IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 77 of 2020
[CRIMINAL JURISDICTION]

STATE

V

ELIKI RAOMA

Counsel	:	Ms. S. Tivao for the State
		Ms. M. Chand with Mr. K. Verebalavu for the Accused
Hearing on	:	03 - 06 November 2020
Summing up on	:	06 November 2020
Judgment on	:	06 November 2020
Sentenced on	:	27 November 2020

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

SENTENCE

1. Eliki Raoma, you stand convicted of the following offences after trial;

SECOND COUNT
(Representative Count)
Statement of Offence
Indecent Assault: contrary to Section 212 of the Crimes Act 2009.

Particulars of Offence
ELIKI RAOMA between the 1st September 2019 to the 9th February 2020 at Draubuta Village, Nausori, in the Eastern Division, unlawfully and indecently assaulted **SN,** a child under the age of 13 years, by touching

her buttocks.

THIRD COUNT

Statement of Offence

Rape: contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

ELIKI RAOMA on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, penetrated the anus of **SN,** a child under the age of 13 years, with his finger.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ELIKI RAOMA on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, penetrated the mouth of **SN,** a child under the age of 13 years, with his penis.

SIXTH COUNT

Statement of Offence

Indecent Assault: contrary to Section 212 of the Crimes Act 2009.

Particulars of Offence

ELIKI RAOMA on the 10th February 2020 at Draubuta Village, Nausori, in the Eastern Division, unlawfully and indecently assaulted **SN,** a child under the age of 13 years, by kissing her lips.

2. The victim in this case was born on 02/10/2014 and you on 21/09/2001. Victim's father and you are cousin brothers. You are therefore called 'Ta Eliki' by the victim. In November 2019 (when the victim was about 05 years and one month and you were 18 years and 02 months old) during the victim's grandfather's birthday celebrations, you gave the victim ice cream and took her outside the house. Then you touched her buttocks after you kissed her on the mouth. Though the victim came out with certain other acts, you were charged only for the act of indecent assault by touching the victim's buttocks.

3. Then on 10/02/20 (when the victim was about 05 years and 04 months and you were 18 years and 05 months old), you went to the victim's house after school

because her father wanted your assistance in relation to some work to be done. You then went with the victim underneath the house as the house was built on long posts. There you kissed the victim on the mouth, you penetrated her anus with your finger and then you penetrated her mouth with your penis. That day the victim's mother noticed that you were looking at the victim in an inappropriate manner and later on when the victim was questioned, the victim came out with regard to what you had done to her.

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. According to the decision in ***Aitcheson v State*** [[2018] FJSC 29; CAV0012.2018 (2 November 2018)] the sentencing tariff for rape of a child below the age of 13 years is 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 respectfully noted that the court did not take an informed decision as to whether the said tariff is appropriate in respect of all forms rape captured by the definition under section 207(2) of the Crimes Act. Therefore, I was inclined to deviate from the said tariff in the cases of ***State v Vosatokaera*** [2020] FJHC 334; HAC233.2019 (22 May 2020) and ***State v Tui*** [2020] FJHC 642; HAC03.2020 (14 August 2020) for the detailed reasons provided in ***Vosatokaera*** (supra).

7. Even the present case is not a case where the victim was raped by vaginal penetration by the penis. The two charges of rape are constituted by penetrating the anus of the victim with the finger and then the mouth with the penis. More importantly, the accused in this case was simply 18 years and 05 months old

when he committed the more recent offences. Had he committed the offence before 05 months or was bone just 05 months before, he would have been considered as a juvenile offender where the maximum sentence would have been an imprisonment term of 02 years. Even in the case of ***State v Volatui*** [2018] FJCA 154; AAU80.2015 (4 October 2018) the Court of Appeal endorsed the sentence imposed by the Learned High Court Judge after deciding to deviate from the relevant accepted tariff where the appellant had committed the offence of rape by digitally penetrating the anus of a male victim while the appellant was 18 years and three months old. All in all, I am not persuaded that the ***Aitcheson*** tariff is appropriate to be applied as the sentencing tariff in this case.

