

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 17 of 2017

[CRIMINAL JURISDICTION]

STATE

V

1. PETERO MAWI
2. SALAUCA VOLAUKILODONI

Counsel : Ms. L. Bogitini and Ms. S. Shameem for the State  
Mr. Qetaki and Ms. O. Grace for the 1<sup>st</sup> Accused  
Mr. J. Daurewa for the 2<sup>nd</sup> Accused

Hearing on : 26 - 28 March 2019

Summing up on : 29 March 2019

Judgment on : 29 March 2019

Sentenced on : 12 April 2019

[The victim's name is suppressed. She will be referred to as "LI."]

SENTENCE

1. Petero Mawi, you stand convicted of the offence of defilement contrary to section 215(1) of the Crimes Act 2009 ("Crimes Act") and Salauca Volaukiledoni, you stand convicted of the offence of rape contrary to section 207(1) of the Crimes Act 2009.

2. The victim in this case was 13 years old at the time the two of you sexually exploited her.
3. Petero Mawi, one night in the month of July 2016 around 8.00pm, you approached the victim and asked her whether you can have sexual intercourse with her. Even though she refused initially, later on she agreed. Then you and the victim had sexual intercourse and the victim in her evidence said that it was consensual. This took place outside her house. The evidence revealed that Salauca Volaukilodoni was also around when you had sexual intercourse with the victim and he approached you after you had finished having sexual intercourse with the victim. Having spoken to Salauca Volaukilodoni you then told the victim that Salauca Volaukilodoni wants to speak to her. The evidence suggests that you wanted the victim to have sexual intercourse with Salauca Volaukilodoni. The victim is related to your wife.
4. Salauca Volaukilodoni, you then told the victim that you want to do the same thing Petero Mawi did with her. She refused. But then you threatened the victim that you will inform her grandfather about her having sexual intercourse with Petero Mawi. It is pertinent to note at this point that the victim's parents had passed away when she was around 5 years old and she was living with her grandparents when this incident took place. Due to your threat, the victim agreed and had sexual intercourse with you. The victim and you are cousins.
5. Petero Mawi, you were 30 years old and Salauca Volaukilodoni, you were 22 years old at the time the above offences were committed. The victim was only about 13 years and 2 months old at that time.
6. Pursuant to section 215(1) of the Crimes Act 2009 read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for defilement is an imprisonment for 10 years

7. Based on the previous sentencing decisions I concluded in the case of *State v Chand* (2016) FJHC 889; HAC314.2015 (6 October 2016) that the sentencing tariff for the offence of *defilement of young person between 13 and 16 years of age* under section 215(1) of the Crimes Act is 02 years to 04 years. However, as I highlighted in *Chand* (supra), 04 years imprisonment was taken as the higher end of the tariff when the maximum sentence for the offence of *defilement of girl between thirteen and sixteen years of age* (under section 156 of the Penal Code) was 5 years imprisonment.
8. It is pertinent to note that the tariff for the offence of indecent assault is 12 months imprisonment to 04 years where the offence of indecent assault carries a penalty of 05 years imprisonment under the Crimes Act. This sentencing tariff was also established when the Penal Code was in force and the penalty for the offence of indecent assault under section 154 of the Penal Code is also 05 years imprisonment. However, the penalty for the offence of defilement of a person between the age of 13 and 16 years is now an imprisonment term of 10 years as I have stated above.
9. Recently, in *Aitchison v State* [(2018) FJSC 29; CAV0012.2018 (2 November 2018)] the Supreme Court reviewed the tariff for child rape and increased it to an imprisonment term between 11 years to 20 years. In the aforementioned case, the Supreme Court said this;

*"24] The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent."*

10. The offence of defilement serves to protect young girls from sexual exploitation [*Dommainasava v The State* [2001] FJHC 25; Haa0032;2001s (18 May 2001)].



Having considered the Supreme Court's stance in *Aitcheson* (supra) and the fact that the higher end of the present tariff for defilement does not reflect the intention of the legislature in increasing the punishment for the said offence from a term of 05 years imprisonment to 10 years imprisonment, I am of the view that the higher end of the tariff for the offence of defilement should now be appropriately increased. Whereas the higher end of the tariff for defilement was 04 years when the relevant maximum sentence was 05 years imprisonment under the Penal Code, the higher end of the tariff in my view should now be 08 years given that the maximum sentence for defilement under the Crime Act is 10 years imprisonment.

11. I would not consider it appropriate to disturb the lower end of the tariff. In cases where the victim is almost 16 years old and the victim and the accused are fairly close in age, a suspended term may be justified. A magistrate has the discretion to suspend the sentence if the final sentence reached is an imprisonment of 02 years or below.
12. In the circumstances, I have decided that the appropriate tariff for the offence of defilement is an imprisonment term between 02 years and 08 years. This tariff should be regarded as the range of the sentence on conviction after trial. The sentencing court may decide to suspend the sentence in line with the provisions of section 26 of the Sentencing and Penalties Act where appropriate.
13. Pursuant to section 207(1) of the Crimes Act, the maximum punishment for rape is life imprisonment. The sentencing tariff for rape of a child victim is a term of imprisonment between 11 to 20 years as stated above.

