

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 147 of 2021

STATE

V

MBR

Counsel : Mr. Unal Lal for the State
Ms. Keli Vulimainadave with Ms. Alanieta Bilivalu for the
Juvenile

Punishment Hearing : 6 May 2022

Punishment : 12 July 2022

The name of the Juvenile is suppressed. Accordingly, the Juvenile will be referred to as "MBR".

PUNISHMENT

[1] MBR, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offence:

COUNT

Statement of Offence

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

Particulars of Offence

MBR, on the 3rd day of December 2021, at Lautoka, in the Western Division, penetrated the mouth of **ADI MILA JOANA** with his penis, without her consent.

- [2] On 11 February 2022, the DPP filed the Information and Disclosures relevant to the case. You were ready to take your plea on the very same day. On that day you pleaded guilty to the one count against you in the Information. This was before my brother Judge His Lordship Justice Sunil Sharma.
- [3] Subsequently this matter came up before me. As such, on 14 March 2022, I re-took your plea. On that day you pleaded guilty to the one count against you in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your guilty plea.
- [4] On the same day, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the count of Rape in the Information, and found the count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea in respect of the count of Rape as charged.
- [5] I now proceed to impose the punishment against you.
- [6] The Summary of Facts filed by the State was as follows:

“The Juvenile in this matter is MBR (hereinafter referred to as “Juvenile”).

The complainant in this matter is Adi Mila Joana (hereinafter referred to as “PW1”).

On the 3rd December 2021, at around 7.30 pm, PW1 along with her cousin, Livia Navou were purchasing a few items from Buabua Shopping Centre. After purchasing the items, they walked to their homes. Whilst walking, PW1 sensed someone was following them so PW1 and her cousin Livia shone their flashlights and saw the Juvenile following them. PW1 and her cousin recalls that the Juvenile was wearing a black pants with a blue t-shirt tied around his head. They claim that Juvenile lowered his head down when they shone their torch on him.

The Juvenile and PW1 were later involved in a physical fight and in the midst of their struggle, PW2 ran to seek assistance. Whilst fighting, the Juvenile pushed PW1 into the drain and pressed her shoulder with one hand whilst putting his unerected penis into her mouth with the other.

PW1 bit the edge of the juvenile’s penis as soon as he inserted it in her mouth. The Juvenile fled from the scene and after he heard voices of people coming towards him.

On the 17th December 2021, at around 7.00 pm, PW1, her cousin, Livia and others again went to Buabua Shopping Centre. A few metres away from the shopping centre, Livia noticed and recognized the Juvenile standing with another person a few metres away. Livia claims that soon as the Juvenile saw them, he started walking away from them. Livia then asked her niece and nephew about the Juvenile and she was informed that

the Juvenile is on Facebook. After receiving this information, Livia searched for the Juvenile on Facebook and was able to find and identify the Juvenile to be the same person who was involved in a physical fight with PW1 on 3rd December 2021.

The Juvenile was later arrested and interviewed under caution. The Juvenile admitted in his caution interview that he pushed PW1 in the drain, got on top of her, opened his pant's zipper and put his penis into PW1's mouth (Q & A 46 – 55) [Attached is a copy of the Record of Interview].

The Juvenile was subsequently charged for the offence of Rape [Attached is a copy of Charge Statement]."

- [7] MBR, you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [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 punishment to be imposed on you.
- [10] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.
- [11] 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.”

- [12] In ***The State v Lasaro Turagabeci and Others*** (unreported) Suva High Court Crim. Case No. HAC0008.1996S; Pain J 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.”

- [13] In the case of ***State v. Marawa*** [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice 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] It was further held in ***Mohammed Kasim v. The State*** (supra):

“.....We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years.....We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

- [15] 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.”

[16] It is settled that the tariff for a rape of an adult victim is a term of imprisonment between 7 years and 15 years-As per Gates J in **State v. Marawa** (supra) and Fernando J in **State v. Naicker** [2015] FJHC 537; HAC 279 of 2013 (15 July 2015).

[17] In determining the starting point within a 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."