8. In the case of ***State v Qarikaulevu*** [2020] FJHC 863; HAC223.2020 (22 October 2020) Rajasinghe J had depicted the sentencing remarks in the cases of ***Vosatokaera*** (supra) and ***Tui*** (supra) which provides reasons to distinguish the said cases from ***Aitcheson*** (supra), as competing sentencing approaches.

9. At the outset it is important to note that the sentencing remarks found in ***Vosatokaera*** (supra) and ***Tui*** (supra) in fact serve as the justification for the final sentences reached in those two decisions. The approach taken in ***Vosatokaera*** (supra) and ***Tui*** (supra) to distinguish from ***Aitcheson*** cannot be regarded as an attempt to create any competition in sentencing offenders in rape cases, but an attempt to apply the relevant law and logic in order to arrive at a sentence which is just, appropriate and proportionate given the circumstances of each of those two cases. There is no finding made in that case that ***Aitcheson*** tariff applies only to penile penetration of the vagina. The discussion in ***Vosatokaera*** (supra) was on whether the said tariff is appropriate in a case where the anus of a male child was very briefly penetrated by a finger by a 25 year old male. The discussion in ***Tui*** (supra) was on whether ***Aitcheson*** tariff was appropriate in a case where again there was a brief penetration of the mouth (the summary of facts did not reflect anything other than there was penetration) of a male child by a 73 year

old male whose hearing was seriously impaired and appeared frail. In both cases the accused had pleaded guilty.

10. In ***Vosatokaera*** (supra) the main challenge was to arrive at a sentence that would serve as a punishment for the crime committed by the accused but also would not be so disproportionately severe in view of the manner the offence was committed considering also the fact that the accused was only 25 years old. That is to determine what would be the period a 25 year old should be incarcerated for very briefly penetrating the anus of a male child, upon pleading guilty to the offence. In my view, the sentence of more than 05 years (365 days X 5) was in fact a substantial punishment for the said act.

11. In ***Tui*** (supra) the challenge was again to arrive at a sentence that would serve as a punishment for the crime committed by the accused but also would not be so disproportionately severe so that the sentence would turn out to be a life sentence for the 73 year old accused who presented with frailties. This is in view of his conduct as disclosed in the summary of facts that he briefly penetrated the mouth of a male child. The sentence of 06 years (365 days X 6) imposed in that case in my view was a substantial punishment for the relevant accused.

12. It is important to understand that even an incarceration for one year (365 days) is a very serious punishment for an individual that would present various ramifications to that person's life. This is also a burden on the tax payers for the reason that it is the Fiji Corrections Services that should be responsible for all expenses and wellbeing of an inmate throughout the term of incarceration. I sincerely hold the view that the number of years selected as the starting point and then the number of years added and deducted when determining a sentence should not be viewed simply as dealing with mere numerical digits.

13. The importance of a sentencer to be able to determine a sentence that is proportionate to the offending involved in the given case was explained by Spigelman CJ (New South Wales) in His Lordship's address to the National Conference of District and County Court judges on 24/06/99[1] in the following terms;

    *"**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." [Emphasis added]

14. The definition provided under section 207 of the Crimes Act for the offence of rape is rather broad and accordingly, there are at least nine (9) different ways in which the offence of rape could be committed in Fiji based on the physical act as it is illustrated in ***Vosatokaera*** (supra). The definition so provided in the said section 207 is clear and unambiguous and therefore it is in fact not necessary to refer to criminological perspectives of rape in order to understand the elements of the offence of rape or the relevant conduct that would constitute the physical element of the offence of rape in Fiji.

[1] The Australian Law Journal – Volume 73, at 877

15. Conversely, though nine different ways in which the offence of rape could be constituted was discussed in ***Vosatokaera*** (supra), the relevant decision does not suggest that there should be nine separate sentencing tariffs for the offence of rape. That classification was outlined only for the purpose of analyzing the definition in section 207 of the Crimes Act.