#### **Sentence of Petero Mawi**

14. I select 02 years imprisonment as the starting point of your sentence.

15. I consider the following as the aggravating factors relevant to you in this case;
- a) The incident took place just two months after the victim's 13<sup>th</sup> birthday;
  - b) The age difference between you and the victim is 17 years. You were more than twice her age;
  - c) You made the victim lie down on the ground outside her house and had unprotected sexual intercourse with her around 8.00pm. Your conduct was shameful and utterly disrespectful. You had no regard for the victim's safety. Your conduct in fact led the victim to be subsequently raped by the second accused; and
  - d) You took advantage of the victim's vulnerability and naivety.
16. I would regard your offending as one of the worst forms the offence of defilement could be committed. As I have outlined above, the victim was just thirteen years and two months old when you defiled her. If this incident had taken place two months earlier, you are looking at an imprisonment term between 11 years and 20 years. A child who is 13 years and 02 months old cannot in fact be expected to understand the intricacies of sexual intercourse and take an informed decision to consent to such act. Fortunately for you, the law is in your favour in this case as the Crimes Act only recognises that a child under 13 years of age is incapable of giving consent as far as the offence of rape is concerned. Nevertheless, the victim's age at the time of the offence which is just about 13 years should be considered as a significant aggravating factor in this case. The nature and gravity of your offending is further compounded by the fact that you are more than twice the victim's age. These two factors, the fact that the victim is just about 13 years old and the significant age gap between you and the victim alone would warrant a sentence at the higher end of the tariff.
17. All in all, in view of the aggravating factors outlined above, I would add 06 years to the starting point. Now your sentence is an imprisonment term of 08 years.

18. It is submitted that you are married with five children and you are the sole breadwinner of your family. You have been employed as a taxi driver since January 2019.
19. Considering the submissions made by your counsel, the only fact I can accept as a mitigating factor is the fact that you are a first offender.
20. In view of the said mitigating factor I would deduct 01 year of your sentence.
21. Accordingly, I hereby sentence you to a term of 07 years imprisonment. 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 05 years of that sentence. In fixing your non-parole term, I have considered your personal circumstances and the fact that you are a first offender.
22. Section 24 of the Sentencing and the 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."*
23. I note that you have been in custody in view of this case from 14/01/17 to 16/02/17 and then from the date of the judgment which is 29/03/19 to date. Accordingly, you have spent about 01 month and 15 days in custody in relation to this matter. In view of the provisions of section 24 of the sentencing and Penalties Act the period you have been in custody for this case shall be regarded as time already served by you.



*Sentence of Salauca Volaukilodoni*

24. I select 11 years imprisonment as the starting point of your sentence
25. I consider the following as the aggravating factors relevant to you in this case:
- a) You are related to the victim and she is your cousin. There is a breach of trust;
  - b) The age gap between the two of you is about 09 years.
  - c) You made the victim lie down on the ground outside her house and had unprotected sexual intercourse with her around 8:00pm;
  - d) You exploited the victim's vulnerability and naivety.
26. Your counsel has submitted that you are in a relationship and you have two children. You are the sole breadwinner of your family and you look after your elderly mother.
27. Considering the submissions made by your counsel, the only fact I can accept as a mitigating factor is the fact that you are a first offender.
28. In view of the aggravating factors stated above, I would add 05 years to the starting point and considering the mitigating factor I would deduct 02 years of your sentence. Your final sentence is an imprisonment term of 14 years.
29. For the same mitigating factor, the discount given for the first accused was 1 year but for the second accused, 02 years. Apart from the fact that the personal circumstances of each accused including the age is different, it should be noted that the sentencing range applicable to the first accused is between 02 years and 08 years imprisonment but the range applicable to the second accused is between 11 years and 20 years. The period to add or deduct in view of a particular aggravating or a mitigating factor as the case may be should in my

view be decided bearing in mind the applicable sentencing range, for it to be fair, reasonable and appropriate when using the two-tier method of sentencing.

30. Accordingly, I hereby sentence you to a term of 14 years imprisonment. 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 12 years of that sentence. In fixing your non-parole term, I have considered your personal circumstances and the fact that you are a first offender.
31. I note that you have been in custody in view of this case from 17/11/16 to 16/02/17 and then from the date of the judgment which is 29/03/19 to date. Accordingly, you have spent about 03 month and 12 days in custody in relation to this matter. In view of the provisions of section 24 of the sentencing and Penalties Act the period you have been in custody for this case shall be regarded as time already served by you.
32. In the result, Petero Māwi, you are sentenced to 07 years imprisonment with a non-parole period of 05 years. Considering the period spent in custody, the time remaining to be served is;

Head Sentence – 06 years; 10 months and 15 days

Non-parole period – 04 year; 10 months and 15 days

33. Salauca Volaukilodoni, you are sentenced to 14 years imprisonment with a non-parole period of 12 years. Considering the period spent in custody, the time remaining to be served is;

Head Sentence – 13 years; 08 months and 18 days

Non-parole period – 11 years; 08 months and 18 days



34. Thirty (30) days to appeal to the Court of Appeal.



A handwritten signature in blue ink, appearing to read 'Vinsent S. Perera'.

Vinsent S. Perera  
JUDGE

Solicitors

Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the first Accused  
R. Vananalagi & Associates for the second Accused