

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 12 of 2020

STATE

V

MARIKA KOROVATA

Counsel : Ms. Kimberly Semisi for the State
Ms. Lice Manulevu with Ms. Frances Singh for the Accused

Dates of Trial : 1-5 March 2021
Judgment : 16 March 2021
Sentence Hearing : 15 April 2021
Sentence : 11 October 2021

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

SENTENCE

[1] Marika Korovata, you were charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2016 to the 31st day of December 2016, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of **AS**, a child under the age of 13 years, with his penis.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2017 to the 31st day of December 2017, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of **AS**, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2018 to the 31st day of December 2018, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of **AS**, a child under the age of 13 years, with his penis.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the vagina of **AS**, a child under the age of 13 years, with his penis.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, between the 1st day of January 2019 to the 29th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, unlawfully and indecently assaulted **AS**, a child under the age of 13 years, by touching her breasts.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MARIKA KOROVATA, on the 30th day of October 2019, at Koroibici Settlement, Lokia, in the Eastern Division, penetrated the anus of **AS**, a child under the age of 13 years, with his penis.

- [2] You pleaded not guilty to the charges and the matter proceeded to trial. The ensuing trial was held over 5 days. The complainant (AS), her grandaunt, Tokasa Nora, the complainant's aunt, Mereseini Rokowati and Medical Officer, Dr. Losana Burua testified on behalf of the prosecution. You testified on your own behalf.
- [3] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty and convicted you of Counts 1-5. You were found not guilty and acquitted of Count 6.
- [4] Although sentence in this case had been fixed for an earlier date it had to be postponed as regular Court sittings were not held for several months due to the outbreak of the coronavirus pandemic in Fiji.
- [5] It was proved during the trial that, between the 1 January 2016 and 31 December 2016, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.
- [6] It was proved during the trial that, between the 1 January 2017 and 31 December 2017, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.
- [7] It was also proved during the trial that, between the 1 January 2018 and 31 December 2018, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.
- [8] It was further proved during the trial that, between the 1 January 2019 and 29 October 2019, in Koroibici Settlement, Lokia, Nausori, you penetrated the vagina of the complainant with your penis, and at the time the complainant was a child under the age of 13 years.
- [9] And finally it was proved during the trial that, between the 1 January 2019 and 29 October 2019, in Koroibici Settlement, Lokia, Nausori, you unlawfully and indecently assaulted the complainant by touching her breasts.
- [10] It is an agreed fact that you are the maternal grandfather of the complainant and that you financially supported the complainant after her mother had passed away in 2016.
- [11] As per her birth certificate tendered to Court as Prosecution Exhibit PE1, the complainant's date of birth is 11 June 2007. Therefore, at the time you committed these offences on her she was between 9-12 years of age. [In the year 2016 she was 9 years old, and she turned 10 in 2017, 11 in 2018 and 12 in 2019]. At the time she testified in Court she had turned 13.

[12] The complainant clearly testified to all the aforesaid incidents. I have referred to the complainant's evidence at length in my judgment.

[13] The complainant testified that she is attending the Nausori Special School since last year. Therefore, it is clear that she is a child with special needs.

[14] 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. It is clear that the impact of your actions are continuing, as the complainant remains emotionally and psychologically traumatized by the incidents.

[15] 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.

[16] 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.

[17] 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.

[18] 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.”

[19] 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.”*

[20] 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.”

[21] 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”.

[22] 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.”

[23] 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.”*

[24] 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.”

[25] 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.”

[26] 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 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.

[27] 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.”*

[28] 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.”

[29] 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 each of the counts of Rape.

