

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 20 of 2020

STATE

V

NIMATI QIONIMUA

Counsel: Mr. Saif Shah for the State
Ms. Litiana Ratidara for the Accused

Dates of Trial: 25-27 January 2021
Summing Up: 28 January 2021
Judgment: 29 January 2021
Sentence Hearing: 17 February 2021
Sentence: 8 March 2021

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

SENTENCE

[1] Nimati Qionimua, you have been found guilty and convicted of the following offence for which you were charged:

COUNT ONE

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code.

Particulars of Offence

NIMATI QIONIMUA, between the 1st day of January 1987 and 28th day of January 1994, at Waibau, Naitasiri, in the Eastern Division, penetrated the vagina of **TT**, with his penis, without her consent.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 3 days. The prosecution, in support of their case, led the testimony of the complainant, **TT**. 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 charge. 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 charge.
- [4] As could be observed you have been found guilty and convicted of one count of Rape, contrary to Sections 149 and 150 of the Penal Code.
- [5] You are the complainant's step-father. The complainant is now 44 years of age. Her date of birth is 7 December 1976. She clearly testified to the incidents which took place since she was in Class 7. She said that she was in Class 7 in 1990. Thus she would have just turned 13 at the time.
- [6] The complainant testified that you penetrated her vagina with your penis 2-3 times a week. This had continued until 28 January 1994, the day she had given birth to her eldest child, who was fathered by you. Thus you had been sexually abusing the complainant for a period of over 4 years. It is clear that the complainant was a juvenile at the time you committed these offences on her.
- [7] The Victim Impact Statement 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 complainant is said to have continued for a long period of time after the incident, as detailed in the said Victim Impact Statement.
- [8] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the purposes for which sentencing may be imposed by a Court; and sets out the relevant factors that a Court should take into account during the sentencing process.
- [9] In particular, Section 4 (3) of the Sentencing and Penalties Act provides as follows:

"(3) In sentencing offenders for an offence involving domestic violence, a court must also have regard to —

(a) any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including —

(i) the age of the victim;

(ii) whether the victim was pregnant; and

(iii) whether the victim suffered any disability;

(b) whether a child or children were present when the offence was committed, or were otherwise affected by it;

(c) the effect of the violence on the emotional, psychological and physical well-being of a victim;

(d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;

(e) the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender —

(i) accepts responsibility for the offence and its consequences;

(ii) has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;

(iii) may pose any further threat to a victim;

(f) evidence revealing the offender's —

(i) attitude to the offence;

(ii) intention to address the offending behaviour; and

(iii) likelihood of continuing to pose a threat to a victim; and

(g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance."

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

[11] Nimati Qionimua, you have been found guilty and convicted of one count of Rape, contrary to Sections 149 and 150 of the Penal Code.

[12] The offence of Rape in terms of Section 149 of the Penal Code, is made punishable under Section 150 of the Penal Code. Section 150 of the Penal Code provides: "Any person

who commits the offence of rape is liable to imprisonment for life, with or without corporal punishment."

- [13] 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."

- [14] 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."*

- [15] 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."

- [16] 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".

[17] 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.”

[18] 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 courts or if serving another sentence, totality of appropriate sentence.”

[19] 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.”

[20] 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.”

[21] 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.

[22] 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.”*

[23] However, it must be noted that the charge against the accused relates to incidents which took place between the periods 1 January 1990 (as per the testimony that was elicited in Court) to 28 January 1994. These criminal proceedings have been instituted against the accused over 25 years later.

[24] Therefore, it would be unjust to use the tariff laid down by the Supreme Court in *Aitcheson v State (supra)*, in determining the sentence to be imposed on the accused in the instant case. The more appropriate tariff to be used would be the tariff adopted by the Supreme Court in *Anand Abhay Raj v. The State (supra)*. This is more so because *Anand Abhay Raj* was a case where the Appellant had been found guilty and convicted by the Suva High Court of 4 counts of Rape, contrary to Sections 149 and 150 of the Penal Code.

[25] For these reasons, Nimati Qionimua, I have decided to adopt the sentencing tariff of 10 to 16 years imprisonment in determining the sentence to be imposed on you in this case.

[26] 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."

[27] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentence at 10 years imprisonment for the count of Rape.

[28] The aggravating factors are as follows:

- (i) You had subjected the complainant to a campaign of rape, which commenced on or about January 1990 and continued up until 28 January 1994. This was a prolonged period of over 4 years.
- (ii) You were the step father of the complainant. Being so, you should have protected the complainant. Instead you have breached the trust expected from you and the breach was gross.
- (iii) There was a large disparity in age between you and the complainant at the time of offending. The complainant would have been between 13 and 16 years of age, at the time you committed these offences on her. At the time of the offending you were between 32 and 35 years of age. Therefore, you were nearly 20 years older than the complainant at the time of offending.
- (iv) You took advantage of the complainant's vulnerability, helplessness and naivety.

- (v) You exposed the innocent mind of a child to sexual activity at such a tender age, and thereby robbed the complainant of her innocence.
- (vi) You perpetrated these offences on the complainant in the family home, where the complainant should have felt safe.
- (vii) You had impregnated the complainant. She had given birth to her eldest child, who was fathered by you, on 28 January 1994.
- (viii) The impact of the crime on the complainant was extremely traumatic. The complainant has been emotionally and psychologically traumatized by your actions. The impact of your actions on the complainant is said to have continued for a long period of time after the incident.

[29] Nimati Qionimua, you are now 63 years of age (Your date of birth being 3 December 1957). You are said to be married and residing at Waibau Settlement, Naitasiri. You have two biological children with the complainant and seven step children from your wife. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[30] 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.

[31] Considering the aforementioned aggravating factors, I increase your sentence by a further 6 years. Now your sentence would be 16 years imprisonment.

[32] For your previous good character I grant you a discount of 2 years. Now your sentence is 14 years imprisonment for the count of Rape.

[33] The next issue for consideration is whether this Court should grant you any concessions due to your current age.

[34] Her Ladyship Madam Justice Nazhat Shameem in the case of *Rokota v. The State* [2002] FJHC 168; HAA 68 J of 2002S (23 August 2002) held as follows:

"...However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character."

[35] Making reference to Principles of Sentencing (2nd Edition), by D. A. Thomas, Her Ladyship said:

"Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally

be shortened so as to avoid the possibility that the offender will not live to be released."

[36] However, considering all the facts and circumstances of this case, especially the fact that the complainant was your stepdaughter and was merely 13-16 years of age at the time of the incidents and the fact that you had sexually abused her over a prolonged period of time, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

[37] Accordingly, I sentence you to a term of 14 years' imprisonment.

[38] However, in determining the non-parole period to be imposed on you, I have given due consideration to your advanced age. Accordingly, pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 9 years' imprisonment.

[39] 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."

[40] Nimati Qionimua, you were in remand custody for this case from 27 November 2019, the day on which you were first produced in the Magistrates Court of Nausori, until 20 October 2020, when you were granted bail by this Court. Thereafter, you were remanded into custody on 29 January 2021, the day on which you were found guilty and convicted by this Court. You have been in remand custody since that date. Accordingly, you have been in custody for a total period of 12 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 12 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 14 years imprisonment.

Non-parole period - 9 years imprisonment.

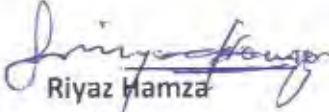
Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 13 years imprisonment.

Non-parole period - 8 years imprisonment.

[42] 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 8th Day of March 2021

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