

**IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION**

CRIMINAL CASE NO: HAC 273/2013

BETWEEN : **STATE**

AND : **T G (The Juvenile)**

COUNSELS : **Ms L Latu for the State**
Mr S Waqainabete for the Accused

Date of Hearing : **28/11/2013**
Date of Sentencing : **05/12/2013**

SENTENCE

[Names of the accused and the victim are suppressed. Accused will be referred to as T.G and victim will be referred to as M.S.T]

[1] The Director of Public Prosecution had preferred the following charges against the Juvenile above mentioned.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Sections 207(1) and 207(2) (a) and (3) of the Crimes Decree No: 44 of 2009.

Particulars of Offence

T.G, on the 17th day of February, 2013 at Mudu Village, Koro Island, in the Central Division, had carnal knowledge of M.S.T, a child under the age of 13 years.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009.

T.G, on the 22nd day of March, 2013 at Mudu Village, Koro Island, in the Central Division, had carnal knowledge of M.S.T, a child under the age of 13 years.

- [2] When the plea was taken on 08/10/2013 the Juvenile pleaded guilty to both charges. Accepting the Plea to be unequivocal this court found him guilty to both charges and convicted him under Section 207(1) and 207(2) (a) and (3) of Crimes Decree No: 44 of 2009.
- [3] State Counsel submitted the following summary of facts of which the Juvenile admitted.
- [4] The Juvenile T.G was 17 years old at the time of the offending and he was a Form 5 student of Koro High School and resides at Mudu Village, Koro Island.
- [5] The victim M.S.T was 11 years and 8 months old Class 7 student of Nakodu, Mudu Primary School, also from the village of Mudu, Koro Island. The Juvenile is the first cousin of the victim.
- [6] On the 17th day of February 2013, at about 8pm the victim was sent to the shop by her father Kolinio Tawake to buy matches. When she returned home, she was told to go again and buy salt. She returned home with the

salt but brought the wrong change, so she went back to get the correct change. On her way back, the victim met the accused. He then told her that someone wants to see her from his home. The victim thought that it was the accused's mother, she went into the accused's house. She checked in the kitchen but did not see anyone. The accused walked in and locked the door. The victim asked the accused why he was locking the door and insisted that she wants to leave. The accused told her to lie down and removed her panty, she refused. The accused got angry, the victim started crying then slowly pulled her panty down and lied down but continued crying. The accused removed his pants and lay on top of her. The accused then stood up and told her to lie downward, the accused started touching her breast, then he told her to kneel down and started massaging her back and inserted his penis into her anus. The victim alleges whilst the accused was doing this act, she heard the accused's mother calling, the accused stopped and told her to go home. The victim stated that her backside was wet and sticky. She went home, could not walk properly, there were people drinking grog at her house. She went straight to her room, she was crying and was frightened to inform her mother Vaciseva Ligatabua.

[7] Then on the 22nd day of March 2013, at about 7.30pm, the victim was on her way to have her shower when she heard the accused calling her from beside Dalituicama's house. The victim went and the accused asked her to get inside the kitchen, the victim went in and the accused closed the door. According to the victim, that day she was wearing a sulu and her panty, the accused forcefully pulled her panty and asked her to lie down. The victim refused and told the accused to stop but the accused forced her to lie down, pulled her sulu and started licking her breast, then licked her vagina, then he later in the words of the victim "put out his penis and put inside my vagina". The victim told the accused that it was painful. The accused continued forcing his penis inside her vagina, he was doing this for 30 minutes. The victim cried and she felt blood coming. Then the accused told the victim to go home and not to tell anyone about them. The victim returned home that night, so afraid to inform her parents.

[8] This matter came to light when the victims' teachers informed her father of her performance. On the same day, her father and her mother inquired her about her performance. The victim started crying and related the alleged

incidents to them. On the next morning, the matter was reported to Koro Police Station.

[9] The victim was medically examined on the 6th day of July 2013 by Dr. Alipate Vakamocea and his specific findings are as follows:

- a) No hymen noted.
- b) Vaginal exam normal not pregnant.

[10] The accused was arrested and interviewed by PC 3189 Sevuloni Nakalevu on the 8th day of July 2013, where he admitted to having sex with the victim twice, the 1st incident he stated that he asked the victim to have sexual intercourse with her, he kissed the victim, then sucked her breast, and he touched her vagina. According to the accused the victim was lying down, he wanted to insert his penis into her vagina, but was refused by the victim. The accused then told her to kneel down and he put his penis into her anus. When inserting his penis into victim's anus, it was painful to the victim, and then he continued rubbing his penis into her anus, until he ejaculated. According to the accused the 2nd incident occurred in the kitchen, after the victim had removed her clothes, he started licking her breast, then licked her vagina, and later inserted his penis into the victim's vagina, until he ejaculated. The accused was charged by PC 4444 Koroilagilagi on the 10th July 2013.

[11] The accused is the first offender.

[12] As per Section 207(1) (2) (a) (3) of the Crimes Decree No: 44 of 2009, the maximum sentence for an offence of Rape is to imprisonment for life.

