

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2021

STATE

V

NACANIELI KUE

Counsel : Mr. Unal Lal for the State  
Ms. Keli Vulimainadave with Ms. Losana Taukei for the Accused

Sentence Hearing : 19 April 2024

Sentence : 10 May 2024

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

### SENTENCE

[1] Nacanieli Kue, as per the Amended Information filed by the Director of Public Prosecutions (DPP), you were charged, with the following offences:

#### COUNT ONE

##### *Statement of Offence (a)*

WRONGFUL CONFINEMENT: Contrary to Section 286 of the Crimes Act 2009.

##### *Particulars of Offence (b)*

NACANIELI KUE, on the 14<sup>th</sup> day of December 2020, at Lautoka, in the Western Division, wrongfully confined MNM.

## COUNT TWO

### *Statement of Offence (a)*

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

### *Particulars of Offence (b)*

**NACANIELI KUE**, on the 14<sup>th</sup> day of December 2020, at Lautoka, in the Western Division, penetrated the vagina of **MNM**, a child under 13 years of age, with his finger.

## COUNT THREE

### *Statement of Offence (a)*

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

### *Particulars of Offence (b)*

**NACANIELI KUE**, on the 14<sup>th</sup> day of December 2020, at Lautoka, in the Western Division, penetrated the vulva of **MNM**, a child under 13 years of age, with his tongue.

- [2] This matter was first called before the High Court on 22 January 2021. On 2 March 2021, the DPP filed the Information relevant to the case and the matter was adjourned for plea. When the plea was first taken, on 24 March 2021, you pleaded guilty to the charges. [As per the original Information filed Count 3 was a charge of Sexual Assault, contrary to Section 210 of the Crimes Act No. 44 of 2009 (Crimes Act)].
- [3] On 5 January 2022, the Learned Defence Counsel had informed Court that you were only admitting to Count 2, but not to Counts 1 and 3. Accordingly, on 12 January 2022, the guilty plea entered in respect of Counts 1 and 3 were vacated and a not guilty plea was entered in respect of the said two counts. However, on 18 February 2022, the guilty plea entered in respect of Count 2 was also vacated and a not guilty plea was entered in respect of the said count.
- [4] On 28 June 2022, the State moved to file the Amended Information, which application was permitted by Court. You took your plea on the same day and pleaded not guilty to the three charges in the Amended Information.
- [5] After the conclusion of all pre-trial issues this matter was set for trial from 3-6 April 2023.

- [6] Accordingly, the trial in the matter was scheduled to commence on 3 April 2023. On the said day, when the charges were put to you, you pleaded not guilty to Counts 1 and 3, but pleaded guilty to Count 2 in the Amended Information.
- [7] This Court was satisfied that you pleaded guilty to Count 2 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.
- [8] On 6 April 2023, the Summary of Facts were filed in Court and were read out and explained to you. You said you understood and agreed to the same. Accordingly, Court found your guilty plea in respect of Count 2 to be unequivocal. I found that the facts support all elements of the count of Rape in the Amended Information, and found the said count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the second count of Rape as charged.
- [9] Since you were convicted for Count 2, the State moved for time to reconsider the other two charges.
- [10] After a long lapse of time, on 13 March 2024, the State filed a Nolle Prosequi in terms of Section 49 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), in respect of Counts 1 and 3. Accordingly, you were discharged in respect of the charges for which the Nolle Prosequi was entered (Counts 1 and 3).
- [11] Nacanieli Kue, I now proceed to pass sentence on you in respect of the remaining Count 2.
- [12] The Summary of Facts filed by the State was as follows:

*"The Complainant in this matter is MNM (PW1), Student of Yasawa Street, Lautoka [a copy of the birth certificate is attached herein].*

*The accused in this matter is NACANIELI KUE, 76 years old in 2020, Unemployed of Kermode Road, Lautoka.*

*On the 14<sup>th</sup> of December 2020, sometimes after 3.00 p.m., PW1 was walking home after getting off the school bus at Kermode Road. She walked up to steps that leads to Tavakubu Road.*

*Whist in the house of the accused, the accused inserted his index finger into PW1's vagina.*

*The matter was reported to the Police by PW1's mother and the accused was subsequently arrested and interviewed under caution. The accused stated that he inserted his finger inside PW1's vagina only once [Q & A 46, 48, 49, 50, 51, 53, 65 & 72]. [A copy of the accused record of interview is attached herein].*

*The accused was later charged for the offence of Rape.*

*PW1 was medically examined at Lautoka Hospital [a copy of the medical report is attached herein]."*

- [13] Nacanieli Kue, you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [14] As per her birth certificate the complainant's date of birth is 19 March 2011. Therefore, at the time you committed this offence on her, the complainant was just 9 years of age and, as such, a juvenile.
- [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 punish and 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] Section 4(2) of the Sentencing and Penalties Act provides that a Court must also consider the following factors when sentencing an offender:

*(2) In sentencing offenders a court must have regard to —*

*(a) the maximum penalty prescribed for the offence;*

*(b) current sentencing practice and the terms of any applicable guideline judgment;*

*(c) the nature and gravity of the particular offence;*

*(d) the offender's culpability and degree of responsibility for the offence;*

*(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

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

[19] Nacanieli Kue, the offence of Rape in terms of Section 207(1) of the 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 **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."*

[22] In **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.”*

- [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] 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 also 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."*

[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 (with Justice Saleem Marsoof and Madam Justice

Chandra Ekanayake agreeing) 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 (20<sup>th</sup> 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 **Aitcheson v State** (*Supra*), it was said:

*[72] Undoubtedly it has been accepted by the society that rape is the most serious sexual offence that could be committed on a woman. Further it is said that; "A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female."*

[31] 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."*

[32] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 11 years imprisonment for the count of Rape.

[33] The aggravating factors are as follows:

- (i) There was a large disparity in age between you and the complainant. At the time of the incident the complainant was only 9 years of age. At the time you were 75 years of age. Therefore, you were 66 years older than the complainant at the time of the offending and wielded a position of power and authority over the complainant.
- (ii) You took advantage of the complainant's vulnerability, helplessness and naivety and thereby paid no regard to her personal security or privacy.
- (iii) 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.



- (iv) This Court finds that your actions were pre-planned. On the day of the incident you saw the complainant walking past your house, at which point you got her to come into the house, where you perpetrated this offence on her.
- (v) The frequent prevalence of the offence of Rape in our society today, especially cases of child Rape.

**[34]** In mitigation you have submitted as follows:

- (i) You are a first offender and a person of previous good character. Even the State confirms this fact.
- (ii) You have submitted that you are truly remorseful of your actions.
- (iii) You have fully co-operated with the Police when you were taken in for questioning and subsequently charged for this matter instead of trying to circumvent the course of justice.
- (iv) That you entered a guilty plea during the course of these proceedings.

**[35]** Nacanieli Kue, you are now 79 years of age (Your date of birth being 10 November 1944). You are said to be a widower. You have no children of your own, but rely on your niece and her family for support. You are said to be unemployed. You were said to be residing with the family of one of your nephew's in Kermodé, Lautoka, at the time of the offending.

**[36]** Furthermore, it is stated that you are sickly with asthma. Due to your old age you are also said to be having a hearing problem.

**[37]** However, the above are all personal circumstances and cannot be considered as mitigating circumstances.

**[38]** Nacanieli Kue, considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence for the count of Rape would be 16 years imprisonment.

**[39]** I accept that you are a first offender and as such a person of previous good character. I also accept your remorse as genuine and also the fact that you fully co-operated with the Police in this matter. Accordingly, considering the above mitigating factors, I deduct 2 years from your sentence. Now your sentence for the count of Rape would be 14 years imprisonment.

**[40]** You entered a guilty plea only when the trial in the matter was about to commence. Although you entered an early guilty plea to the charges in the original Information, that guilty plea was later vacated. Therefore, your guilty plea must be considered as a belated one. Nevertheless, in doing so you saved some of the resources of this Court, instead of proceeding with the matter for trial. More importantly, you saved the complainant from having to give evidence and thereby re-live the incident all over again. For your guilty plea I grant you a further discount of 3 years. Now your sentence for the count of Rape would be 11 years imprisonment.

[41] The next issue for consideration is whether this Court should grant you any concessions due to your advanced age and also due to the asthmatic condition that you are reported to be suffering from.

[42] Her Ladyship Madam Justice Nazhat Shameem in the case of *Rokota v. The State* [2002] FJHC 168; HAA 68 J of 20025 (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."*

[43] Making reference to Principles of Sentencing (2<sup>nd</sup> 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."*

[44] However, considering all the facts and circumstances of this case, especially the fact that the complainant herself was merely 9 years of age at the time of the incident, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

[45] Accordingly, I sentence you to a term of 11 years imprisonment.

[46] 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 6 years imprisonment. I also order the Prison authorities to ensure that you are given proper treatment for your asthmatic condition while you are serving your sentence of imprisonment.

[47] 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."*

[48] You were in remand custody from 21 December 2020, the day on which you were arrested for this case, until 7 July 2022, the day on which you were released on bail. Thereafter, upon your conviction for this charge, you were remanded into custody once again by this Court on 3 May 2023. You have remained in custody since that day. Accordingly, you have been in custody for a total period of about 31 months. The period you have been in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 31 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 11 years imprisonment.

Non-parole period - 6 years imprisonment.

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

Head Sentence - 8 years and 5 months imprisonment.

Non-parole period - 3 years and 5 months imprisonment.

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



  
Riyaz Hamza  
JUDGE  
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 10<sup>th</sup> Day of May 2024

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