

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 93 of 2016

STATE

V

KAMELI DIANI

Counsel : Ms. Shyamala Alagendra with Ms. Mehzabeen Khan for the State
Mr. Lisiate Qetaki with Ms. Lavinia David for the Accused

Dates of Trial : 22-25 January 2019

Summing Up : 28 January 2019

Judgment : 30 January 2019

Sentence : 5 February 2019

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

SENTENCE

[1] Kameli Diani, you have been found guilty and convicted of the following offences for which you were charged:

COUNT 1

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the anus of **TV**, a child under the age of 13 years, with his penis.

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at a separate incident from Count 1, at Colo-I-Suva, in the Central Division, penetrated the anus of **TV**, a child under the age of 13 years, with his penis.

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

KAMELI DIANI, at an unknown date between the 1st day of January 2014 and the 17th day of April 2014, at Colo-I-Suva, in the Central Division, penetrated the mouth of **TV**, a child under the age of 13 years, with his penis.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 4 days. The complainant, TV, his grandfather, Tu Cebu Kuruvaki, and his uncle, Inia Rasaku, testified 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 three charges. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors. Accordingly, this Court found you guilty and convicted you of the said three charges.
- [4] It was proved during the trial that, between 1 January 2014 and the 17 April 2014, at Colo-I-Suva, you penetrated the anus of TV, with your penis, and at the time TV was a child under 13 years of age.
- [5] It was also proved during the trial that, between 1 January 2014 and the 17 April 2014, but on a separate occasion to count 1, at Colo-I-Suva, you penetrated the anus of TV, with your penis, and at the time TV was a child under 13 years of age.
- [6] It was further proved during the trial that, between 1 January 2014 and the 17 April 2014, at Colo-I-Suva, you penetrated the mouth of TV, with your penis, and at the time TV was a child under 13 years of age.
- [7] You are an uncle of the complainant. Your father, Tu Cebu Kuruvaki, is the complainant's grandfather. Tu Cebu Kuruvaki testified that the complainant had been residing with him at Colo-i-Suva since 2007. It is admitted that the complainant was residing with you and other family members at Naisoqo Settlement, Colo-I-Suva, in the year 2014.
- [8] As per his birth certificate tendered to Court as Prosecution Exhibit PE1, the complainant's date of birth is 10 April 2004. Therefore, at the time of the alleged incidents as set out in the Amended Information, which was said to be between the 1 January 2014 and the 17 April 2014, the complainant would have been 9 years old (turning 10), and as such, he was a juvenile. At the time he testified in Court the complainant said that he is 14 years of age.
- [9] The complainant said that he goes to the Suva Special School and he is a senior. Prior to that he had attended Nausori Special School. However, he does not remember when he attended Nausori Special School nor when he started at Suva Special School.
- [10] The complainant described as to how on one occasion you had taken off your pants and put your penis into the complainant's anus. He said that this incident happened during the day time and during this time he had been attending Nausori Special School.
- [11] The complainant testified to another similar incident which took place when his grandfather had gone to Krest Chicken to sell food. During this time too he had been attending Nausori Special School.
- [12] The complainant also testified to an incident which happened in the night, when he was sleeping. He said that you had opened his mouth and put your penis into the

complainant's mouth. Even at the time this incident took place the complainant said that he had been attending Nausori Special School.

- [13] A Psychiatrist Assessment had been conducted on the complainant on 29 October 2018. The said assessment had been carried out by Dr. Daryn Reicherter, M.D.; Clinical Professor and Director of the Human Rights in Trauma Mental Health Programme, Department of Psychiatry and Behavioural Sciences, School of Medicine, Stanford University.
- [14] As per the assessment, it is stated that the complainant has a long history of low Intelligence Quotient (IQ) and carries a diagnosis of Intellectual Disability (ID) and Attention Deficit Hyperactivity Disorder (ADHD). He has struggled with learning disabilities since a very early age and is considered a "special boy" because of intellectual disability. These long standing issues have been tendered via special education in school. Having ID is a vulnerability that increases the risk for sexual victimization.
- [15] As a result of rapes, the complainant has experienced a traumatic life stressor that has directly impacted his mental health and caused damage. He has developed a clinical syndrome called "Post Traumatic Stress Disorder" (PTSD) with panic attacks.
- [16] Dr. Reicherter has concluded that the complainant meets full criteria for PTSD. After the multiple abuses, he is reported to have intrusive distressing memories, recurrent distressing dreams, avoidance symptoms, anhedonia, irritable mood, and exaggerated startle response. The PTSD symptoms have been persistent since the incidents of rapes, and continue to this day. They are chronic and pervasive. The psychological injuries have caused a significant life change since these events.
- [17] 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.
- [18] 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.
- [19] 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."

[20] 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.”*

[21] 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.”

[22] 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”.

[23] 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.”

[24] 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.”

[25] This has been recently 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.”

[26] Similarly, the State has submitted to Court the statistics for Sexual Offences cases, from May 2015 to December 2018.

Year	Total Victims	Victims Under 18	Victims Under 13	Victims Under 8	Victims Under 5
2018	204	141	81	36	14
2017	200	130	72	27	16
2016	228	150	70	20	12
2015 (May-Dec)	138	87	40	19	8
TOTAL	770	508	263	102	50

[27] In the case of ***Anand Abhay Raj v. The State*** [2014] FJSC 12; CAV 0003 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.

[28] However, in the recent case of **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates 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 (20th 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.”*

[29] 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.”

[30] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 years imprisonment for the first count of Rape.

[31] The aggravating factors are as follows:

- (i) The victim was extremely vulnerable by reason of his age and other circumstances in the case. As noted earlier, the victim has a long history of low Intelligence Quotient (IQ) and carries a diagnosis of Intellectual Disability (ID) and Attention Deficit Hyperactivity Disorder (ADHD). He has struggled with learning disabilities since a very early age and is considered a “special boy” because of intellectual disability.
- (ii) The impact of the crimes on the victim was traumatic and is said to be continuing.
- (iii) You were the uncle of the complainant. Being so, you should have protected him. Instead you have breached the trust expected from you and the breach was gross.
- (iv) There was a large disparity in age between you and the complainant. The complainant was 9 years of age at the time you committed these offences

on him. At the time you were 23 years of age. Therefore, there was a difference in age of 14 years.

- (v) Court is of the view that there was some degree of pre-planning on your part to commit these offences.
- (vi) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (vii) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- (viii) You are now convicted of multiple offending.

[32] Kameli Diani, you are now 28 years of age. You are said to be in a defacto relationship having three children who are 5, 3 and 1 year of age. You are said to be employed as a delivery body earning \$150.00 weekly. You have studied only upto Form 1/Year 7. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[33] As per the Antecedent Report filed, it is noted that there are two active previous convictions recorded against you. Therefore, Court is not in a position to give you any concession for previous good character.

[34] Considering the aforementioned aggravating factors, I increase your sentence by a further 7 years. Now your sentence is 19 years imprisonment for count one.

[35] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 years imprisonment for the second count of Rape. Considering the aforementioned aggravating factors, I increase your sentence by a further 7 years. Now your sentence is 19 years imprisonment for count two.

[36] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 years imprisonment for the third count of Rape. Considering the aforementioned aggravating factors, I increase your sentence by a further 7 years. Now your sentence is 19 years imprisonment for count three.

[37] In the circumstances, your sentences are as follows:

Count 1 – Rape contrary to Section 207 (1), 2(a) and 3 of the Crimes Act – 19 years imprisonment.

Count 2 – Rape contrary to Section 207 (1), 2(a) and 3 of the Crimes Act – 19 years imprisonment.

Count 3 – Rape contrary to Section 207 (1), 2(c) and 3 of the Crimes Act – 19 years imprisonment.

I order that all three sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 19 years.

[38] Accordingly, I sentence you to a term of imprisonment of 19 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 16 years of that sentence.

[39] 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.”

[40] You were in remand custody for this case from 19 February 2016 to 3 May 2016, when you were granted bail by this Court. Thereafter, you have been in remand custody since 26 October 2018, when Court revoked your bail. Accordingly, you have been in custody for a period of about 6 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 6 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[41] In the result, you are sentenced to a term of imprisonment of 19 years with a non-parole period of 16 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 18 years and 6 months.

Non-parole period - 15 years and 6 months.

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



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 5th Day of February 2019

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