

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 139 of 2023**

**STATE**

**V**

**ML**

**Counsel** : Mr. Laisiasa Baleilevuka with Ms. Rukalesi Uce for the State  
Ms. Nimita Sharma with Ms. Sagrika Pillay for the Juvenile

**Punishment Hearing** : 9 April 2025

**Punishment** : 14 May 2025

*The name of the complainant and the Juvenile are suppressed. Accordingly, the complainant will be referred to as "FRKFN" and the Juvenile will be referred to as "ML".*

## **PUNISHMENT**

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

### **COUNT ONE**

#### **(REPRESENTATIVE COUNT)**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**ML**, between the 1<sup>st</sup> day of August 2023 and the 30<sup>th</sup> day of September 2023, at Nadi, in the Western Division, penetrated the vagina of **FRKFN**, a child under the age of 13 years, with his finger.

- [2] This matter was first called before the High Court on 29 September 2023. The Disclosures relevant to the case were filed on 20 October 2023 and served on your Counsel. On 13 March 2024, the DPP filed and served the Information and the matter was adjourned for plea.
- [3] On 29 April 2024, you were ready to take your plea on the said Information. Accordingly, on that day you pleaded guilty to the single count of Rape 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 13 September 2024, the State filed the Summary of Facts. On 18 October 2024, 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:

**A. BACKGROUND**

1. *The juvenile is ML, 16 years of age (DOB: 6/12/2007), student of Nakavu in Nadi.*
2. *The complainant is FRKFN, 5 years of age (DOB: 27/1/2018) of Nakavu in Nadi.*
3. *The juvenile and the complainant are cousins.*

**B. INCIDENT**

4. *On the 2<sup>nd</sup> of September 2023, the complainant's mother namely Taina Nabuka (hereinafter referred to as PW1) was bathing the complainant after she returned from work when the complainant complained to her of her 'dule' meaning vagina being painful. PW1 enquired about why it was so and the complainant informed her that the juvenile had touched her on two separate occasions.*
5. *Upon further enquiry into the above, the complainant relayed to PW1 that these incidents would occur when no one was at home.*
6. *On one occasion, only the complainant and the juvenile were at home, whilst everyone else went to school and work. The juvenile told the complainant to go to the room and informed her that he would massage her back. When the complainant went to the room, the juvenile took off her undergarment and made her lie down on the mattress. As the complainant was lying down, the juvenile inserted his right finger into the complainant's vagina which the complainant felt*

*it to be painful and cried. The juvenile then kissed the complainant on the mouth but the complainant pushed him away and he fell on the floor. Thereafter, the complainant opened the door and went out.*

**C. INVESTIGATION & ARREST**

7. *The matter was reported to the Police and investigation was carried out. The complainant was taken to Nadi Hospital for medical examination.*

***Annexed and marked as PE1 is the Medical Report dated 3<sup>rd</sup> September 2023 [Not Annexed].***

8. *Thereafter the juvenile was arrested and taken to the Nadi Police Station.*

**D. RECORD OF INTERVIEW AND CHARGE**

9. *On the 7<sup>th</sup> of August 2023 (actually on 4 September 2023), the juvenile was interviewed under caution by DC 5075 Fabiano and in the presence of his aunt Alumita Teiviti at the Nadi Police Station. The juvenile admitted that he inserted his finger into the complainant's vagina inside the room on one occasion.*

***Annexed and marked as PE2 is the Record of Interview of the juvenile dated 7<sup>th</sup> August 2023 [Not Annexed].***

10. *The juvenile was later charged with one representative count of Rape contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.*

[7] When reading through the said Summary of Facts filed by the State, it is clear that the period of offending as stated in the Information is incorrect. The period of offending as stated in the Information is 1 August 2023 to 30 September 2023. This cannot be so as the complaint to the Police was made on 3 September 2023, which led to investigations being conducted into this matter. Therefore, the actual period of offending should read as between 1 August 2023 and the 30 August 2023.

[8] ML, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[9] 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.*

**[10]** I have duly considered the above factors in determining the punishment 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 and also to protect the community.

**[11]** 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.*

- [12] ML, I have duly considered the above factors as well in determining the punishment to be imposed on you.
- [13] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.
- [14] 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."*

- [15] 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."*

- [16] 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."*

- [17] 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".*

- [18] 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."*

- [19] 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."*

[20] 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."

[21] 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."*

[22] 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.

