

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 176 OF 2022

STATE

V

PW

Counsel : Ms. A. Vavadakua for State

: Mr. K. Chang for Convict

Date of Hearing : 22 August 2022

Date of Punishment : 26 August 2022

(The names of the victim and the convict are suppressed. They are referred to as LM and PW respectively)

PUNISHMENT

1. PW, you were charged on the following information filed by the Director of Public Prosecutions:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

PW, between 1st day of July 2019 and 31st day of July 2020, at M, in N, in T, in the Eastern Division, penetrated the month of LM, a child under the age of 13 years, with his penis.

2. On 18 July 2022, having understood the charge, you pleaded guilty to the above count in the presence of your counsel. You fully understood the nature of the charge and the consequences of pleading guilty. I am satisfied that you entered an informed and unequivocal plea of guilty on your own freewill.

3. You understood the following summary of facts read in court and admitted the same.
 1. The Accused in this matter is PW. He is 19 years old.
 2. He was 17 years old at the time he was charged for this offence.
 3. The complainant in this matter is LM. She was born on the 31st of May 2011.
 4. The Accused and the complainant were in the same village at the period of offending ie 1st of July 2019 and 31st of July 2020. They are cousins. The complainant normally calls the Accused "T".
 5. On the period mentioned above, the complainant was playing hide and seek with her friends at M, in N, Tailevu when the Accused took her to a toilet nearby.
 6. Inside the toilet, the Accused pulled out his penis and told the complainant to suck his penis. The complainant, LM, sucked PW's penis inside the toilet that day. LM was at the time still under the age of 13 years.
 7. At the time the Accused committed the above act on the child, he was around 16 to 17 years old having being born on the 21st of February 2003.

4. I am satisfied that the summary of facts satisfies all the elements of the offence of Rape as charged. I find you guilty of Rape as charged.

5. The maximum penalty prescribed for the offence of Rape is life imprisonment. The Supreme Court in *Aitcheson vs The State* [2018] FJSC 29, CAV 0012 of 2018 (2 November, 2018) set the tariff for the offence of Rape where the victim is a child. Accordingly, the tariff ranges from 11 to 20 years' imprisonment.

6. You are now an adult of 19 years old. The State concedes that you were 17 years old at the time of the offence. In these circumstances, I am guided by the Court of Appeal

judgment in *Komaisavai v State* [2017] FJCA 91; AAU154.2015 (20 July 2017) where the Court observed:

[8] It is apparent from the sentencing decision that he was sentenced on the basis that he was 19 years old. It would appear that the reference to 19 years old was intended to be a reference to the age of the second Appellant at the date of sentencing. His birth certificate states that he was born on 1 August 1995. However the offence was committed on 27 October 2012. As a result the second Appellant was 17 years 3 months old at the time of offending. In section 2 of the Juveniles Act 1973 a juvenile is defined as a person who has not attained the age of 18 years and includes a child and a young person. A child is a person who has not reached 14 years and a young person is a person who has turned 14 but has not reached 18 years. Under these definitions the second appellant was a young person and consequently a juvenile at the time the offence was committed. Under section 30(1) of the Juveniles Act no child can be ordered to be imprisoned for any offence and a young person shall not be ordered to be imprisoned for more than 2 years for any offence. It stands to reason then, that the second Appellant could not have been sentenced to a term of imprisonment of more than 2 years.

7. In light of the judgment cited above, I consider you as a juvenile under Section 2 of the Juveniles Act for the purpose of this sentence. A juvenile falls under a special category when it comes to punishment. Section 30(3) of the Juveniles Act states that a young person shall not be ordered to be punished for more than two years for any offence. A “young person” means a person who has attained the age of 14 years, but who has not attained the age of 18 years. (*Sec. 57(2) (b) of the amended Juveniles Act*). Irrespective of the maximum sentence prescribed for the offence of Rape by the Crimes Act and the sentencing tariff prescribed by the Supreme Court for child rape, I am bound by the provisions of the Juveniles Act whose purpose is to deal with the juveniles leniently.
8. It is aggravating that you have committed this offence on your own cousin who was only six years old at the time of the offence. She no doubt trusted you as her older relative. You have breached that trust. You have exposed the child’s mind at such a young age to a sexual conduct by making her suck your penis. There is a considerable age gap between you and the victim.
9. Your Counsel has drawn my attention to compelling mitigating features in you and your offending. I have taken all those factors into consideration in deciding your punishment. You have committed an opportunistic offence without any degree of premeditation. You are a first offender. You have maintained a clear record over the past 19 years. You

pleaded guilty to the charge at the first available opportunity manifesting that you are genuinely remorseful of your conduct. Furthermore, by pleading guilty, you have saved the precious time of this Court and prevented second victimisation of the child by having her in Court to give evidence. The record of interview filed by the police indicates that you have cooperated with police during investigations. [*The Fiji Court of Appeal in Cokanisiga v The State [2005] FJCA 57 has recognised the cooperation extended to police as a mitigating factor*]. You seek mercy of this Court and indicated your willingness to reform, should an opportunity be given. You have extended traditional apology to the complainant and her family.

10. Having considered the above mentioned aggravating and mitigating features, I pick a punishment of two years imprisonment for your offending. You have been in remand for approximately three months from the dated of arrest which is 17 may 2022. I regard your remand period as a period of imprisonment already served and deduct three months from your punishment to arrive at a punishment of 21 months' imprisonment.
11. Since the imprisonment term is below three years, I should, under Section 26 (2) (a) of the Sentencing and Penalties Act (SPA), consider if a suspended sentence is warranted in this case. One of the purposes of sentencing under Section 4 of the SPA is to establish conditions so that rehabilitation of offenders may be promoted and facilitated. (Sec 4(1) (d). In *Suren Sing v The State [200] FJHC 264; 2FLR 127* Shameem J observed:

However, as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present, then the offender is usually given a non-custodial sentence.

12. I also considered the following guidelines enunciated by Grant Actg. CJ (as he then was) in *DPP v Jolame Pita (1974) 20 FLR 5*, to satisfy myself that you are a suitable candidate to get a suspended sentence:

Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust,

or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate.

13. You are young. You are a first offender and you pleaded guilty at the first available opportunity. You are genuinely remorseful. Therefore, you are qualified to be handed down a suspended sentence so that rehabilitation may be promoted and facilitated.

14. Following Orders are made:

- I. You are imposed a punishment of 21 months' imprisonment;
- II. The imprisonment term is suspended for a period of 3 years with immediate effect;
- III. A permanent Domestic Violence Restraining Order is issued to protect the victim.

15. I now explain the effect and consequences of the suspended sentence. If you are convicted for an offence during the operational period of 3 years, you are liable to be punished and the suspended term may be activated.

16. 30 days to appeal to the Court of Appeal.



Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Juvenile.

Aruna Aulthge

Judge