

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 61 of 2021

STATE

V

ILAISA DAU

Counsel : Ms. Saini Naibe for the State
Ms. Losana Taukei with Ms. Priyanka for the Accused

Dates of Trial : 29 & 30 November and 4 December 2023

Judgment : 12 February 2024

Sentence Hearing : 22 April 2024

Sentence : 23 May 2024

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

SENTENCE

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

ONE COUNT

Statement of Offence

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

Particulars of Offence

ILAISA DAU, on the 15th day of May 2021, at Mataveikai Village, Rakiraki, in the Western Division penetrated the vagina of AV, a child under the age of 13 years, with his finger.

- [2] You pleaded not guilty to the charge and the matter proceeded to trial. The ensuing trial was held over 3 days. The complainant (AV), her mother Sereana Ravouvou and Dr. Mere Vakawaletabua, 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 on 15 May 2021, at Mataveikai Village, Rakiraki, you penetrated the vagina of the complainant AV, with your finger, and at the time the complainant AV was a child under the age of 13 years.
- [5] It is an admitted fact that you and the complainant were residing at Mataveikai Village, in Rakiraki, at the time of the said incident. It is also an admitted fact that you are the complainant's great grandfather.
- [6] It is also admitted that the complainant's date of birth is 17 September 2012. Therefore, at the time you committed this offence on her she was below 9 years of age. At the time she testified in Court she had turned 11.
- [7] The complainant clearly testified to the manner in which you had penetrated her vagina with your finger, on the 15 May 2021, at your house. 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] Section 4(2) of the Sentencing and Penalties Act provides that a Court must also consider the following factors when sentencing an offender:

(2) In sentencing offenders a court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[11] Furthermore, 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."

[12] Ilaisa Dau, I have duly considered the above factors as well in determining the sentence to be imposed on you.

[13] 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.

[14] 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."

- [15] 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."

- [16] 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."*

- [17] 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".

- [18] 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."

[19] 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."

[20] 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."

[21] 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."

[22] 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.

[23] 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."*

[24] 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."

[25] In determining the starting point within the said tariff, the Court of Appeal, in **Laisasa 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."

[26] Ilaisa Dau, 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.

[27] The aggravating factors are as follows:

- (i) Breach of trust. You are well known to the complainant and her family. The complainant is related to you. You are the complainant's great grandfather. The complainant used to address you as "Kawa", meaning great grandfather. The complainant's residence and your residence were in a close proximity to each other at Mataveikai Village, 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 less than 9 years of age, at the time you committed this offence on her. At the time of the offending you were 76 years of age. Therefore, you were over 65 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) The frequent prevalence of the offence of Rape in our society today, especially cases of child Rape.

- [28] 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.
- [29] Ilaisa Dau, you are now 79 years of age (Your date of birth being 16 July 1944). In two months you would be turning 80. You are said to be unemployed and was financially supported through social welfare assistance. You previously resided at Mataveikai Village, in Rakiraki and California Road, Lovu, Lautoka.
- [30] In my view, these are strictly personal circumstances and cannot be considered as mitigating circumstances.
- [31] You have submitted to Court two character reference letters. One is from Father Liqorio Raulutegu, the Parish Priest of the Saint Francis Xavier Parish, Rakiraki. Therein he has stated that you are a very responsible and hardworking man and that you have involved yourself in all the church activities.
- [32] The second reference letter is from Mr. Jovilisi Muloca, the Turaga ni Koro (Village Headman) of Namataveikai Village, Rakiraki. Therein it is stated that you are an upstanding member of the community and a hardworking man.
- [33] As per the Previous Convictions report filed, it is noted that there are three previous convictions recorded against you, ranging from 1962 to 1985. The last conviction dates back to 11 July 1985, where you had been sentenced by the Rakiraki Magistrate's Court (Case No. C.F. 59 of 1985), to 3 months imprisonment, which term was suspended for one year, for the offence of Larceny (and also fined \$40.00).
- [34] 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.*
- [35] 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].

[36] 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.

[37] You were sentenced to 3 months imprisonment by the Rakiraki Magistrate's Court, on 11 July 1985. The said sentence was suspended for a period of one year. Thus the operational period of your suspended sentence would have been completed on 11 July 1986. Therefore, in terms of the Rehabilitation of Offenders (Irrelevant Convictions) Act, your rehabilitation period would have commenced on the said day.

[38] You have committed the offence you have been convicted for in this case on 15 May 2021, which is clearly beyond the rehabilitation period of 10 years (counting from 11 July 1986). Therefore, this Court will consider you as a person of recent good character.

[39] You have submitted that you have fully co-operated with the Police when you were taken in for questioning and subsequently charged for this matter instead of trying to circumvent the course of justice.

[40] For your recent good character and for fully co-operating with the police in this matter, I grant you a discount of 2 years. I find no other mitigating circumstances in this case to grant you any further discounts. As such, your sentence will now be 14 years imprisonment for the count of Rape.

[41] Accordingly, I sentence you to a term of 14 years imprisonment for the offence of Rape.

[42] The next issue for consideration is whether this Court should grant you any concessions due to your current advanced age of 79 years and your medical condition.

[43] The Officer in Charge of the Lautoka Remand Centre, Assistant Superintendent of Corrections, A. Vucago, has submitted a report to Court, dated 24 April 2024, stating that you were first admitted at the Lautoka Remand Centre on 5 October 2023. Upon your admission you had been diagnosed with urinary retention, whereby you were required to secrete your urine into a urine bag that you have to carry along with you. After your admission to the Remand Centre, you were initially taken to the Punja's Health Centre for your first rectal tube change. Since then all your subsequent rectal tube changes have been administered by the nurse and doctor at the Remand Centre, at least once a month.

[44] 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."

[45] 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."

[46] However, considering all the facts and circumstances of this case, especially the fact that the complainant was your great granddaughter and was under 9 years of age at the time of the incident, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

[47] Accordingly, I sentence you to a term of 14 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.

[48] 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. The Correction Authorities must ensure that your rectal tube is changed at regular intervals (when it is due for change).

[49] 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.”

[50] You were arrested for this case and produced in the Magistrate’s Court of Rakiraki on 19 May 2021. You were granted bail by the Magistrate’s Court on the same day. On 9 October 2023, your bail was cancelled and you were remanded into custody once again. You have remained in custody since that day. Accordingly, you have been in custody for a total period of about 7½ months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 8 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 14 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 - 13 years and 4 months imprisonment.

Non-parole period - 7 years and 4 months imprisonment.

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




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 23rd Day of May 2024

Solicitors for the State : Office of the Director of Public Prosecutions, Lautoka.
Solicitors for the Accused : Office of the Legal Aid Commission, Lautoka.