

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 205 of 2019

STATE

V

EMINONI SENABAU

Counsel : Mr. Alvin Singh with Ms. Sheenal Swastika for the State
Mr. Shivendra Nath for the Accused

Dates of Trial : 26-28 & 31 October 2022

Judgment : 13 April 2023

Sentence Hearing : 16 May 2023

Sentence : 2 June 2023

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

SENTENCE

[1] Eminoni Senabau, as per the Amended Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offence:

Count 1

(Representative Count)

Statement of Offence

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

Particulars of Offence

EMINONI SENABAU, between the 14th day of January to the 20th day of April 2019, at Rakiraki, in the Western Division, had carnal knowledge of **AE**, a child under the age of 13 years.

- [2] You pleaded not guilty to the charge and the matter proceeded to trial. The ensuing trial was held over 4 days. The complainant (AE), Dr. Emele Bolakoro and the complainant's father Vereimi Koro, testified on behalf of the prosecution. You testified on your own behalf.
- [3] At the conclusion of the evidence and having reviewed the totality of the evidence, this Court found you guilty and convicted you of the said charge.
- [4] It was proved during the trial that, between the 14 January 2019 and the 20 April 2019, at Rakiraki, you penetrated the vagina of the complainant AE, with your penis, and at the time the complainant AE was a child under the age of 13 years.
- [5] It is an admitted fact that you and the complainant were residing at Matawailevu Village, Nalawa in Rakiraki, at the time of the said incident. It is also an admitted fact that you are related to the complainant.
- [6] As per her birth certificate tendered to Court as Prosecution Exhibit PE1, and also as per the admitted facts, the complainant's date of birth is 15 June 2006. Therefore, at the time you committed these offences on her she was just below the age of 13 years. At the time she testified in Court she had turned 16.
- [7] The complainant clearly testified to the manner in which you had penetrated her vagina with your penis, on three separate occasions, during the period 14 January 2019 and the 20 April 2019 (this was during the first school term in 2019). I have referred to the complainant's evidence at length in my judgment.
- [8] Section 4(1) 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. The factors 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.

[9] I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to punish and 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.

[10] Eminoni Senabau, 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.

[11] 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.”

[12] 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.”

[13] 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.”*

- [14] 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”.

- [15] 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.”

- [16] 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."

[17] 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."

[18] This has been 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."

[19] 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.

[20] However, in the 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.”*

[21] In ***Aitcheson v State*** (*Supra*), it was said:

“[72] Undoubtedly it has been accepted by the society that rape is the most serious sexual offence that could be committed on a woman. Further it is said that; “A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female.””

[22] 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.”

[23] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 11 years imprisonment for the count of Rape.

[24] The aggravating factors are as follows:

- (i) You are well known to the complainant and her family. The complainant is related to you. The complainant used to address you as “Bubu”, meaning grand-father. The complainant’s residence and your residence were in a close proximity to each other at Matawailevu Village, Nalawa in Rakiraki. Thus

the complainant trusted you. Being so, you should have protected the complainant. Instead you have breached the trust expected from you and the breach was gross.

- (ii) There was a large disparity in age between you and the complainant. The complainant was only 12 years of age, at the time you committed these offences on her. At the time of the offending you were 68 years of age. Therefore, you were over 55 years older than the complainant at the time.
- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (iv) You have exposed the innocent mind of a child to sexual activity at such a tender age, and thereby robbed the complainant of her innocence.
- (v) You are charged with a representative count of Rape. The complainant testified that you perpetrated these offences on her on three separate occasions, within the course of approximately one month.
- (vi) I am of the opinion that these acts of Rape that you perpetrated on the complainant were pre-planned or pre-meditated.

[25] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 16 years imprisonment for the count of Rape.

[26] Eminoni Senabau, you are now 72 years of age (Your date of birth being 5 December 1950). You are said to be married for the past 33 years with three children, one boy aged 17 years, schooling at Navosa Secondary School and one girl aged 11 years, schooling at Nasikawa District School, Sigatoka. Your wife is said to be an amputee and is reliant on you. You are said to be a yaqona farmer by occupation and the sole bread winner of your family.

[27] You are said to have been educated up to Class 8. After leaving school, you are said to have joined your father in farming and you have been working most of your life. Even in your old age, you have continued to work and support your family through livestock farming.

[28] You have worked at various jobs with your latest being as a Security Officer looking after the house of a Businessman in Lautoka.

[29] Unfortunately, these are strictly personal circumstances and cannot be considered as mitigating circumstances.

[30] You have submitted that you are coming from a very well-known religious and respectable family in Fiji and has been a continuous supporter of your Assembly of God Church Group and other charitable organizations.