[30] The aggravating factors are as follows:

- (i) You are the maternal grandfather of the complainant and you have been financially supporting the complainant after her mother had passed away in 2016. Thus the complainant trusted you and depended on you. Being so, you should have protected the complainant. Instead you have breached the trust expected from you and the breach was gross.
- (ii) There was a large disparity in age between you and the complainant. The complainant would have been between 9-12 years of age, at the time you committed these offences on her. At the time of the offending you were between 59 and 62 years of age. Therefore, you were over 50 years older than the complainant.
- (iii) The complainant is a child with special needs and she is attending the Nausori Special School since last year. 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) I find that there was some degree of planning and premeditation on your part in committing these offences.
- (vi) You had threatened the complainant with violence if she informed anyone about the incidents of abuse.
- (vii) The complainant has been emotionally and psychologically traumatized by your actions and the harm is said to be continuing.
- (viii) You are now convicted of multiple offending.

[31] Considering the aforementioned aggravating factors, I increase your sentence by a further 8 years. Now your sentences are 19 years imprisonment for each of the counts of Rape.

- [32] Marika, you are now 65 years of age (Your date of birth being 23 August 1956), married with 6 children. One of your children is said to be suffering from Down syndrome. It is said that you were employed as a Plaster man prior to being remanded into custody for this case, earning \$180.00 per week. You are said to be the sole bread winner of your family. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.
- [33] Although no medical certificates have been submitted in proof, it has been stated that you are having a heart condition for which you are currently attending clinics at the Cardiac Section of the C.W.M. Hospital. It is said that you have been getting bad chest pains ever since you have been remanded and this could be as a result of your heart condition.
- [34] 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. Therefore, Court considers you as a person of previous good character.
- [35] I accept that you are a person of previous good character. Accordingly, considering the aforesaid mitigating factor I reduce 2 years from your sentences. Now your sentences are 17 years imprisonment for each of the counts of Rape.
- [36] Marika Korovata, you have been found guilty and convicted of one count of Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act (Count 5).
- [37] The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [38] 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.
- [39] 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)."

[40] In this case, as per Count 5, it has been proved that you unlawfully and indecently assaulted the complainant, by touching her breasts with your hands. Therefore, in my opinion, the offence in Count 5 should be categorized under Category 3 above.

[41] 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 fifth count of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act.

[42] 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 6 years' imprisonment for the fifth count of Sexual Assault.

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

Count 1- Rape contrary to Section 207 (1) and 2(a) and (3) of the Crimes Act – 17 years' imprisonment.

Count 2 – Rape contrary to Section 207 (1) and 2(a) and (3) of the Crimes Act – 17 years' imprisonment.

Count 3- Rape contrary to Section 207 (1) and 2(a) and (3) of the Crimes Act – 17 years' imprisonment.

Count 4 – Rape contrary to Section 207 (1) and 2(a) and (3) of the Crimes Act – 17 years' imprisonment.

Count 5 – Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years' imprisonment.

I order that all sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 17 years.

- [44] Accordingly, I sentence you to a term of 17 years imprisonment.
- [45] The next issue for consideration is whether this Court should grant you any concessions due to your current advanced age and your medical condition.
- [46] 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.”

- [47] 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.”

- [48] However, considering all the facts and circumstances of this case, especially the fact that the complainant was your grand-daughter and was merely 9-12 years of age at the time of the incidents, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.
- [49] Accordingly, I sentence you to a term of 17 years’ imprisonment. 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 13 years’ imprisonment.
- [50] I also order the Prison authorities to ensure that you are given proper treatment for your heart condition while you are serving your sentence of imprisonment.
- [51] 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.”

- [52] You were arrested for this case on 4 December 2019 and remanded into custody until 8 September 2020, the day on which you were granted bail by this Court. That is a period of 9 months. Thereafter, you were again remanded into custody on 16 March 2021, the day on which you were found guilty and convicted for this case. That is a period of nearly 7 months. Accordingly, you have been in custody for a period of nearly 16 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 16 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 17 years' imprisonment.

Non-parole period - 13 years' imprisonment.

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

Head Sentence - 15 years' and 8 months imprisonment.

Non-parole period - 11 years' and 8 months imprisonment.

[54] 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 11th Day of October 2021

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