

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 03 of 2020

[CRIMINAL JURISDICTION]

STATE

V

ILIESA TUI

Counsel : Mr. S Komaibaba for State
Ms. L Ratidara for Accused

Date of Sentence : 14 August, 2020

[The name of the victim is suppressed. Accordingly, the victim will be referred to as "NV". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said victim.]

SENTENCE

1. Iliesa Tui, you pleaded guilty to the following charge and were convicted accordingly on 01/07/20;

Statement of Offence

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

Particulars of Offence

ILIESA TUI between the 1st day of October 2019 to the 31st day of October 2019, at Nadali Village in the Eastern Division, penetrated the mouth of **NV**, a child under the age of 13 years, with his penis.

2. You have admitted the following summary of facts;

Victim: *The victim in this matter is one NV, 7 years old, student of*

Accused: *The accused person in this matter is one Iliesa Tui, 73 years old of Veiniuyaki settlement, Nadali.*

Relationship: *The accused person and the victim attend the same church at Nadali Adventist church.*

FACTS:

Sometimes between 1st to the 31st day of October 2019, the victim and the accused person were at the Nadali Adventist church;

After the sermon the victim was running around inside the church with his other two siblings, the victims sibling went outside and the accused was left alone with the victim.

It was when they were alone that the accused person penetrated the mouth of the victim with his penis.

*The matter was reported to the police thereafter, in which the accused person was arrested and interviewed under caution whereby he admitted to penetrating his penis into the mouth of the complainant as stipulated in **question and answer No. 40** of the caution interview.*

The accused was then charged for the offence of Rape contrary to section 207(1) (2) (c) and (3) of the Crimes Act 2009.

3. It is submitted by your counsel that you are a widower and you live with your daughter who is married. You are 73 years old. You have never attended school and therefore, not received a formal education. It is submitted that you have worked as a labourer at the Public Works Department for 35 years. I have observed that you have a serious hearing difficulty and that you are walking with the aid of crutches.
4. Pursuant to section 207(1) of the Crimes Act 2009 ("Crimes Act") read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for rape is life imprisonment.

5. In the case of *Aitcheson v State* [[2018] FJSC 29; CAV0012.2018 (2 November 2018)] the court held that the sentencing tariff for rape of a child below the age of 13 years should be 11 years to 20 years imprisonment.
6. However, it is pertinent to note that *Aitcheson* (supra) involved six counts of rape by penile penetration of the vagina where the relevant accused had raped his two biological daughters who were under the age of 13 years. It is therefore clear that the aforementioned tariff has been formulated having regard to the offence of rape committed by penetration of the vagina by penis. This being a case where the accused had penetrated the victim's mouth by his penis, this case can be distinguished from *Aitcheson* (supra) for the same reasons I have explained in *State v Vosatokaera* [2020] FJHC 334; HAC233.2019 (22 May 2020).
7. Thus, I am unable to convince myself that, given the circumstances of the offending in this case, the sentence should be within the range of 11 years to 20 years imprisonment.
8. The discretion provided by the legislature to the sentencing court is to punish an offender who had committed the offence of rape contrary to section 207 of the Crimes Act with a term of imprisonment up to life. The legislature does not provide that a particular minimum term of imprisonment should be imposed in every case of rape regardless of the manner and the circumstances of the offending. Therefore the sentencing tariff pronounced in *Aitcheson* (supra) cannot be taken to have imposed a minimum term of 11 years imprisonment for every offender charged with rape where the victim is a child. The following sentiments of Spigelman CJ (of New South Wales) in His Lordship's address to the National Conference of District and County Court judges on 24/06/99¹ are pertinent in this regard;

¹ The Australian Law Journal – Volume 73, at 877

“Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative fore-thought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice.

...

Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure.”

9. All in all, given the circumstances of the offending in this case, it is my considered view that the starting point of your sentence should be a term of 7 years imprisonment.

10. I would now look at the aggravating circumstances in this case.

11. The age difference between you and the victim is around 66 years. It is manifestly clear that you have exploited the victim’s vulnerability and naivety. A church is a place of worship. A place where the congregation receive spiritual guidance. You being an adult member of the congregation and of the society, who has the responsibility of providing guidance and protection to the younger generation, selected the church premises to molest the 7 year old victim. In the victim impact statement, the victim had stated that he no longer goes to the relevant church. The victim had also stated that he had been teased by his sister’s friend at school over this incident. The said victim impact statement clearly reflects that the victim continues to face the consequences of your shameful act committed on him and he will have to live with it for quite a long

period of time. In view of these aggravating circumstances I would add 5 years to your sentence. Now your sentence is a term of 12 years imprisonment.

12. I consider the following as the mitigating factors in this case;
 - a) You are a first offender;
 - b) You are remorseful;
 - c) You have cooperated with the police; and
 - d) You have pleaded guilty.
13. In view of the above mitigating factors, apart from the fact that you have pleaded guilty to the charge, I would deduct 03 years bringing your sentence to 09 years imprisonment.
14. I would regard your guilty plea as an early guilty plea and grant you a discount of one-third. A term of 03 years will be deducted from your sentence in view of your early guilty plea.
15. Accordingly, I would sentence you to a term of 06 years imprisonment. I order that you are not eligible to be released on parole until you serve 05 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Act.
16. It is submitted that you have been in custody in view of this matter since 02/01/20. Accordingly you have spent 07 months and 12 days in custody. The said period shall be considered as a period of imprisonment already served by you in terms of section 24 of the Sentencing and Penalties Act.
17. In the result, you are sentenced to a term of 06 years imprisonment with a non-parole period of 05 years. In view of the time spent in custody, the time remaining to be served is as follows;

Head Sentence – 05 years; 04 months; and 18 days

Non-parole period – 04 years; 04 months; and 18 days

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



Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused.**