[13] Section 30 of the Juvenile Act prescribes a maximum sentence of 2 years. As per Section 20 Juvenile Act the words "Conviction" and "Sentence" shall not be used in relation to Juveniles.

Tariffs for Rape

- [14] In the case of **Chand v State** [2007] AAU005. 2006S (25 June 2007), the court referred to the case of **Mohammed Kasim v The State** Appeal 14 of 1993 where the same court observed:

“We consider that any rape case without aggravating or mitigating feature the starting point for sentencing an adult should be a term of imprisonment of 7 years. It must be recognized by the courts that the crime of rape has become altogether too frequent. The sentences imposed by the courts for that crime must reflect an understandable public outrage”

- [15] In the case of **State v AT** [2011] FJHC360 : HAC 035. 2011S (14th June 2011) Hon. Justice Temo remarked that;

“In my view, order has to be established in the Juvenile world. Young persons who are approaching adulthood (i.e. 18 years old) should not be allowed to exploit the venerable in the Juvenile world. In this case, a 17 years 10 months and 03 days old juvenile takes the advantage of a 04 years old juvenile. In my view it is the duty of the court to step in and protect the most venerable in the Juvenile world.

This is especially so, when those who are approaching adulthood (i.e. 18 years old) take advantage of the young, by raping them. To commit rape against the young, in my view, is the characteristic of a “depraved character” and a custodial sentence within the ambit of the Juvenile Act is called for. The length of the sentence will depend on the mitigating and aggravating factors”.

- [16] The Juvenile is 18 years old and he is studying.
- [17] In **O’Keefe v State** [2007] FJHC: 34 the Fiji Court of Appeal held that the following principle of sentencing:

“When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person”

[18] I have carefully considered these submissions in light of the provisions of the Sentencing and Penalties Decree No: 42 of 2009 especially those of the sections set out below in order to determine the appropriate sentence.

[19] Section 15(3) of the Sentencing Decree provides that:

“as a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4, and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in the General Sentencing Provisions of the decree”.

[20] The objectives of sentencing, as found in Section 4(1) of the Decree, are as follows:

1. To punish offenders to an extent and a manner, which is just in all the circumstances;
2. To protect the community from offenders;
3. To deter offenders or other persons from committing offences of the same or similar nature;
4. To establish conditions so that rehabilitation of offenders may be promoted or facilitated;
5. To signify that the court and the community denounce the commission of such offences; or
6. Any combination of these purposes.

[21] Section 4(2) of the Decree further provides that in sentencing offenders, a Court must have regarded to:

- (a) The maximum penalty prescribed for the offence;
- (b) Current sentencing practice and the terms of any applicable and guideline Judgments;
- (c) The nature and gravity of the particular offence;
- (d) The defender’s culpability and degree of responsibly 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;

[22] Now I consider the aggravating factors:

1. That the offence was committed on a Juvenile. The victim was 11 years and 8 months old at the time of the incident.
2. The offence was committed by a juvenile.
3. The victim is the first cousin of the accused.
4. That the accused took advantage of the trust that the victim placed on him as an older cousin.
5. The accused disregarded of the clearly defied societal, religious and traditional rules that prohibit sexual relationship between first cousins.
6. The victim was emotionally and psychologically traumatized as a result of the offence.

[23] Now I consider the mitigating circumstances:

1. The Juvenile is remorseful.
2. He saved the court time by pleading guilty to the charge.
3. Prevented the complainant from having to relive her ordeal encountered.
4. He is continuing his education.
5. He is the first offender and fully co-operated with police.
6. He regrets what he has done and assures the court he will not re-offend.

[24] At present the Juvenile is 18 years and 06 months old. He has already approached adulthood. (ie 18 years old). The profound duty of the court is to ensure safety and protection of Juveniles in the community. Hence this court is duty bound to pass an appropriate sentence in order to protect Juveniles from future offenders. The victim impact report also taken into consideration before passing the sentence.

[25] Considering all aggravating and mitigating circumstances I sentence the Juvenile as follows:

- [26] For the 1st count I take 12 months imprisonment as the starting point. I add 04 months for aggravating factors to reach the period of imprisonment at 16 months. I deduct 04 months for the mitigating factors.
- [27] For the 2nd count I take 12 months imprisonment as the starting point. I add 04 months for aggravating factors to reach the period of imprisonment at 16 months. I deduct 04 months for the mitigating factors.
- [28] I order both sentence to run concurrent to each other. Now the sentence of the Juvenile is 12 months imprisonment.
- [29] Considering personal background and other circumstances of this case I suspend the 12 months imprisonment of the Juvenile for a period of 05 years. Suspended sentence is explained to the Juvenile.
- [30] Probation officer is requested to arrange proper counseling programs for the Juvenile until he completes his education. Breach of any conditions laid down by the probation officer to be reported to this Court for an appropriate order.
- [31] 30 days to appeal.

P Kumararatnam
JUDGE

At Suva
05/12/ 2013