[23] 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."*

- [24] 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."*

- [25] In terms of Section 2 of the Juveniles Act No. 13 of 1973 (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.
- [26] ML as per your Birth Certificate your date of birth is 6 December 2007. At the time of the offending, you were 15 years and 8 months of age, and as such a "young person".
- [27] Section 20 of the Juveniles Act provides: *The words "conviction" and "sentence" shall not be used in relation to juveniles and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of juvenile persons, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order made upon such a finding, as the case may be.*
- [28] 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.*

[29] ML, the aggravating factors are as follows:

- (i) Breach of trust. You are said to be a cousin of the complainant. Your aunt (your father's younger sister) is married to the brother of the complainant's mother. At the time of the alleged incident, you had come to live with the complainant's family. So at the time, you were living together in the same household as the complainant. Being so, you should have protected and safeguarded the complainant. Instead you have breached the trust expected from you.
- (ii) There was a disparity in age between you and the complainant. At the time of the incident the complainant was only 5 years and 6 months of age. At the time you were 15 years and 8 months of age. So you were over 10 years older than the complainant at the time of the offending.
- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety and thereby paid no regard to her personal security or privacy.
- (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) 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.
- (vi) The frequent prevalence of the offence of Rape in our society today, especially cases of child Rape.

[30] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous cases or pending cases. The State too confirms that there are no previous cases recorded against you.
- (ii) That you have 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.

(iv) That you entered a guilty plea at an early stage of these proceedings.

[31] Accordingly, considering the objective seriousness of the offence and 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 mitigating factors, and the restrictions placed on this Court in terms of the provisions of Section 30 of the Juveniles Act, ML I impose on you a punishment of 2 years imprisonment for the count of Rape.

[32] The next issue for consideration is whether your punishment should be suspended.

[33] 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.*

[34] ML you are now 17 years of age [Your date of birth being 6 December 2007]. At the time of the offending, you were 15 years and 8 months of age. You are single. You are said to be residing in Legalega, Nadi, with your uncle and aunty. You are supported financially by your uncle and aunty. Your uncle is said to be working in Australia, while your aunt stays at home. Your parents are said to be divorced and you have been residing with your uncle and aunty ever since. It is said that you are about to be enrolled in the Polytech School in Nadi to follow a course in Office Administration.

[35] ML you have admitted to the Summary of Facts and taken full responsibility for your actions. You have submitted that your actions were unforgiveable and deeply regret what you have done. You are aware that your actions have caused irreparable harm to the complainant and you sincerely apologize for your said actions.

[36] ML you were arrested for this matter on 4 September 2023 and produced in the Magistrates' Court of Nadi on the next day. You were granted bail on the same day. Therefore, you have not been in remand custody for this case a single day.

- [37] A Pre-Punishment Report has been submitted by Ms. Vasemaca Uqueque, Welfare Officer, Department of Social Welfare, Nadi Office, confirming the factors you have highlighted in mitigation.
- [38] As per the Pre-Punishment Report, it is stated that your parents are separated and living on their own. Your father (ML Senior) lives in Labasa, while your mother (Sotiana Kulikulitea) lives in Somosomo, Taveuni. You have been staying with your aunt at Legalega, Nadi. Prior to this, you had been staying with your paternal aunt in Labasa and later relocated with another aunt in Nakavu Village, where the offence was committed. It is stated that you have no permanent place to live.
- [39] It is further stated in the report that you wish to reunite with your father who currently resides in Labasa.
- [40] 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."*

- [41] 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."*

- [42] I have considered the following circumstances:

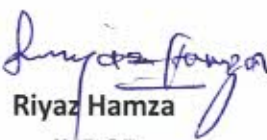
- You are a juvenile offender, who is considered as a young person at the time of offending;
- You have been of previous good character;
- You have co-operated with the Police in this matter;
- You have accepted responsibility for your conduct;
- You submit that you are truly remorseful of your actions;
- You have assured Court that you will not re-offend and are willing to reform;
- You entered a guilty plea at an early stage during these proceedings.

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



- [43] 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 8 years.
- [44] In the result, your final punishment of 2 years imprisonment, is suspended for a period of 8 years. You are advised of the effect of breaching a suspended punishment.
- [45] 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 father (ML Senior). The Social Welfare Department is to provide all necessary assistance, support and counselling to you and your father. It is also the responsibility of your father to ensure that you obey any directions given by the Social Welfare Department.
- [46] A copy of this Punishment is to be served on the Officer in Charge of the Department of Social Welfare, Nadi Office and also the Officer in Charge of the Department of Social Welfare, Labasa Office.
- [47] 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 14<sup>th</sup> Day of May 2025

**Solicitors for the State:**

**Solicitors for the Juvenile:**

**Office of the Director of Public Prosecutions, Lautoka.**

**Office of the Legal Aid Commission, Lautoka.**