16. In fact the said nine different modes of penetration were identified based on the three main categories found under section 207(2) of the Crimes Act. They are;
    a) Carnal Knowledge – Penetration of a sexual organ (either the vagina or the anus) of the victim with the offender's sexual organ (penis). [207(2)(a)]
    b) Penetration of a sexual organ of the victim (vulva, vagina or the anus) with an object or a body part of the offender that is not a sexual organ. [207(2)(b)]
    c) Penetration of the mouth of the victim which is clearly not a sexual organ, with the penis which is a sexual organ of the offender. [207(2)(c)]

17. In my view, those categories are listed in the above order by the legislature not by accident but on a rational basis, taking into account the level of harm and culpability caused to the victim due to the relevant mode of penetration.

18. It is pertinent to note that although inserting a finger inside the vagina or the anus of another person without consent is considered as rape, inserting a finger inside the mouth of another person without consent does not constitute rape. However, inserting the penis inside the mouth do constitute rape. Thus the body part which was used for the penetration and the orifice which was subjected to penetration during the relevant physical invasion do matter when it comes to the offence of rape.

19. When it comes to sentencing, it would be necessary to appreciate the level of harm caused to the victim as a result of the offending and the culpability of the offender, in order to punish the offender in a manner just and appropriate in all the circumstances. The violation of the physical autonomy of a person which is central to the offence of rape would invariably cause certain physical, psychological and emotional harm to the victim.

20. However, it is pertinent to note that a male victim would not run the risk of being impregnated as a result of penetration of his anus with the penis of the offender; yet, when it comes to vaginal penetration with the penis, a female victim would be subjected to such risk. Therefore, the nature and the level of physical harm of penile penetration of the vagina of a female is different from that of penetrating the anus of a male with the penis.

21. For the same reason, the nature and the level of physical harm caused by a vaginal penetration using a finger and by penetration of the mouth of a person with the penis, could be distinguished from that of vaginal penetration of a female with the penis. Moreover, it is not difficult to understand that if an object such as an iron rod as in the *2012 Delhi gang rape and murder case*, was used to penetrate the vagina of the victim, the physical harm caused by such penetration is enormous compared to the penetration by a penis. Thus, the physical harm caused due to the offence of rape is clearly and heavily dependent on the body part (penis or the finger) or the nature of the object that was used for the penetration and also the orifice of the victim's body that was penetrated.

22. It is common knowledge that the psychological and the emotional attributes of males and females are not identical for various reasons. There are obvious differences between the manner in which males and females would react to the same event both psychologically and emotionally. Therefore, if carefully analysed, it would not be difficult to note that the psychological and emotional

harm caused by the relevant invasive conduct would in fact be different based on the gender of the victim. This would not necessarily mean that there should be different sentencing tariffs based on the gender of the victim. Nonetheless, this factor may become a relevant consideration in determining the appropriate sentence in an appropriate case.

23. It should also be noted that the psychological and the emotional harm inflicted due to vaginal penetration with the penis would not be the same as in the case of a vaginal penetration with a finger. There is no doubt that on both instances the victim would experience violation of personal dignity; but, given the different circumstances a victim is generally expected to experience when a penis is inserted inside the vagina as opposed to a finger, the psychological and the emotional harm or impact cannot be expected to be the same.

24. All in all, the body part or the object which is used in order to perform the penetration, the orifice which was penetrated and the gender of the victim are factors that may become relevant for the determination of the level of harm inflicted in appropriate cases of rape. Hence the need to take into account such factors where relevant in deciding the appropriate sentence.

