

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 94 of 2019

STATE

V

SIMIONE PAKI

Counsel: Ms. Sadaf Shameem for the State
Ms. Shantel Hazelman with Ms. Lusiana Naikawakawavesi for the Accused

Dates of Trial: 24-27 August 2020

Summing Up: 31 August 2020

Judgment: 3 September 2020

Sentence Hearing: 29 September 2020

Sentence: 15 October 2020

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

SENTENCE

[1] Simone Paki, 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 the Crimes Act 2009.

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 31st day of July

2018, at Nasinu, in the Central Division, unlawfully and indecently assaulted MWM, a child under the age of 13 years, by sucking the unclothed breast of the said MWM.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vulva of MWM, a child under the age of 13 years, with his tongue.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vagina of MWM, a child under the age of 13 years, with his finger.

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

SIMIONE PAKI, between the 14th day of January 2019 and the 31st day of January 2019, at Nasinu, in the Central Division, attempted to have carnal knowledge of MWM, a child under the age of 13 years.

- [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 complainant, MWM, and Amerita Ranadi, her class teacher. 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 Counts 1, 2 and 4 and by a majority decision found you guilty of Count 3. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors in respect of Counts 1, 2 and 4 and the majority decision of the Assessors in respect of Count 3. Accordingly, this Court found you guilty and convicted you of the said four charges.
- [4] As could be observed you have been found guilty and convicted of one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act; and one count of Attempted Rape, contrary to Section 208 of the Crimes Act.
- [5] The complainant clearly testified to all the offences that you had perpetrated on her, while you were residing at her residence during the relevant time of the offending. I have summarized the complainant's evidence at length in my summing up.
- [6] It has been agreed by both parties that the complainant's date of birth is 26 September 2007. Therefore, at the time of the alleged offences, the complainant would have been between 10 and 11 years of age. As such, she was clearly a juvenile at the time you committed these offences on her.
- [7] The Victim Impact Statements of the complainant has been filed in Court. Therein, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. The impact of your actions on the victim is said to be continuing, as detailed in the said Victim Impact Statement.
- [8] 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.

[9] I have duly considered the above factors in determining the sentence to be imposed on you.

[10] Simione Paki, you have been found guilty and convicted of two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act (Counts 2 and 3).

[11] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.

[12] 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."

[13] 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."*

[14] 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."

- [15] 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".

- [16] 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."

- [17] 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."

[18] 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."

[19] 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."

[20] 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.

[21] 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."*

- [22] 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."

- [23] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentences at 11 years imprisonment for the second and third counts of Rape.

- [24] The aggravating factors are as follows:

- (i) You were the grand uncle of the complainant. The complainant referred to you as grandfather. You had come to live at the complainant's house so as to assist the family. Thus the complainant and her family trusted you. Being so, you should have protected the complainant. Instead you have breached the trust expected from you and the breach was enormous.
- (ii) There was a large disparity in age between you and the complainant. The complainant would have been between 10 and 11 years of age, at the time you committed these offences on her. At the time of the offending you were between 51 and 52 years of age. Therefore, you were nearly 41 years older than the complainant.
- (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, and thereby robbed the complainant of her innocence.

- (v) You perpetrated these offences in the complainant's own home where the complainant should have felt safe. All the incidents took place when the other occupants of the house were not present and when you were alone with the complainant.
 - (vi) The impact of the crime on the complainant was extremely traumatic and is said to be continuing.
 - (vii) You are now convicted of multiple offending.
- [25] Simone Paki, you are now 53 years of age (Your date of birth being 17 November 1966). You are said to be divorced. You have two children who are now married. You testified in Court that previously you were employed as a taxi driver. You were employed as a taxi driver for about 30 years, until 2013. However, these are all personal circumstances and cannot be considered as mitigating circumstances.
- [26] 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.
- [27] Considering the aforementioned aggravating factors, I increase your sentences by a further 5 years in respect of the second and third counts of Rape. Now your sentences for the second and third counts of Rape is 16 years imprisonment.
- [28] For your previous good character I grant you a discount of 2 years. Now your sentences for the second and third counts of Rape is 14 years imprisonment for each count.
- [29] Simone Paki, you have been found guilty and convicted of one count of Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act respectively (Count 1).
- [30] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [31] 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.
- [32] 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)."

- [33] In this case, as per Count 1, it has been proved that you unlawfully and indecently assaulted the complainant, by sucking her unclothed breast with your mouth. Therefore, in my opinion, the offence in Count 1 should be categorized under Category 3 above.
- [34] As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years imprisonment for the first count of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act.
- [35] 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 4 years' imprisonment for the first count of Sexual Assault.
- [36] Simione Paki, you have been found guilty and convicted of one count of Attempted Rape in terms of Section 208 of the Crimes Act (Count 4).
- [37] The offence of Attempt to Commit Rape in terms of Section 208 of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [38] 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."

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

"In Joji 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."

[40] 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.

[41] Accordingly, considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, and also taking into consideration the aggravating factors and the sole mitigating factor, which is your previous good character, I impose on you a sentence of 4 years' imprisonment for the fourth count of Attempted Rape.

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

Count 1 – Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 4 years' imprisonment.

Count 2- Rape contrary to Section 207 (1) and 2(b) and (3) of the Crimes Act – 14 years' imprisonment.

Count 3 – Rape contrary to Section 207 (1) and 2(b) and (3) of the Crimes Act – 14 years' imprisonment.

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

I order that all four sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 14 years.

[43] Accordingly, I sentence you to a term of 14 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 11 years of that sentence.

[44] 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."

[45] Simone Paki, you were in remand custody for this case from 6 March 2019 to 23 October 2019, when you were granted bail by this Court. Thereafter, your bail was cancelled by this Court on 22 July 2020. You have been in remand custody since that date. Accordingly, you have been in custody for a total period of nearly 10 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 10 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 14 years imprisonment.

Non-parole period - 11 years imprisonment.

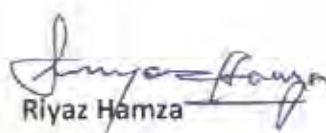
Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 13 years and 2 months imprisonment.

Non-parole period - 10 years and 2 months imprisonment.

[47] 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 15th Day of October 2020

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