

**IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION**

CRIMINAL CASE NO: HAC 035 of 2022

STATE

V

JONE LUTUI QALOVI

**Counsel: Ms. Prakash for the State
Ms. Sharma & Ms. Shafique for the Accused**

Dates of Trial: 18th March 2024 to 26th March 2024

Judgment: 5th April 2024

Sentence Hearing: 18th April 2024

Sentence: 25th April 2024

SENTENCE

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

1. In a judgment delivered on 5th April, 2024 this court found the accused guilty of two counts of **Sexual Assault**, one count of **Rape** and convicted him accordingly.
2. The following facts were proven by prosecution during the trial beyond reasonable doubt:
3. The victim in 2021 was 14 years of age and a year 9 student who resides with her parents at Votualevu in Nadi.

4. On the 22nd November, 2021 the victim was on her way to Nawaka to see her friend when she met the accused at Namaka a 49 year old security officer at Bulachino Coffee shop.
5. The victim had asked the accused if she could use his mobile to call a taxi.
6. The accused invited the victim to seat on a chair after the victim made the phone call. It was getting dark and the victim was afraid to go home as her mother would beat her up. The accused spread pieces of carton on the floor and later invited the victim to sleep on it. The victim while lying on the floor could feel the accused kissing her neck right shoulder forearm and stomach area. The victim moved backwards as she did not like what the accused was doing to her.
7. The accused than remove his pants and also remove the victim's panty and licked her vagina and later inserted his finger inside her vagina. The victim did not like what the accused was doing to her. The victim was moving backwards and pushing the victims head away and did not agree to what the accused was doing to her.
8. Hence, the victim on the 24th of November 2022 complained to her mother about the sexual assault and Rape. The matter was reported to police.
9. The mother with the victim reported the matter to the police on the same day. The victim was medically examined and according to the examining doctor the injuries seen during vaginal examination was consistent with forceful penetration.
10. That the accused was arrested, caution interviewed and charged. The state counsel filed written sentence submissions and the defence counsel filed mitigation for which this court is grateful.
11. The following personal details and mitigation was submitted by the counsel for the accused:
12. The accused was 49 years old at the time of the offending; First offender; is married and has four young children; the children require the care and attention of the accused. He is employed as a casual labour. Earns \$50 per day; Sole bread winner of the family; his wife is unemployed.
13. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj -vs.- The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.
14. Hence the court also noted that there was no Victim Impact Statement filed by the State however, the court is fully aware of the impact of the crimes on the victim was traumatic and it was severe.

15. Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 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.

16. 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.

17. Jone Lutui, I will first deal with the count of Rape that you have been found guilty and convicted, which is a count of Rape in terms of Section 207 (1) & (2) (b) of the Crimes Act No. 44 of 2009 ("Crimes Act") (Count 4). The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.

18. 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."

19. 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.”*

20. In **The State v Lasaro Turagabeci and Others** (supra) Pain J had 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.”

21. 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”.

22. 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.”

23. 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.

24. 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.”
25. 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.”

26. 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.

27. 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.”*

28. In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa Koroiwuki 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.”

29. 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.*

30. The **aggravating factors** are as follows:

(i) The victim was vulnerable, alone and unsuspecting the accused took advantage of this and sexually abused the victim in a vacant building which was under his guard.

(ii) There was a large disparity in age between you and the victim. The victim was 14 years whereas the accused was 49 years. The accused was a 35 years older than the victim. The age difference is also substantial.

(iii) You took advantage of the victim’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 victim of her innocence.

(v) I find that there was some degree of planning and premeditation on your part in committing these offences. You had committed these offences on the victim at a time you found her alone.

(vi) The victim has been emotionally and psychoserious.

(vii) You are now convicted of multiple offending.

31. 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.
32. Jone Lutui you are now 51 years of age (date of birth 15.10. 1972). You are married and residing with your wife, with four children. And you reside with your family at Waqadra in Nadi. You are a casual labourer earning \$50.00 a day and sole bread winner of your family.
33. It is submitted that your children are financially dependent on you as your wife is unemployed.
34. Unfortunately, the above are all personal circumstances and cannot be considered as mitigating circumstances.
35. As per the Antecedent Report filed, it is noted that your previous conviction are over 10 years old therefore this court will disregard the same. You have not reoffended for the last 10 years. Therefore, Court considers you as a person of previous good character
36. Your Counsel has submitted that you are now remorseful of your actions. However, this Court cannot consider your belated show of remorse as genuine.
37. I accept that you are a person of previous good character. Accordingly, considering the aforesaid mitigating factor I reduce 2 years from your sentence. Now your sentence will be 14 years imprisonment for the count of Rape.
38. Jone Lutui you have been found guilty and convicted of two counts of Sexual Assault pursuant of Section 210 (1) (a) of the Crimes Act (Counts 2 and 3).
39. The offence of Sexual Assault in terms of Section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
40. In the cases of ***State v. Abdul Khaiyum*** [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012); and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice

Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.

41. It was held in *State v. Laca* (supra) "The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks."
42. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim's body;

(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

43. In this case, as per Counts 1 and 2, it has been proved that you unlawfully and indecently assaulted the complainant, by kissing her neck, right shoulder forearm and stomach area. Secondly, you leaked the victim's vagina for about 5 minutes therefore, in my opinion, the offences for the two counts should be categorized under category 2 and category 3 above.
44. As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentences at 2 years imprisonment for the second and third counts of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act.
45. Considering the aggravating factors mentioned above, which are common for all offences, and the sole mitigating factor, which is your previous good character, I impose on you a sentence of 4 years imprisonment for the 1st count sexual assault and 5 years imprisonment for the second and count of Sexual Assault.

46. In the circumstances, your sentences are as follows:

Count 1- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 4 years imprisonment

Count 2 – Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 5 years imprisonment

Count 3 – Rape contrary to Section 207 (1) and 2(b) of the Crimes Act – 14 years' imprisonment.

I order that all sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 14 years.

47. Accordingly, I sentence you to a term of 14 years' imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 11 years' imprisonment.

48. 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.”

49. You were arrested in this case and produced in Court on 11th of March 2022 and remanded into custody. You were granted bail on 3rd June 2022. Further you were remanded on the 5th of April 2024. After you were found guilty and convicted for this case. In total that is a period a little over 3 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

50. Your final sentence is as follows:

Head Sentence - 14 years' imprisonment.

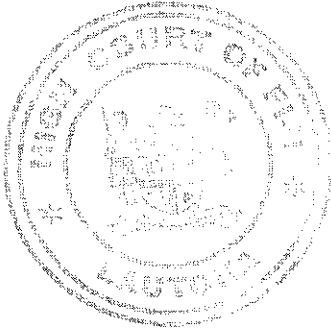
Non-parole period - 11 years' imprisonment.

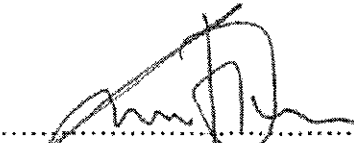
Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence – 13 years and 9 months imprisonment.

Non-parole period - 10 years and 9 months imprisonment.

51. You have 30 days to appeal to the Court of Appeal if you so wish.




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Sekonaia V. Vodokisolomone
Acting Puisne Judge

AT LAUTOKA

Dated this 29th Day of April 2024