

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 281 of 2020

STATE

V

ILIESA SAMULALA

Counsel : Ms. Bhavna Kantharia for the State
Mr. Timoci Varinava for the Accused

Dates of Trial : 20-22 October 2021

Closing Submissions : 25 October 2021

Judgment : 29 October 2021

Sentence Hearing : 19 November 2021

Sentence : 8 December 2021

SENTENCE

[1] Iliesa Samulala, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

COUNT 1

Statement of Offence

UNLAWFUL WOUNDING: Contrary to Section 261 of the Crimes Act.

Particulars of Offence

ILIESA SAMULALA, on the 21st day of September 2020, at Lami, in the Central Division, unlawfully wounded **KATARINA BUBU**, by throwing his tool bag which landed on the back of her head and kicking her with his gum boots.

COUNT 2

Statement of Offence

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

Particulars of Offence

ILIESA SAMULALA, on the 21st day of September 2020, at Lami, in the Central Division, had carnal knowledge of **KATARINA BUBU** without her consent.

- [2] You pleaded not guilty to the above mentioned charges and the matter proceeded to trial. The ensuing trial was held over 3 days. The prosecution in support of their case, called the complainant, Katarina Bubu (who was your de-facto partner), Medical Officer, Dr. Losana Burua, and WDC 3767 Maritina Lewameli, the Investigating Officer in the case. You testified on your own behalf and also called your son Maikeli Baleinaverelala Tabuakuro, to testify in support of your case.
- [3] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty of the alternate offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act No 44 of 2009 (Crimes Act), in respect of Count 1; and found you guilty of Rape as charged in respect of Count 2. You were accordingly convicted of the two charges of Assault Causing Actual Bodily Harm and Rape.
- [4] It was proved during the trial that on 21 September 2020, at Lami, you assaulted the complainant by throwing your tool bag which landed on the back of her head and kicked her with your gum boots, thereby causing Actual Bodily Harm to the complainant (Count 1).
- [5] It was also proved during the trial that on 21 September 2020, at Lami, you raped the complainant, by penetrating her vagina, with your penis, without her consent and that you knew or believed that the complainant was not consenting, or you were reckless as to whether or not she was consenting (Count 2).
- [6] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) sets out the purposes for which sentencing may be imposed by a Court. The purposes are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[7] I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to deter offenders or other persons from committing such offences and also to signify that the Court and the community denounce the commission of such offences.

[8] Section 4 (3) of the Sentencing and Penalties Act stipulates the factors that a Court must have regard to in sentencing offenders for a domestic violence offence.

“(3) In sentencing offenders for an offence involving domestic violence, a court must also have regard to —

(a) any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including —

(i) the age of the victim;

(ii) whether the victim was pregnant; and

(iii) whether the victim suffered any disability;

(b) whether a child or children were present when the offence was committed, or were otherwise affected by it;

(c) the effect of the violence on the emotional, psychological and physical well-being of a victim;

(d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;

(e) the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender —

(i) accepts responsibility for the offence and its consequences;

(ii) has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;

(iii) may pose any further threat to a victim;

(f) evidence revealing the offender's —

(i) attitude to the offence;

(ii) intention to address the offending behaviour; and

(iii) likelihood of continuing to pose a threat to a victim; and

(g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance."

[9] I will first deal with the Count of Rape (Count 2). The offence of Rape in terms of Section 207(1) of the 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 State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S; Pain J 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."

[12] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice 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.”

[13] It was further held in **Mohammed Kasim v. The State** (supra):

“.....We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years.....We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

[14] In the case of **Felix Ram v. The State** [2015] FJSC 26; CAV 12 of 2015 (23 October 2015); His Lordship Chief Justice Anthony Gates laid down the following factors that a Court should take into account when sentencing an offender who has been convicted of Rape:

“(a) whether the crime had been planned, or whether it was incidental or opportunistic;

(b) whether there had been a breach of trust;

(c) whether committed alone;

(d) whether alcohol or drugs had been used to condition the victim;

(e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;

(f) whether the impact on the victim had been severe, traumatic, or continuing;

(g) whether actual violence had been inflicted;

(h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;

(i) whether the method of penetration was dangerous or especially abhorrent;

(j) whether there had been a forced entry to a residence where the victim was present;

(k) whether the incident was sustained over a long period such as several hours;

(l) whether the incident had been especially degrading or humiliating;

(m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;

(n) Time spent in custody on remand;

(o) Extent of remorse and an evaluation of its genuineness;

(p) If other counts or if serving another sentence, totality of appropriate sentence.”

[15] It is settled that the tariff for a rape of an adult victim is a term of imprisonment between 7 years and 15 years-As per Gates J in **State v. Marawa** (supra) and Fernando J in **State v. Naicker** [2015] FJHC 537; HAC 279 of 2013 (15 July 2015).

[16] 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.”

[17] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the second count of Rape.

[18] The aggravating factors are as follows:

- (i) You were in a de-facto relationship with the complainant at the time of the offending. Since you were the de-facto partner of the complainant at the time, this tantamount to a domestic violence offence.
- (ii) Being her de-facto partner you should have protected the complainant. Instead you have breached the trust expected from you and the breach was gross.
- (iii) It was established from the evidence that the incident of Rape was accompanied by force and violence.
- (iv) It is confirmed from the Medical Examination Report that injuries had been caused to the complainant’s genitalia as a result of the Rape.