[18] In terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

[19] MBR your date of birth is 13 February 2005. At the time of the offending, you were 16 years of age, and as such a "young person".

[20] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

"(1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."

Emphasis is mine.

[21] The aggravating factors are as follows:

- (i) The frequent prevalence of the offence of Rape in our society today.
- (ii) The complainant in this case was 36 years of age and very much older than you. In fact, she was more than double your age.
- (iii) I find that there was some degree of pre-planning or pre-meditation on your part in committing this offence.
- (iv) This incident of Rape was accompanied by force and violence. You had pushed the complainant into the drain and pressed her shoulder with one hand while committing the act of Rape.

- (v) Injuries had been caused to the complainant as a result of your actions. This is confirmed as per the findings in the Medical Examination Report of the complainant.
- (vi) As per the Victim Impact Statement of the complainant it is clear that she has been emotionally and psychologically traumatized by your actions and the harm is said to be continuing.

[22] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have submitted that you are truly remorseful of your actions and assured Court that you will not re-offend. You say you are willing to reform.
- (iv) It is submitted that you are ashamed of what you have done to the complainant and seeks forgiveness from her and her family.
- (v) You have submitted that your actions had been provoked by the complainant, with whom you had been involved in a physical fight during the course of the incident. Although, you admit that your response to the provocation was quite bizarre and unusual.
- (vi) That you entered a guilty plea at the first available opportunity.

[23] Considering all the aforementioned factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, MBR I impose on you a punishment of 2 years imprisonment for the count of Rape.

[24] The next issue for consideration is whether your punishments should be suspended.

[25] Section 26 of the Sentencing and Penalties Act provides as follows:

- (1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*
- (2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of*

imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

- [26] MBR you are now 17 years of age [Your date of birth being 13 February 2005]. You are said to be residing at Kaleli Settlement, Waiyavi with your uncle. However, at the time of the offending, you were residing at Buabua, Lautoka. You are said to be the youngest in your family of three siblings.
- [27] You are said to be a Year 11 student attending St. Thomas High School in Lautoka.
- [28] You have submitted that your actions were unforgiveable and that you deeply regret your actions.
- [29] MBR you were arrested for this matter on 18 December 2021 and produced in the Magistrates' Court of Lautoka. You were granted bail by the High Court on 4 January 2022. Therefore, you have been in remand custody for this matter for over 2 weeks.
- [30] As per the Pre Punishment Report submitted by the Probation Officer, Department of Social Welfare, Lautoka Office, it is submitted that you have admitted and taken full responsibility for your actions. You feel highly embarrassed and deeply ashamed of your behaviour. You have promised that you will not re-offend. You have stated that you will study hard to achieve your ambition in life, which is to be an Electrician.
- [31] The Report further states that you have a good family support from your father and your mother which will enable you to live as a law abiding citizen in the future.
- [32] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

- [33] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[34] I have considered the following circumstances:

- You are a young juvenile offender;
- You have been of previous good character;
- You have fully cooperated with the Police in this matter;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions and have apologized for same;
- You have assured Court that you will not re-offend and are willing to reform;
- You entered a guilty plea at the first given opportunity during these proceedings;
- You were in remand custody for this case for about 2 weeks.

Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your punishment.

[35] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your punishment for a period of 10 years.

[36] In the result, your final punishment of 2 years imprisonment, is suspended for a period of 10 years. You are advised of the effect of breaching a suspended punishment.

[37] Furthermore, Court orders that you be put under probation of the Social Welfare Department for a period of 2 years. The Social Welfare Department is to immediately arrange for counselling to be provided to you in the presence of your parents. The Social Welfare Department is to provide all necessary assistance, support and counselling to your parents, so that they improve their parenting skills towards you. It is also the responsibility of your parents to ensure that you obey any directions given by the Social Welfare Department.

[38] A copy of this Punishment is to be served on the Officer in Charge of the Department of Social Welfare, Lautoka Office.

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



Solicitors for the State:
Solicitors for the Juvenile:


Riyaz Hamza

JUDGE
HIGH COURT OF FIJI

Office of the Director of Public Prosecutions, Lautoka.
Office of the Legal Aid Commission, Lautoka.