- [31] You are said to be the Mata Ni Vanua of the village and is the spokesman from your village, generally advising the village community on various protocols laid out by the Chief of the village.
- [32] You are said to be a committee member of Sigavou Kei Ra, a community organization assisting the ordinary people and the underprivileged people in the Ra community. You are also said to be part of the Management of the Matawailevu Rugby Club.
- [33] In support of the above, you have submitted to Court a character reference letter from Mr. Isaia Vonowale, the Turaga ni Koro of Matawailevu Village, Nalawa, Ra.
- [34] However, as per the Antecedent Report filed, it is noted that there are six previous convictions recorded against you, ranging from 1972 to 2013. The last conviction dates back to 26 June 2013, where you had been sentenced by the Rakiraki Magistrate's Court (Case No. C.F. 342 of 2012), to 3 months imprisonment, which term was suspended for one year, for the offence of Common Nuisance.
- [35] In terms of Section 3 of the Rehabilitation of Offenders (Irrelevant Convictions) Act No. 11 of 1997 [Rehabilitation of Offenders (Irrelevant Convictions) Act], the term "irrelevant conviction" has been defined in the following manner:

3. For the purposes of this Act, a conviction is irrelevant:-

(a) where there is no direct relationship between that conviction and the particular matter in respect of which it is sought to take that conviction into account; or

(b) if the rehabilitation period has expired.

- [36] Section 4 of the Act broadly defines what "direct relationship" means; while Section 5 of the Act defines the term "rehabilitation period" as follows:

5.-(1) Notwithstanding subsection (2), the rehabilitation period applicable to a conviction is:

(a) in case of a person who is seventeen years or over, ten years; or

(b) in case of a person who is under the age of seventeen years,-

(i) seven years, for a term of imprisonment or detention not exceeding two years under section 30 or 31 of the Juveniles Act; or

(ii) ten years, for a term of imprisonment or detention exceeding two years under section 31 of the Juveniles Act.

(2) Subject to subsection (1), the rehabilitation period applicable to Part III, is five years.

[Emphasis is my own].

[37] Section 6(1) of the Rehabilitation of Offenders (Irrelevant Convictions) Act provides:

6.-(1) The rehabilitation period commences:-

(a) on the date of conviction; or

(b) where a custodial sentence was imposed, on the date: on which the convicted person was unconditionally released from imprisonment; or

(c) where the release of a convicted person from detention is subject to a condition or other penalty imposed by the Court, when the condition or that other penalty is fulfilled.

[38] You were sentenced to 3 months imprisonment by the Rakiraki Magistrate's Court, on 26 June 2013. The said sentence was suspended for a period of one year. Thus the operational period of your suspended sentence would have been completed on 26 June 2014. Therefore, in terms of the Rehabilitation of Offenders (Irrelevant Convictions) Act, your rehabilitation period would have commenced on the said day.

[39] You have committed the offence you have been convicted for in this case during the period 14 January 2019 and the 20 April 2019, which is clearly within the rehabilitation period of 10 years (counting from 26 June 2014). Therefore, unfortunately, this Court cannot consider you as a person of previous good character or grant you any discount in lieu of this fact.

[40] You have submitted that you are remorseful of your actions and that after the incident you had sought forgiveness from the complainant's father in the traditional Fijian manner which her father had accepted. Although, there is no confirmation of this fact, I accept your remorse, although belated, as genuine.

[41] For the aforesaid mitigating factor I grant you a discount of 1 year. I find no other mitigating circumstances in this case to grant you any further discounts. As such, your sentence will now be 15 years imprisonment for the count of Rape.

[42] Accordingly, I sentence you to a term of 15 years imprisonment for the offence of Rape.

[43] The next issue for consideration is whether this Court should grant you any concessions due to your current advanced age of 72 years and your medical condition.

[44] You have submitted to Court a Special Outpatient's Report from the Medical Officer, Nasau Health Centre, Rakiraki, dated 19 May 2023. Therein it is stated that you have been seen at the Special Outpatients Department at the Nanukuloa Health Centre. It is confirmed that you have a history of multiple injuries to both your knees and your back and that you experience severe pain during cold weather conditions. You usually get treated with Diclofenac and Dexamethasone given intramuscularly on a monthly basis as prophylaxis.

[45] Her Ladyship Madam Justice Nazhat Shameem in the case of *Rokota v. The State (supra)* held as follows:

“...However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character.”

[46] Making reference to Principles of Sentencing (2nd Edition), by D. A. Thomas, Her Ladyship said:

“Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released.”

[47] However, considering all the facts and circumstances of this case, especially the fact that the complainant was known to you and was merely 12 years of age at the time of the incident and also since there are multiple acts of offending committed by you during the specified time period, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

[48] Accordingly, I sentence you to a term of 15 years’ imprisonment. However, in determining the non-parole period to be imposed on you, I have given due consideration to your advanced age and your medical condition. Accordingly, pursuant to the provisions of Section 18 (1) of the Sentencing and Penalties Act, I fix your non-parole period as 8 years’ imprisonment.

[49] Considering your advanced age and your medical condition, I order the Correction Authorities to ensure that you are provided proper facilities while you are serving your sentence of imprisonment.

[50] 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.”

[51] You were arrested for this case and produced in the Magistrate’s Court of Rakiraki on 23 August 2019. You were granted bail by the Magistrate’s Court on the same day. You were remanded into custody for this case on 13 April 2023, the day on which this Court found you guilty and convicted you of the charge. You have remained in custody since that day. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 2 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 15 years' imprisonment.

Non-parole period - 8 years' imprisonment.

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

Head Sentence - 14 years' and 10 months imprisonment.

Non-parole period - 7 years' and 10 months imprisonment.

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



AT LAUTOKA

Dated this 2nd Day of June 2023


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the State : **Office of the Director of Public Prosecutions, Lautoka.**
Solicitors for the Accused : **Nath Lawyers, Attorneys-At-Law, Lautoka.**