

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 233 of 2019

[CRIMINAL JURISDICTION]

STATE

V

PAULA VOSATOKAERA

Counsel : Mr. S. Komaibaba for State
Ms. L. Manulevu for Accused

Sentenced on : 22 May 2020

[The name of the victim is suppressed. Accordingly, the victim will be referred to as "MT". 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 victim.]

SENTENCE

1. Paula Vosatokaera, you pleaded guilty to the following charge and were convicted accordingly;

Statement of Offence

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

Particulars of Offence

PAULA VOSATOKAERA, between the 1st day of September 2018 and the 26th day of April 2019 at Mokani Village in the Eastern Division, penetrated the anus of **MT**, a child below the age of 13 years, with his

finger.

2. You have admitted the following summary of facts;

Complainant: *MT, 12 years old, student of . . .*

Accused: *Paula Vosatokaera, 25 years old, unemployed.*

Relationship: *The accused person is the long distance uncle of the victim.*

FACTS

Between the 1st day of September 2018 to the 26th day of April 2019 at Mokani Village in Tailevu, after watching movies in the evening, the victim went to sleep on the bed.

After a while the accused person laid down next to the victim on top of the bed which they normally share and started removing the victim's pants.

After managing to do so, the victim was lying face down on the bed; when the accused spat on the victim's anus and inserted his finger into the victim's anus.

The victim felt a lot of pain, when the accused person that the victim was in pain, and then the accused person stopped penetrating the victim's anus with his finger.

On 21/4/2019, the incident only came to light when the victim told his grandmother namely on Watiaumoce Boginivalu what the accused person had done to him.

*The matter was reported to the Nausori police station on 26/4/2019, whereby the accused person was arrested, interviewed under caution and charged for the offence of Rape. The accused had fully admitted to the offence in the caution interview in question and answer number 31 to 34. **(Attached and marked as "A1" is the caution interview).***

The victim was medically examined by Dr. Elvira Ongbit on 27/04/2019 and it was specifically discovered in D12 of the medical findings that there was:

- 1. 1 x Hematoma noted on the 8 o'clock position of the victims anus*
- 2. 1 x scar Cheadle on skin top noted at 7 o'clock position of the victims anus.*

(Attached and marked as "A2" is the medical examination report of the victim).

3. 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.
4. In the case of *Aitcheson v State* [[2018] FJSC 29; CAV0012.2018 (2 November 2018)] the court held that the sentencing tariff for rape of a child below the age of 13 years is 11 years to 20 years imprisonment.
5. However, it is pertinent to note that *Aitcheson* (supra) involved six counts of rape by penile penetration of the vagina where the relevant accused had raped his two biological daughters who were under the age of 13 years.
6. The sentencing tariff pronounced in the case of *Wallace Wise v The State*, Criminal Appeal No. CAV 0004 of 2015; (24 April 2015) for the offence of aggravated robbery was an imprisonment term between 08 years to 16 years. However, it could be noted that this court and also the Court of Appeal in certain cases has considered it appropriate not to apply the said tariff when sentencing offenders for the offence of aggravated robbery which is committed in the streets. The justification found in those cases to divert from the tariff of 08 years to 16 years is that *Wise* (supra) involved a robbery that was committed during a home invasion. That is, the courts have recognised that different levels of culpabilities exist within the same offence given the nature and the circumstances of the offending.
7. Section 207(2) reads thus;
 - 2) A person rapes another person if –
 - (a) the person has carnal knowledge with or of the other person without the other person’s consent; or

- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

8. Accordingly the offence of rape in Fiji can be committed at least in nine different ways given the relevant physical act;

a) Section 207(2)(a);

- i. Penile penetration of the vagina
- ii. Penile penetration of the anus of a female
- iii. Penile penetration of the anus of a male

b) Section 207(2)(b);

- iv. Penetration by an object or a body part other than a penis, of the vulva
- v. Penetration by an object or a body part other than a penis, of the vagina
- vi. Penetration by an object or a body part other than a penis, of the anus of a female
- vii. Penetration by an object or a body part other than a penis, of the anus of a male

c) Section 207(2)(c);

- viii. Penetration of a female victim's mouth by the accused with his penis;
- ix. Penetration of a male victim's mouth by the accused with his penis.

9. It should be noted that the sentencing tariff of 11 years to 20 years imprisonment has been established having regard to only the first form of rape listed above.

10. All in all, I was unable to convince myself that, given the circumstances of the offending in this case, the sentence should be within the range of 11 years to 20 years imprisonment.

11. The discretion provided by the legislature to the sentencing court is to punish an offender who had committed the offence of rape contrary to section 207 of the Crime Act, with an imprisonment term up to life imprisonment. The legislature does not provide a minimum term of imprisonment. In my view, a sentencing tariff should not be understood as an instrument to sap the discretion provided by the legislature to a sentencing court.
12. Given the circumstances of the offending in this case, it is my considered view that the starting point of your sentence should be an imprisonment term of 7 years.
13. I consider the following as aggravating factors in this case;
 - a) You are related to the victim. You used that relationship to have access to the victim and then to commit this crime. There is a breach of trust;
 - b) The age gap between you and the victim is 13 years; and
 - c) You exploited the victim's vulnerability and naivety.
14. The prosecutor wants this court to consider the impact of the offence you have committed on the victim as stated in the victim impact statement as an aggravating factor.
15. I have few concerns regarding the victim impact statement filed in this case.
16. It is stated in the report that "*[t]his statement is being recorded by Mr. Setefano Komaibaba of ODPP Office Nausori (State Counsel) and victim's father namely ST*". Firstly, the prosecutor getting involved in preparing the victim impact statement calls into question the authenticity of the said statement. "Not only must justice be done; it must also be seen to be done".

17. Secondly, the statement alluded to above also indicates that whatever the impact recorded in the relevant statement is what the victim's father thought that to be and it did not come directly from the victim.
18. The third reason, which led me not to take into account the contents of the said victim impact statement is the fact that I am not convinced that what the victim is said to be going through according to that statement is a result of the offence committed by the accused in this case.
19. According to the charge, the time of offence is between 01/09/18 and 26/04/19. The charge is not a representative count and therefore, the accused had committed the offence only once during that period. The summary of facts reveals that the accused had stopped penetrating the victim's anus by his finger when the accused noticed that the victim was in pain. Moreover, I am mindful of the fact that the accused was initially charged with three counts of rape. However, after the witness conference, the Information was amended by replacing the said three charges with the present charge. It should also be noted that the accused had maintained from the time he was cautioned interviewed that he only penetrated the victim's anus using his finger. The victim however, had initially alleged that the accused had penetrated his anus with the penis on two occasions and the accused had penetrated his mouth with his penis on one occasion, based on which the initial three charges had been framed. These circumstances lead me to conclude that the offence the accused is convicted of in this case cannot be the incident or the only incident that had resulted in the changes in the behaviour of the victim as noted in the victim impact statement.
20. I consider the following as the mitigating factors in this case;
 - a) You are a first offender;
 - b) You are remorseful;

- c) You have cooperated with the police; and
 - d) You have pleaded guilty.
21. Your counsel has submitted that you are 24 years old and single. You have obtained stage 1 to stage 15 certificates on Welding and Fabrication from the Fiji National University.
22. Considering the above aggravating factors I would add 04 years to your sentence. Now your sentence is an imprisonment term of 11 years. In view of the above mitigating factors, apart from the fact that you have pleaded guilty to the charge, I would deduct 03 years bringing your sentence to 08 years.
23. Considering the fact that you were not initially charged with the offence you are now convicted of and the fact that you pleaded guilty to the current charge on the first opportunity after the Information was amended, I would consider your guilty plea as an early guilty plea in order to provide you with a discount of one-third. A term of 02 years and 08 months will be deducted from your sentence in view of your early guilty plea.
24. Accordingly, I would sentence you to a term of 05 years and 04 months imprisonment. I order that you are not eligible to be released on parole until you serve 03 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Act.
25. You have been in custody for a period of 04 months and 19 days in view of this case. That is from 12/06/19 to 31/10/19. The said period shall be considered as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act. I would regard the time that should be considered as served to be 05 months.

26. In the result, you are sentenced to a term of 05 years and 04 months imprisonment with a non-parole period of 03 years. In view of the time spent in custody, time remaining to be served is as follows;


Head Sentence - 04 years and 11 months

Non-parole period - 02 years and 07 months

27. Having considered the facts of this case, a permanent Domestic Violence Restraining Order is issued against you, identifying the victim in this case 'MT' as the protected person. You are hereby ordered not to have any form of contact with the said victim directly or by any other means, unless otherwise directed by this Court.

28. Thirty (30) days to appeal to the Court of Appeal.




Vincent S. Perera
JUDGE

Solicitors;

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