25. I wish to again emphasise that ***Vosatokaera*** (supra) and ***Tui*** (supra) has not created different sentencing regimes for the offence of rape, instead, the circumstances presented in those cases demanded the said cases to be distinguished from the case of ***Aitcheson*** (supra). It would be relevant for this discussion and for the purpose of completeness to state that I would however agree with the conclusion of Rajasinghe J in ***Qarikaulevu*** (supra) to apply the ***Aitcheson*** Tariff in the said case. In the said case the relevant accused was charged with rape for having carnal knowledge of a male victim below the age of thirteen years, by penetrating the said victim's anus with the accused's penis. This mode of penetration falls under the first category of the offence of rape

under section 207(2) where the sexual organs of both the victim and the offender were involved. Therefore, the circumstances of the said case in my view does not provide a sufficient basis for the said case to be distinguished from ***Aitcheson*** (supra).

26. I would conclude the discussion on this incidental issue by quoting from the case of ***McDowell v. Oyer***, 21 Pa. 417, 423-24 (Pa. 1853) where the following observations were made in relation to the application of the doctrine of *stare decisis*;

> "Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. **A palpable mistake, violating justice, reason, and law, must be corrected**, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Témpora mutantur*. We change with the change of the times, as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people."
> [Emphasis added]

27. Coming back to the case at hand, the offence of indecent assault under section 212 of the Crimes Act carries a maximum sentence of 05 years imprisonment.

28. The offences you are convicted of form a series of offences of similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties

Act, I consider it appropriate to impose an aggregate sentence of imprisonment for the four offences you are convicted of.

29. In the case of ***State v. AV*** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009) Goundar J said thus;

> *. . . 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.*

30. As I observed in the case of ***State v Lagolevu*** [2020] FJHC 787; HAC52.2019 (25 September 2020), given the number of cases brought before the courts in Fiji and the sentiments expressed in those cases it is clear that sexual exploitation of children is rife. There is no conclusive evidence however, on whether the increase noted in the number of such cases (quantity) filed during the past few years is a result of an increase in the awareness among the community and access to justice or whether in fact the number of offences committed are on the increase. Whichever is the case, protecting Fiji's children from sexual predators has become a priority.

31. Therefore, when sentencing offenders who had sexually exploited children, a sentencing court should be mindful of the need to protect the community from offenders, to deter the offenders and other persons with similar impulses from committing like offences and to signify that the court and the community denounce the sexual exploitation of children, but always bearing in mind to punish the offender to an extent and in a manner which is just in all the circumstances (vide section 4(1) of the Sentencing and Penalties Act). The punishment or the sentence should be proportionate to the seriousness of the offending.

32. Given the nature of the offending in this case and the fact that only five months have lapsed after you lost the status of being a juvenile, it is my considered view that the starting point of your aggregate sentence should be an imprisonment term of 06 years.

33. I consider the following as aggravating factors in this case;
    a) You are related to the victim. You used that relationship to have access to the victim and then to commit this crime. There is a breach of trust;
    b) The age gap between you and the victim is 13 years; and
    c) You exploited the victim's vulnerability and naivety.

34. The only mitigating factor in your favour is that you are a first offender. I have already considered the fact that you are a young offender in selecting a relatively low sentence as the starting point.

35. Considering the above aggravating factors I would add 03 years to your sentence. Now your sentence is an imprisonment term of 09 years. In view of the above mitigating factor I would deduct 02 years bringing your sentence to 07 years.

36. Accordingly, I would sentence you to a term of 07 years imprisonment. I order that you are not eligible to be released on parole until you serve 04 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Act.

37. You have been in custody for a period of 05 months and 22 days in view of this case. 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.

38. In the result, you are sentenced to a term of 07 years imprisonment with a non-parole period of 04 years. In view of the time spent in custody, time remaining to be served is as follows;

Head Sentence – 06 years; 06 months and 08 days

Non-parole period – 03 years; 06 months and 08 days

39. Having considered the facts of this case, a permanent Domestic Violence Restraining Order is issued against you, identifying the victim in this case 'SN' as the protected person. You are hereby ordered not to have any form of contact with the said victim directly or by any other means, unless otherwise directed by this Court.

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

Vinsent S. Perera
JUDGE

Solicitors;
Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused