

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 231 of 2022

STATE

v

PAULIASI VATUNALABA

Counsel: Ms. N. Shankar for the State
Mr. S. Ravu for the Accused

Date of Sentence: 28 August 2024

SENTENCE

Caveat – The victim shall herein be referred as ‘SV’ pursuant to the name suppression Order.

1. **Pauliasi Vatunalaba**, the accused, is indicted with the following five counts as per the Information dated 28 July 2022 by the Director of Public Prosecutions:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the *Crimes Act 2009*.

Particulars of Offence

PAULIASI VATUNALABA between the 1st day of December 2017 and the 31st day of December 2017, at Naikawaga Village, in Tailevu, in the Eastern Division, unlawfully and indecently assaulted **SV**, by shaving her pubic hair.

COUNT TWO

[Representative Count]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the *Crimes Act 2009*.

Particulars of Offence

PAULIASI VATUNALABA between the 1st day of January 2018 and the 31st day of December 2018, at Naikawaga Village, in Tailevu, in the Eastern Division, unlawfully and indecently assaulted **SV**, by fondling her breasts.

COUNT THREE

[Representative Count]

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the *Crimes Act 2009*.

Particulars of Offence

PAULIASI VATUNALABA between the 1st day of June 2020 and the 31st day of

December 2020, at Naikawaga Village, in Tailevu, in the Eastern Division, unlawfully and indecently assaulted **SV** by fondling her breasts.

COUNT FOUR

[Representative Count]

Statement of Offence

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

Particulars of Offence

PAULIASI VATUNALABA between the 1st day of January 2018 and the 31st day of December 2018, at Naikawaga Village, in Tailevu, in the Eastern Division, penetrated the vulva of **SV**, with his fingers, without her consent.

COUNT FIVE

[Representative Count]

Statement of Offence

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

Particulars of Offence

PAULIASI VATUNALABA between the 1st day of June 2020 and the 31st day of December 2020, at Naikawaga Village, in Tailevu, in the Eastern Division, penetrated the vagina of **SV**, with his fingers, without her consent.

2. On 3 July 2023 the accused Pauliasi Vatunalaba voluntarily and unequivocally pleaded ‘guilty’ to all five counts and affirmed by his lawyer Mr. Severo Ravu of the Legal Aid Commission.
3. The *Summary of facts* was then read out by State counsel Ms. Nimisha Shankar with the relevant Medical Report dated 13/02/2021 annexed, which *Summary of facts* was voluntarily admitted by the accused and affirmed by his lawyer Mr. Severo Ravu. In addition, the antecedent report presented by State counsel also show that the accused does not have any prior conviction.
4. In addition to the *Summary of facts* and *Antecedent report*, State counsel also submitted the complainant **SV**’s victim impact statement dated 4 July 2023, filed on 12 July 2023. Refer to Sharma v State [2017] FJSC 5; CAV0031.2016 (20 April 2017) whereby the Supreme Court deliberated on the use of the victim impact statement for purposes of sentencing.
5. The accused Pauliasi Vatunalaba was then formally convicted by the Court followed by Mr. Ravu’s plea in mitigation, and the sentencing hearing.
6. Having heard the Defence plea in mitigation and counsels sentencing submissions, this is the Court’s finding on sentence.

Summary of facts

7. According to the Prosecution, the accused Pauliasi Vatunalaba was arrested on 27 June 2022, interviewed under caution with partial admission, and charged with 3 counts of *Sexual Assault* and 2 counts of *Rape* at the Nausori police station.
8. ‘**SV**’, the complainant and victim in this instant, is the eldest child of the accused Pauliasi Vatunalaba and Melaia Vonolagi (PW2) with five siblings, who all resided together at Naikawaga village, Namara, Tailevu, until 2021 in a house located about 20 minutes walking distance away from the said village.
9. Sometime in December 2017 when **SV** was about 15 years old, she was home alone with her

father the accused when the latter asked her to show him her armpit and private part to see if her pubic hair had grown, to which **SV** did as asked and the accused responded by shaving **SV**'s public hair. This is specifically in relation to **Count 1 – Sexual Assault** of the Information.

10. In early 2018 **SV** was about 16 years old and attending high school, and whilst asleep one night she was awakened by someone touching her vagina and saw that her bra had been unfastened and the accused squeezing her breasts and his hand inside her pants while lying below her. **SV** felt annoyed by the accused's conduct and kicked him to move away from her. This is specifically in relation to **Count 2 – Sexual Assault** of the Information.

11. About two weeks later, while **SV** was fast asleep at night she felt a hand touching her vagina and upon opening her eyes she saw her father the accused touching her breasts and her bra unfastened. Thereafter the accused would repeatedly touch **SV**'s vagina and squeeze her breasts almost every night, and on most occasion this was done with the lights on enabling **SV** to see clearly what was being physically done to her, and reacted by scolding and kicking the accused to stop. This is also in relation to **Count 2 – Sexual Assault** of the Information.

12. During the third term of the schooling calendar in 2020, the accused continued to touch and squeeze **SV**'s breasts upon unfastening her bra, and would also poke **SV**'s vagina with his finger. This is specifically in relation to **Counts 3 and 5** in the Information.

13. In the beginning of 2018 when **SV** was about 15 years old and attending school, and while asleep at night she was awoken due to someone touching her vagina, and upon looking she saw the accused lying below her with his hands inside her pants and felt the accused penetrating her vulva with his fingers without her consent. This is specifically in relation to **Count 4 - Rape** in the Information.

14. About two weeks later in 2018, **SV** was asleep at night when she felt someone's finger penetrating her vulva, and upon looking she saw the accused touching her breasts and her bra unfastened. This happened almost every night whereby the accused would lie down beside or

below **SV** and penetrate **SV's** vulva with his finger and squeeze her breasts. **SV** could clearly see the accused doing this to her on many occasion due to the lights being on, and she would react by scolding the accused in a loud voice or kick him to stop. This is also in relation to **Count 4 - Rape** in the Information.

15. Sometime in December 2018 when **SV** would have turned 16 years, **SV** was asleep in the house when she felt the accused's hand in her pants touching her vagina and penetrating her vulva with his finger without her consent. **SV** reacted by shoving the accused and went back to sleep. The next morning **SV** was then asked by her mother PW2 as to whether her father the accused had done anything to her, to which **SV** responded by telling PW2 what the accused have been doing to her causing PW2 to feel sad and sob. PW2 then confronted the accused about what **SV** had told her and the same was conveyed to the accused's mother. The accused's mother then discussed the matter with the accused, PW2 and **SV**, and the accused then apologised to **SV** and PW2 and promised to stop sexually abusing **SV**. From then on the accused had stopped sexually abusing **SV**, but up and until sometime in 2020 when he inappropriately touched **SV** again. This is also in relation to **Count 4 – Rape** in the Information.

16. Despite the accused's earlier apology and promise to stop the sexual molestation, the accused however molested **SV** again and also raped **SV** by poking **SV's** vagina with his finger sometime in 2020 when **SV** was about 18 years old. This is specifically in relation to **Count 5 - Rape** in the Information.

17. On 13 February 2021 **SV** was medically examined by Dr. Losasa Burua (PW4) who found as per the medical report that **SV's** hymen was not intact with an old healed hymenal tear at 6 o'clock position, and opined that the said genital wound was caused by blunt force trauma (finger).

Rape sentence analysis – Counts 4 & 5

18. In this case *Rape* is contrary to sections 207(1) – (2)(b) of the Crimes Act 2009, and the

maximum penalty is life imprisonment.

19. The sentencing tariff for rape of a child including persons under 18 years is 11 to 20 years imprisonment according to Aitchison v State [2018] FJSC 29; CAV0012.2018 (2 November 2018) and at paragraphs 24 – 25, the Supreme Court held:

[24] The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise discretion taking into account the age group of these child victims. I do not for myself believe that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.

[25] 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.

20. Furthermore, in Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015) at paragraphs 25 – 26, the Supreme Court *inter alia* provided a non-exhaustive list of factors to be considered by the court when sentencing a child rapist:

[25] In this case we are informed of pain having been caused to the 9 year old girl, but not as to whether she had required any medical treatment thereafter or whether she had suffered any psychological distress. Courts will be wise therefore to tread carefully before downgrading the type of penetration suffered, and instead to focus on the overall impact on the victim. The real consideration is, whatever the intruding object used, how horrific were the overall circumstances of the crime to the victim.

[26] Factors to be considered in such cases could be:

- (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*

- especially 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 the 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.*

21. With regard to the *Rape* in counts 4 and 5 of the Information, I choose a starting point of 15 years imprisonment.
22. The starting point of 15 years is enhanced by 5 years due to the following aggravating factors, also considering the list of factors provided by the Supreme Court in Ram v State (supra):
- a) The accused had deliberately and opportunistically raped his own daughter within their home while other members of the family were asleep.
 - b) The complainant **SV** was raped inside the very home where any child and adult must be properly and morally nurtured by their parents or guardian, remain safe, comfortable, and shielded from all forms of abuse, sexual or otherwise.
 - c) This was an incestuous and heinous rape and blatant betrayal of trust by the accused akin to the saying of '*a fox in the henhouse*'.
 - d) The accused had intentionally used his finger to penetrate his daughter's vulva and vagina without her consent.

