

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 319 of 2015

STATE

V

ALIPATE TUWAI

Counsel : Ms. Shyamala Alagendra with Ms. Lavenia Bogitini for the State
Mr. Filimoni Vosarogo for the Accused

Dates of Trial : 6-10 August 2018

Summing Up : 13 August 2018

Judgment : 14 August 2018

Sentence : 17 August 2018

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

SENTENCE

[1] Alipate Tuwai you have been found guilty and convicted of the following offence for which you were charged:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

ALIPATE TUWAI between the 12th day of September 2015 to the 19th day of September 2015, at Suva, in the Central Division, had carnal knowledge of **ST** without her consent.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 5 days. The complainant, ST, her primary school teacher, Clare Fong and Doctor Elvira Ongbit gave evidence on behalf of the prosecution.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you guilty of the charge. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors, and found you guilty and convicted you of the said charge.
- [4] It was proved during the trial that, between the 12 September 2015 and the 19 September 2015, at Suva, you penetrated the vagina of ST, with your penis, without her consent.
- [5] You are an immediate neighbour of the complainant at Gaji Road in Samabula. The complainant was only 13 years of age, at the time you committed the above offence on her (her date of birth being 11 September 2002), and as such, she was a juvenile.
- [6] The complainant clearly testified as to how, you penetrated her vagina with your penis, without her consent. You were entrusted to take the complainant to her home on that fateful Saturday evening. Instead, on the way, you lured her to a grassy spot and raped her. By your shameful act you have robbed the innocence of a 13 year old child.
- [7] In terms of the Victim Impact Assessment Report filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. It is stated that the complainant felt scared and ashamed. The reason for being scared is because you had threatened to kill her if she told anyone about the incident. The reason for shame was because she had to return to Court and narrate the incident all over again. The complainant has stated that when she was asked questions during the trial, memories of the incident had come flashing back to her mind and she could not cope with it. The complainant states that after the unfortunate experience she suffered she felt lost most of the time. She has left school too, because she could not focus with her school work.

- [8] Section 4 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. I have duly considered these factors in determining the sentence to be imposed on you.
- [9] 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.
- [10] 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."

- [11] 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."*

- [12] 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."

- [13] 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”.

- [14] 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.”

- [15] In **State v. Niko Vila** [2012] FJHC 907; HAC 136 of 2010 (29 February 2012); His Lordship Justice Priyantha Nawana held:

“The accused’s engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl in the calibre of AV is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and assess even by psychologists or sociologist. The depravity of the accused in committing the offence should be denounced to save little children for their own future; and, the men of the accused’s calibre should not be allowed to deny the children of their legitimate place in the community. In passing down the sentence in a case of this nature, deterrence is, therefore, of paramount importance.”

- [16] I have also considered the following cases which concerned a minor child being raped by a neighbour, and the Sentences imposed by Court:

- (1) **State v Inoke Cumu** – Sentence [2016] FJHC 1134; HAC 305 of 2014 (15 December 2016).
- (2) **State v Zubair** – Sentence [2017] FJHC 895; HAC 425 of 2016 (24 November 2017).
- (3) **State v Sakaraia Qoro** – Sentence [2018] FJHC 270; HAC 53 of 2015 (11 April 2018).
- (4) **State v Feroz Kumar** – Sentence [2018] FJHC 403; HAC 24 of 2015 (11 May 2018).

- [17] 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.”
- [18] Similarly, the Learned Assistant DPP has submitted to Court the statistics for Sexual Offences cases, including cases of Rape and Sexual Assault, from May 2015 to 31 July 2018.

| <u>Year</u> | <u>Total Victims</u> | <u>Victims U18</u> | <u>Victims U14</u> |
|-------------|----------------------|--------------------|--------------------|
| 2018 | 123 | 78 | 54 |
| 2017 | 444 | 130 | 99 |
| 2016 | 228 | 150 | 91 |
| 2015 | 138 | 87 | 48 |

- [19] In the case of *Anand Abhay Raj v. The State* [2014] FJSC 12; CAV 03 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.
- [20] 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.”

- [21] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years imprisonment for the count of Rape.
- [22] The aggravating factors are as follows:
- (i) You were an immediate neighbour of the complainant. Being so you should have protected her. 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 was merely 13 years of age at the time you committed the offence on her. At the time you were 37 years of age. Therefore, there was a difference in age of 24 years.
 - (iii) 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.
- [23] Alipate Tuwai, you are now 41 years of age. You are married and living with your wife, Makelesi Tuwai and 4 children. The older 3 children are said to be children of your wife from a former partner. The fourth child is your own and is 2 years and 6 months old. You are said to be a welder with Online Engineering Limited and had been employed there for about 1 year. Prior to that you had been a security officer with South Pacific Security. However, these are all personal circumstances and cannot be considered as mitigating circumstances.
- [24] As per the Previous Convictions Report filed there is one active previous conviction recorded against you. Therefore, this Court cannot consider you as a first offender.
- [25] Considering the aforementioned aggravating factors, I increase your sentence by a further 4 years. Now your sentence is 14 years imprisonment for the count of Rape.
- [26] Accordingly, I sentence you to a term of imprisonment of 14 years. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 11 years of that sentence.
- [27] 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."*
- [28] You have been in remand custody for this case from 20 September 2015 to 17 December 2015, when you were granted bail by this Court. Thereafter, you have been in remand custody since 14 August 2018, the day on which I delivered the Judgment in this case. Accordingly, you have been in custody for a period of about 3 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[29] In the result, you are sentenced to a term of imprisonment of 14 years with a non-parole period of 11 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 13 years and 9 months.

Non-parole period - 10 years and 9 months.

[30] 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 17th Day of August 2018

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