[19] I find you are 41 years of age [your date of birth being 18 March 1980]. It is said that you were a child born out of wedlock. Since you had been facing a lot of discrimination from your own family, including your step-father who didn't want to accept you, your maternal grandparents had brought you up from birth. You were married and have 3 sons, aged 15, 13 and 11 years respectively. It is said that your legal wife had passed away due to liver problems in 2014. You had been really affected by her passing and had looked for a companion. Thus, you are said to have entered into a de-facto relationship with the complainant in 2014. Prior to your arrest for this case, you had been self-employed as an Electrician earning \$100.00 per week. You are the sole bread-winner of the family. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.

[20] In terms of the Previous Convictions Report filed in Court it is stated that the Accused is known but does not have any previous convictions. The State Counsel too has confirmed this position. Therefore, this Court considers you as a person of previous good character.

[21] Considering the aforementioned aggravating factors, I increase your sentence by a further 4 years. Now your sentence is 11 years for Count 2. I deduct 2 years from your sentence for your previous good character. Your sentence is now 9 years for Count 2.

[22] I will now deal with the offence of Assault Causing Actual Bodily Harm (Count 1). In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an Assault Causing Actual Bodily Harm." The prescribed penalty for this offence is a term of imprisonment for 5 years.

[23] In **State v. Tugalala** [2008] FJHC 78; HAC 25S of 2008S (29 April 2008); Her Ladyship Madam Justice N. Shameem said:

*"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in **Elizabeth Joseph v. The State** [2004] HAA 030/04S and **State v. Tevita Alafi** [2004] HAA073/04S, that it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases, sentences of 18 months imprisonment have been upheld (**Amasai Korovata v. The State** [2006] HAA 115/06S)."*

[24] In **Jonetani Sereka v. The State** [2008] FJHC 88; HAA 27 of 2008 (25 April 2008); His Lordship Justice Daniel Gounder held:

*"The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of provocation and no weapon used, to 9 months imprisonment for the more serious cases of assault (**State v Anjula Devi**, Criminal Case No. 04 of 1998 Lab.)."*

[25] His Lordship Justice Vincent Perera in **Anaiasa Naqialawa v. State** [2017] FJHC 484; HAA 15 of 2017 (29 June 2017); stated thus:

“It is pertinent to note that 12 months is only a one fifth of a 5 year imprisonment which is the maximum sentence for the offence of assault causing actual bodily harm under section 275 of the Crimes Act. All in all, I am of the view that it is appropriate to have 12 months imprisonment as the higher end of the tariff for the said offence.

Needless to say, the selecting of a starting point is not that difficult where the relevant sentencing tariff indicates the lower end of the imprisonment term applicable to a particular offence as opposed to other sentencing options that may be considered.

If the sentencer decides that an imprisonment term is the appropriate punishment for an offender who is convicted of the offence of assault causing actual bodily harm under section 275 of the Crimes Act and not to opt for an absolute or conditional discharge, it is important for the sentencer to have a clear opinion on the minimum imprisonment term the offence should attract considering its objective seriousness. In my view, an imprisonment term of 3 months would appropriately reflect the objective seriousness of the offence of assault causing actual bodily harm under section 275 of the Crimes Act.”

[26] In **State v McPherson** [2017] FJHC 890; HAC 42.2016 (22 November 2017); **State v Naimoso** [2018] FJHC 345; HAC 95.2016 (27 April 2018); and **State v Qalobula** [2020] FJHC 255; HAC 100.2018 (3 April 2020) this Court held that the tariff for the offence of Assault Causing Actual Bodily Harm should range from 3 months to 12 months imprisonment.

[27] Even in the case of **State v Marama** [2020] FJHC 629; HAC 174.2019 (7 August 2020); which was a domestic violence case (where the complainant/injured was the sister-in-law of the accused), this Court held that the tariff for the offence of Assault Causing Actual Bodily Harm should range from 3 months to 12 months imprisonment. The Court considered the domestic relationship between the parties as an aggravating factor.

[28] Having regard to the above authorities, I consider the tariff for the offence of Assault Causing Actual Bodily Harm in the instant case too to range from 3 months to 12 months imprisonment.

[29] As a result of the assault, the complainant had sustained a superficial abrasion and swelling on the right side at the back of the head (occipital area). Accordingly, considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, and also taking into consideration the aggravating factors and mitigating

circumstances relevant to this case, I impose on you a sentence of 9 months imprisonment for the first count of Assault Causing Actual Bodily Harm.

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

Count 1- Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act – 9 months’ imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act - 9 years’ imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 9 years.

[31] Accordingly, I sentence you to a term of 9 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 7 years of that sentence.

[32] 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.”

[33] You had been arrested for this case on 21 September 2020 and was granted bail by this Court on 6 November 2020. Thereafter, you were again remanded into custody on 29 October 2021, the day on which you were found guilty and convicted for this case. Accordingly, you have been in custody for a period of nearly 3 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[34] In the result, your final sentence is as follows:

Head Sentence - 9 years’ imprisonment.

Non-parole period - 7 years’ imprisonment.

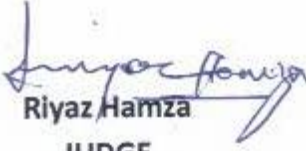
Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 8 years’ and 9 months imprisonment.

Non-parole period - 6 years’ and 9 months imprisonment.

[35] 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 8th Day of December 2021

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