- e) The rape was not a one-off occurrence but eventuated following a series of sexually molesting his daughter.
- f) **SV** sustained genital wound caused by blunt force trauma via finger according to Dr. Losasa Burua (PW4).
- g) Despite apologising to his daughter **SV**, wife and mother for sexually molesting **SV**, the accused continued to sexual abuse and rape **SV** which clearly indicate the accused being disingenuous and lacking remorse.
- h) Regarding emotional and psychological harm, **SV** wrote in her victim impact statement: *'I feel assaulted and afraid. I don't go out like I used to. Afraid to be around crowded places. Sometime I don't concentrate. Most of the time, when I am doing something I would be dreaming away.'* Refer to Sharma v State [2017] FJSC 5; CAV0031.2016 (20 April 2017) whereby the Supreme Court deliberated on the use of the victim impact statement for purposes of sentencing.

23. The 20 years is reduced by 2 years due to the mitigating factors of the accused having no prior conviction, 44 years old, married with 6 children including the complainant **SV**, subsistence farmer and sole breadwinner of the family, thus arriving at the interim custodial term of 18 years.

24. Early guilty plea – a deduction of 3 years from the 18 years is made for the early guilty plea, thus arriving at 15 years.

25. Time spent in custody – a further deduction of 1 year 20 days is made for time spent in custody pursuant to section 24 of the Sentencing and Penalties Act 2009, thus arriving at the custodial term of 13 years 11 months 10 days.

26. Therefore, the head sentence for:

- Count 4 – Rape is 13 years 11 months 10 days; and
- Count 5 – Rape is 13 years 11 months 10 days.

Sexual assault sentence analysis – Counts 1, 2 & 3

27. In this case *Sexual assault* is contrary to section 210(1)(a) of the Crimes Act 2009, and the maximum penalty is 10 years imprisonment.

28. The sentencing tariff for sexual assault is 2 to 8 years imprisonment according to State v Vuli [2019] FJHC 1091; HAC205.2017 (12 November 2019) and at paragraphs 30 – 32, Justice Riyaz Hamza held:

[30] The offence of Sexual Assault in terms of section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[31] 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.

[32] 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 range is for less serious assaults such as brushing of covered breasts or buttocks.”

“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)."

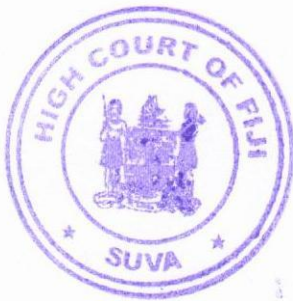
29. With regard to the *Sexual assaults* in counts 1, 2 and 3 of the Information, I choose a starting point of 6 years imprisonment.
30. The starting point of 6 years is enhanced by 4 years for the aggravating factors like those highlighted in paragraph 22 herein, and reduced by 2 years for the mitigating factors, thus arriving at the interim custodial term of 8 years.
31. The 8 years is further reduced by 2 years for the early guilty plea, thus arriving at 6 years imprisonment which term is reduced further by 1 year 20 days for time spent in custody, thus arriving at the custodial term of 5 years 11 months 10 days.
32. Therefore, the head sentence for:
- Count 1 – *Sexual assault* is 5 years 11 months 10 days; and
 - Count 2 – *Sexual assault* is 5 years 11 months 10 days; and
 - Count 3 – *Sexual assault* is 5 years 11 months 10 days.
33. Based on the *Totality principle of sentencing*, the sentences of 5 years 11 months 10 days respectively for Counts 1, 2 and 3 – *Sexual assault*, and 13 years 11 months 10 days respectively for Counts 4 and 5 – *Rape*, are to run **concurrently** to the effect that Pauliasi Vatunalaba is to serve a sentence of 13 years 11 months 10 days.
34. As for the minimum term or non-parole period, in light of section 18 of the Sentencing and Penalties Act 2009 and the Supreme Court decision in Timo v State [2019] FJSC 22; CAV0022.2018 (30 August 2019), I have decided to fix a non-parole period of 12 years for this case.

35. Pauliasi Vatunalaba is hereby convicted of the 3 counts of *Sexual assault* and 2 counts of *Rape* in the Information by the Director of Public Prosecutions, and sentenced to 13 years 11 months 10 days imprisonment, with the non-parole period of 12 years imprisonment.

36. Thirty (30) days to appeal to the Fiji Court of Appeal.

Sentence ordered by the Court

Pauliasi Vatunalaba, being convicted of 3 counts of *Sexual assault* and 2 counts of *Rape*, is sentenced to 13 years 11 months 10 days imprisonment, with a non-parole period of 12 years imprisonment.



.....
Hon. Mr. Justice Pita Bulamainivalu
PUISNE JUDGE

At Suva

28 August 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused