin, as your mother and her mother are biological sisters.

[11] As per her birth certificate tendered to Court as Prosecution Exhibit PE1, the complainant's date of birth is 25 February 2012. Therefore, at the time you committed these offences she was only 6 years of age.

[12] The complainant clearly testified to all the acts that you had perpetrated on her. I have summarized the complainant's evidence at length in my summing up.

[13] In terms of the Victim Impact Statement filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. She feels fearful at times when she is alone. Sometimes, when she sleeps, she states that she sees you in her dreams and she wakes up frightened. Therefore, it is clear that the impact of your actions are continuing, as the complainant remains distressed and traumatized by the incident.

[14] 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.

[15] I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to deter offenders or other persons from committing such offences and also to signify that the Court and the community denounce the commission of such offences.

[16] 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.

[17] 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."*

[18] 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."*

[19] 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."

[20] 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".*

[21] In the case of ***State v. 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."*

[22] In the case of ***Felix Ram v. The State*** [2015] FJSC 26; CAV 12 of 2015 (23 October 2015); His Lordship Chief Justice Anthony Gates laid down the following factors that a Court should take into account when sentencing an offender who has been convicted of Rape:

"(a) whether the crime had been planned, or whether it was incidental or opportunistic;

(b) whether there had been a breach of trust;

(c) whether committed alone;

(d) whether alcohol or drugs had been used to condition the victim;

(e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;

(f) whether the impact on the victim had been severe, traumatic, or continuing;

(g) whether actual violence had been inflicted;

(h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;

(i) whether the method of penetration was dangerous or especially abhorrent;

(j) whether there had been a forced entry to a residence where the victim was present;

(k) whether the incident was sustained over a long period such as several hours;

(l) whether the incident had been especially degrading or humiliating;

(m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;

(n) Time spent in custody on remand;

(o) Extent of remorse and an evaluation of its genuineness;

(p) If other counts or if serving another sentence, totality of appropriate sentence."

[23] 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."

[24] 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."*

[25] In the case of ***Anand Abhay Raj v. The State*** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathyaa 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.

[26] 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 (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."*

[27] 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."*

[28] 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.

[29] The aggravating factors are as follows:

(i) You were an older cousin 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 reasonable disparity in age between you and the complainant. The complainant was 6 years of age at the time you committed these offences on her. At the time you were 20 years of age. Therefore, there was a difference in age of 14 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.

[30] Josua, you are now 21 years of age (Your date of birth being 4 November 1998), and were residing at Laucala Beach Estate with your mother and siblings. You are said to be the fifth sibling in a family of 9. Your father is said to be have passed away when you were only 14 years of age. You are said to have reached Form 6 at secondary school and had enrolled at the Matua Program to complete your secondary school education. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.

[31] As per the Antecedent Report filed, it is noted that there are nil previous convictions recorded against you. The State Counsel too has confirmed that you are a first offender and have no pending cases. Therefore, Court considers you as a person of previous good character.

[32] You have submitted that you are truly remorseful of your actions and that the offences were committed by you due to your lack of good judgment. You have sought forgiveness from Court. Furthermore you are said to have sought forgiveness from the complainant's family. You have submitted to Court photographs to confirm this fact.

[33] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence is 14 years imprisonment for the first count.

[34] I accept that you are a person of previous good character. I also accept your remorse as genuine and the fact that you have sought forgiveness from the complainant's family. Accordingly, considering the aforesaid mitigating factors I reduce 3 years from your sentence. Now your sentence is 11 years for Count 1.

[35] You have been convicted of one count of Indecently Annoying Any Person in terms of Section 213(1) (a) of the Crimes Act (Count 2).

[36] The offence of Indecently Annoying Any Person in terms of Section 213(1) (a) of the Crimes Act carries a maximum penalty of one year's imprisonment.

[37] In the case of ***State v Yabakiono*** [2016] FJHC 383; HAC 77.2014 (9 May 2016); His Lordship Justice Madigan observed: "*The maximum penalty for indecently annoying another is imprisonment for one year without a tariff having been set; nor need there be one. There are a myriad ways in which a person can be sexually harassed and the sentence will be at the discretion of the court hearing the matter.*"

[38] Accordingly, considering all the facts and circumstances of this case, I sentence you to 10 months imprisonment for Count 2.

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

Count 1 – Rape contrary to Section 207 (1), 2(b) and 3 of the Crimes Act – 11 years imprisonment.

Count 2 - Indecently Annoying Any Person contrary to Section 213 (1) (a) of the Crimes Act – 10 months imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 11 years.

[40] Accordingly, I sentence you to a term of 11 years imprisonment.

[41] The discretion originally granted to a Court in determining whether to fix a non-parole period or not has now been taken away by virtue of the Corrections Service (Amendment) Act No. 29 of 2019 (which was passed into Law on 22 November 2019). Therefore, it is now mandatory when a Court sentences an offender to be imprisoned for life or for a term of 2 years or more, to impose a non-parole period to be served in terms of Section 18 (1) of the Sentencing and Penalties Act.

[42] The Corrections Service (Amendment) Act No. 29 of 2019 has introduced an additional sub Section 27(3) to the Corrections Services Act 2006. The said sub-section reads as follows:

> ***"****Notwithstanding subsection (2), where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purposes of the initial classification, the date of release for the prisoner shall be determined on the basis of a remission of one-third of the sentence not taking into account the non-parole period".*

[43] Josua Digitaki Kotabalavu, considering the fact that you are a young offender and also considering the personal circumstances you have submitted to Court, I deem it appropriate to fix the non-parole period to be served by you, pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, in a manner that would coincide with the period of remission that you would be entitled to in terms of the Corrections Services Act 2006.

[44] Accordingly, I fix your non-parole period or the period that you are not eligible to be released on parole as 88 months or 7 years and 4 months of your sentence.

[45] 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."*

[46] You were in remand custody for this case from 28 November 2018 until 7 December 2018, the day on which you were granted bail by this Court. That is a period of about 10 days. Thereafter, you were remanded into custody on 20 February 2020, the day on which you were found guilty and convicted for this case. Accordingly, you have been in custody for a period of one month. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of one month should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

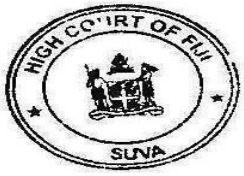
[47] In the result, your final sentence is as follows:

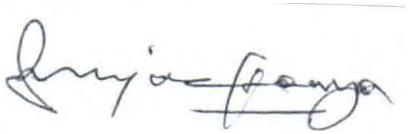
Head Sentence	-	11 years imprisonment.
Non-parole period	-	7 years 4 months imprisonment.

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

Head Sentence	-	10 years and 11 months imprisonment.
Non-parole period	-	7 years 3 months imprisonment.

[48] 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 12th Day of March 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Volavola Lawyers, Nasinu.