

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 217 of 2023

STATE

v

WAISAKE TULAILAI

Counsel: Mr. Z. Zunaid for the State
Ms. A. Dean for the Accused

Date of Mitigation/Sentencing submission: 17 April 2025

Date of Sentencing: 9 May 2025

SENTENCE

Caveat - The victim shall herein be referred as '**ZIR**' pursuant to the name suppression Order.

1. **Waisake Tulailai**, the accused, was tried, found guilty and convicted on 19 March 2025 of the 2 counts of ***Rape***, laid out as follows in the Information by the Acting Director of Public Prosecutions dated 18 July 2023 and filed on 19 July 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

WAISAKE TULAILAI, on an unknown date between the 11th day of April 2022 and the 16th day of December 2022 at Kuku village, Tailevu, in the Central Division, had carnal knowledge of **ZIR**, a child under the age of 13 years, by inserting his penis into her vagina.

COUNT TWO

Statement of Offence

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

Particulars of Offence

WAISAKE TULAILAI, on the 29th of May 2023 at Kuku village, Tailevu, in the Central Division, had carnal knowledge of **ZIR**, a child under the age of 13 years, by inserting his penis into her vagina.

Brief facts

ZIR, the complainant, was born on 10 January 2012. Between 11 April 2022 and 16 December 2022 and 29 May 2023, ZIR attended Krishna Vedic School located at Naduru in Nausori, and resided at Kuku village, Tailevu, with her older sister Tulia Latu and her husband Waisake Tulailai (accused), Miriama Moceiwai her other sister, and 4 step-siblings namely, Ropate (12 years),

Mereoni, Ana and Male who are Waisake Tulailai's biological children, in the house belonging to her brother-in-law Waisake Tulailai.

Between 11 April and 16 December 2022, ZIR was in class 5 then at Krishna Vedic School, and upon returning home from school, she watched TV in the sitting room with her sister Miriama Moceiwai and the 4 step-siblings at around 4.00pm, and while watching TV she looked back and saw her brother-in-law Waisake Tulailai calling her to go to the prayer room. ZIR then went to the prayer room, and while in the prayer room Waisake Tulailai removed her skirt, bra, t-shirt and panty and lay her down on the bed, thereafter Waisake Tulailai removed his trousers by unbuckling and unzipping it and put out his *polo* or penis, he then lifted ZIR's legs and put his *polo* or penis in and out of ZIR's *pussy* or vagina. ZIR felt bad and pain when Waisake Tulailai put his *polo* or penis in and out of her *pussy* or vagina, but did not shout because he told her to bite his clothes and not to shout. When this particular rape happened, Waisake Tulailai's wife Tulia had gone to Lautoka to attend her brother's thanksgiving feast.

On Ratu Sukuna day on 29 May 2023, ZIR was then in class 6 at Krishna Vedic School, and her sister Tulia had gone for a feast preparation to where the soldiers were while she and others remained at home with Waisake Tulailai. While watching movie in the sitting that evening, Waisake Tulailai then kicked ZIR's leg indicating to her to go to the prayer room. ZIR then went to the prayer, and while in the prayer room Waisake Tulailai took off her clothes including her bra and panty, lay her down on the bed, he then took out his *polo* or penis, put coconut oil on ZIR's *pussy* or vagina and sucked ZIR's breast, and thereafter put his *polo* or penis inside ZIR's *pussy* or vagina. ZIR felt pain in her abdomen area when Waisake Tulailai put his *polo* or penis into her *pussy* or vagina, but did not scream because he told her to bite a piece of cloth.

After Ratu Sukuna day, ZIR cried and then told her friends at Krishna Vedic School of Waisake Tulailai raping her, and her friends then informed their teacher Kinisimere Rawaqa who then told the Head Teacher. ZIR told her teacher Kinisimere Rawaqa that she was raped by Waisake Tulailai.

Rape sentencing analysis – Counts 1 & 2

2. In this case, **Rape** is contrary to section 207(1) - (2)(a) & (3) of the Crimes Act 2009, and the

maximum penalty is life imprisonment.

3. The **sentencing tariff for rape of a child** including persons under 18 years is 11 to 20 years imprisonment according to Aitcheson 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.

4. 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 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 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.*

5. The complainant ZIR was born on 10 January 2012 and aged under 13 years old during the rape, thus a ‘child’ pursuant to:

- (i) Juveniles Act (Cap 56), s.2 - “child” is a person who has not attained the age of fourteen (14) years; and
- (ii) Interpretation Act (Cap 7), s.2(1) – *In this Act and in every other written law and in all public documents enacted, made or issued before or after the commencement of this Act the following words and expressions shall have the meanings hereby assigned to them respectively unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:- “child” means a person under the age of fourteen years.*

6. Section 17 of the Sentencing and Penalties Act 2009 state:

17. If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.

7. The sentencing approach to be adopted by this Court in this instant shall be in accordance with section 17 of the Sentencing and Penalties Act 2009 given the nature and extent of the offending.

8. Given the sentencing tariff of 11 to 20 years imprisonment for child rape, for this instant, I

choose a **starting point** of 13 years imprisonment based on the objective seriousness of the rape.

9. The starting point of 13 years is enhanced by 6 years due to the following **aggravating factors**, bearing in mind the list of factors provided by the Supreme Court in Ram v State (supra):

- a) Waisake Tulailai, the accused, raped his sister-in-law ZIR who is below 13 years, by intentionally penetrating ZIR's vagina with his penis.
- b) The accused's conduct was opportunistic and atrocious, having lured ZIR to the prayer room and taking advantage of the fact that his wife was not at home and being alone with the children, raped ZIR by inserting his penis into ZIR's vagina.
- c) This is undoubtedly an incestuous and heinous rape of a vulnerable girl / child under the age of 13 years still attending primary school. Furthermore, this is a blatant betrayal of trust by the accused who is a 37 year old male adult, married man with 4 biological children of tender age i.e. 13, 10, 8 and 7, deemed and obliged to instill good morals and values to the children including protecting and preventing vulnerable children and young girls from being raped and sexually violated. This situation is akin to the idioms of '*a fox in the chicken coop*', and '*a wolf in sheep's clothing*'.
- d) ZIR being raped by her brother-in-law in the prayer room dedicated for *inter alia* worship of the deity and within the very home where she should be loved, cherished and protected, has undoubtedly scarred her emotionally and psychologically, and may need proper and effective counselling and care for purposes of recovery and healing. The Supreme Court in Aitcheson v State (supra) at paragraph 72 held, '[72] *Undoubtedly it has been accepted by the society that rape is the most serious 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."*'
- e) Child rape is becoming prevalent in Fiji, a scourge and menace to the entire society, compelling the need for holistic means to properly and effectively deter and prevent such societal bane. Deterrence is therefore highly warranted weighed together with *inter alia* the sentencing objectives of punishment, retribution and rehabilitation.

10. The 19 years is reduced by 3 years due to the **mitigating factors** considering that the accused is 37 years old, married but separated from his spouse, has 4 biological children aged 13, 10, 8 and 7, employed as a caregiver earning \$350 weekly, and no prior conviction, thus arriving at the interim custodial term of 16 years.

Time spent in custody

11. Of the 16 years imprisonment, a further deduction of 2 months 23 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 15 years 9 months 7 days.

Aggregate sentence

12. Pursuant to section 17 of the Sentencing and Penalties Act 2009, the aggregate sentence of imprisonment for *Rape* in Counts 1 and 2 of the indictment is 15 years 9 months 7 days.

Non-parole period

13. As for the **non-parole period**, based on section 18 of the Sentencing and Penalties Act 2009 including 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 14 years imprisonment.

CONCLUSION

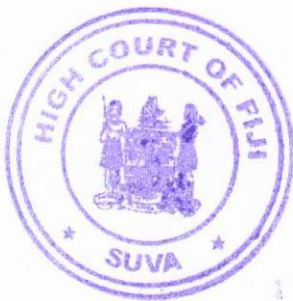
Sentence

14. **Waisake Tulailai** stands convicted of the 2 counts of *Rape* in the Information by the Acting Director of Public Prosecutions dated 18 July 2023 and filed on 19 July 2023, and hereby sentenced to an aggregate custodial term of **15 years 9 months 7 days with the non-parole period of 14 years imprisonment**.

Permanent DVRO, standard non-molestation, non-contact orders

15. In addition to the imprisonment sentence, pursuant to the Domestic Violence Act 2009, I hereby issue a ***Permanent Domestic Violence Restraining Order*** [s.22] with the standard non-molestation conditions [s.27] including a non-contact order [s.29] against **Waisake Tulailai**, and the protected party being the complainant **ZIR**.

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



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

At Suva

9 May 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused