

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 402 of 2018

STATE

v

MELI KENAWAI

Counsel : Ms. Swastika Sharma for the State
Ms. Shantel Hazelman with Ms. Maria Cabona for the Accused

Dates of Trial : 6-9 July 2020
Summing Up : 15 July 2020
Judgment : 17 July 2020
Sentence Hearing : 30 July 2020
Sentence : 12 August 2020

The name of both complainants are suppressed. Accordingly, the 1st complainant will be referred to as "IM" and the 2nd complainant will be referred to as "JT".

SENTENCE

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted **IM**, by touching his penis.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the mouth of **IM** with his penis, without his consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **IM** with his penis, without his consent.

COUNT FOUR

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the mouth of **JT** with his penis, without his consent.

COUNT FIVE

(Representative Count)

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the anus of **JT** with his penis, without his consent.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **JT** with his finger, without his consent.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted **JT**, by touching his penis.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 4 days. The prosecution, in support of their case, called the 1st complainant (IM), the 2nd complainant (JT), and 1st complainant's grand-mother Sera Rogonasau. You gave evidence on your own behalf.
- [3] 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 the seven charges. 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 the said seven charges.

- [4] As could be observed you have been found guilty and convicted of two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); three counts of Rape, contrary to Section 207 (1) and (2) (c), Section 207 (1) and (2) (a) and Section 207 (1) and (2) (b) of the Crimes Act respectively; and also two counts of Attempted Rape, contrary to Section 208 of the Crimes Act.
- [5] The first three counts you have been found guilty and convicted of are in respect of the 1st complainant; while the remaining four counts you have been found guilty and convicted of are in respect of the 2nd complainant.
- [6] It was proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you unlawfully and indecently assaulted IM, by touching his penis.
- [7] It was also proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you penetrated the mouth of IM, with your penis, without his consent.
- [8] It was also proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you penetrated the anus of IM, with your penis, without his consent.
- [9] It was also proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you attempted to penetrate the mouth of JT, with your penis, without his consent.
- [10] It was further proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you attempted to penetrate the anus of JT, with your penis, without his consent.
- [11] It was further proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you penetrated the anus of JT, with your finger, without his consent.
- [12] And it was further proved during the trial that between 1 January 2017 and 31 December 2017, at Nasinu, you unlawfully and indecently assaulted JT, by touching his penis.
- [13] Both complainants clearly testified to all the acts that you had perpetrated on them, between 1 January 2017 and 31 December 2017, while they were at your own residence. I have summarized both complainant's evidence at length in my summing up.
- [14] The 1st complainant's date of birth is 13 March 2002, while the 2nd complainant's date of birth is 12 July 2003. Therefore, at the time of the alleged offences, the 1st complainant, IM, was between 14 and 15 years of age, and the 2nd complainant, JT, was between 13 and 14 years of age. As such, they were both juveniles at the time you committed these offences on them.

- [15] The Victim Impact Statements of both the complainants have been filed in Court. Therein, it is recorded that both complainants have been emotionally and psychologically traumatized by your actions. The impact of your actions on the victims are said to be continuing, as detailed in the said Victim Impact Statements.
- [16] 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.

- [17] I have duly considered the above factors in determining the sentence to be imposed on you.
- [18] Meli Kenawai, you have been found guilty and convicted of three counts of Rape, contrary to Section 207 (1) and (2) (c), Section 207 (1) and (2) (a) and Section 207 (1) and (2) (b) of the Crimes Act respectively (Counts 2, 3 and 6).
- [19] 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.
- [20] 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."

- [21] 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(5) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S."*

[22] 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."

[23] 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"

[24] 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."

[25] 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.”*

[26] Furthermore, 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.”

- [27] This has been recently 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."

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

- [29] However, in the 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."*

- [30] 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."

[31] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentences at 12 years imprisonment for each of the second, third and sixth counts of Rape.

[32] The aggravating factors are as follows:

- (i) You have committed these offences on two separate victims.
- (ii) Your father is a Senior Pastor at the Assembly of God Church. Both complainants testified that they attended the same church as you and your father. They used to even stay over at your residence. Thus the two complainants trusted you, your father and your family. Being so, you should have protected them. Instead you have breached the trust expected from you and the breach was gross.
- (iii) There was a disparity in age between you and the two complainants. The 1st complainant, IM, was between 14 and 15 years of age, and the 2nd complainant, JT, was between 13 and 14 years of age, at the time you committed these offences on them. At the time of the offending you were 26 years of age. Therefore, you were older in age by over 10 years.
- (iv) You took advantage of the two complainant's vulnerability, helplessness and naivety.
- (v) You have exposed the innocent mind of two children to sexual activity at such a tender age, and thereby robbed the two complainants of their innocence.
- (vi) The impact of the crimes on the two victim was traumatic and is said to be continuing.
- (vii) You are now convicted of multiple offending.

[33] Melli Kenawai, you are now 29 years of age (Your date of birth being 15 February 1991). You have been residing with your parents at the Laqere settlement. Currently you are said to be single as you have committed yourself to supporting your parents and your younger brother. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[34] You are a first offender. The State too confirms that there are no previous convictions recorded against you. Therefore, Court considers you as a person of previous good character.

[35] Considering the aforementioned aggravating factors, I increase your sentences by a further 8 years in respect of each count. Now your sentences for the second, third and sixth counts of Rape is 20 years imprisonment.

- [36] For your previous good character I grant you a discount of 2 years. Now your sentences for the second, third and sixth counts of Rape is 18 years imprisonment.
- [37] Meli Kenawai, you have been found guilty and convicted of two counts of Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act respectively (Counts 1 & 7).
- [38] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [39] In the cases of *State v. Abdul Khaiyum* [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012); and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.
- [40] It was held in *State v. Laca* (supra) "The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks."

"A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.

Category 2

- (i) Contact between the naked genitalia of the offender and another part of the victim's body;
- (ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;
- (iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

- [41] In this case, as per Count 1, it has been proved that you unlawfully and indecently assaulted IM, by touching his penis; and as per Count 7, it has been proved that you

unlawfully and indecently assaulted ST, by touching his penis. Therefore, in my opinion, the offences in Counts 1 and 7 should be categorized under Category 2 (ii) above.

- [42] As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentences at 2 years imprisonment for the first and seventh counts of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act.
- [43] Considering the aggravating factors aforementioned, which are common for all offences, and the sole mitigating factor, which is your previous good character, I impose on you a sentence of 5 years' imprisonment for the first and seventh counts of Sexual Assault respectively.
- [44] Mell Kenawai, you have been found guilty and convicted of two counts of Attempt to Commit Rape in terms of Section 208 of the Crimes Act respectively (Counts 4 & 5).
- [45] The offence of Attempt to Commit Rape in terms of Section 208 of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [46] In the case of *Aunima v. The State* [2001] FJHC 105; HAC0033J.2001s (27 June 2001); Her Ladyship Madam Justice Shameem held that the tariff for the offence of Attempted Rape was between 12 months to 5 years imprisonment.

"Applying all these principles, I find that the accepted tariff for Attempted Rape in the Fiji Courts ranges from 12 months imprisonment to 5 years imprisonment. A starting point should then be chosen according to the seriousness of the offending."

- [47] In the case of *Bulimawai v The State* [2005] FJHC 261; HAA0068J.2005S (2 September 2005) Her Ladyship Madam Justice Shameem held:

"In Jaji Aunima v. State Cr. App. 33/2000, I identified the tariff for attempted rape as being 12 months imprisonment to 5 years imprisonment. Sentences at the upper end of the tariff should be imposed where gratuitous violence is inflicted, where a weapon is used, where there is a gross breach of trust or where there is a large age gap between complainant and offender. In Hari Chand v. State (supra) I upheld a 3 year term for the attempted rape of his daughter-in-law by the offender. There was no gratuitous violence but there was a gross breach of trust"

- [48] However, what must be borne in mind is at the time the above two cases were decided the offence of Attempted Rape was an offence under the Penal Code and carried a maximum penalty of 7 years imprisonment. In terms of the Crimes Act the maximum penalty for the offence is now 10 years imprisonment.

[49] Accordingly, considering the objective seriousness of the offences and taking into consideration the nature and the gravity of the offences and your culpability and degree of responsibility for the offences, and also taking into consideration the aggravating factors and mitigating circumstances relevant to this case, I impose on you a sentence of 5 years' imprisonment for the fourth and fifth counts of Sexual Assault respectively.

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

Count 1 – Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 5 years' imprisonment.

Count 2- Rape contrary to Section 207 (1) and 2(c) of the Crimes Act – 18 years' imprisonment.

Count 3 – Rape contrary to Section 207 (1) and 2(a) of the Crimes Act – 18 years' imprisonment.

Count 4- Attempt to Commit Rape contrary to Section 208 of the Crimes Act – 5 years' imprisonment.

Count 5- Attempt to Commit Rape contrary to Section 208 of the Crimes Act – 5 years' imprisonment.

Count 6 – Rape contrary to Section 207 (1) and 2(b) of the Crimes Act – 18 years' imprisonment.

Count 7 - Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 5 years' imprisonment.

I order that all seven sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 18 years.

[51] Accordingly, I sentence you to a term of 18 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 15 years of that sentence.

[52] 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."

[53] Meli Kenawai, you were in remand custody for this case from 23 October 2018 to 27 March 2019, when you were granted bail by this Court. Thereafter, you have been in remand custody since 17 July 2020, the day on which Court found you guilty and convicted you in this case. Accordingly, you have been in custody for a total period of

nearly 6 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 6 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 18 years imprisonment.

Non-parole period - 15 years imprisonment.

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

Head Sentence - 17 years and 6 months imprisonment.

Non-parole period - 14 years and 6 months imprisonment.

[55] You have 30 days to appeal to the Court of Appeal if you so wish..



AT SUVA

Dated this 12th Day of August 2020

A handwritten signature in blue ink, appearing to read "Riyaz Hamza".

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

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