IN THE MAGISTRATES COURT OF FIJI
AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. 497 of 2011

STATE

-v-

T.D

Prosecution: *Ms. A Vavadakua of the Office of the Director of Public Prosecutions*
Defendant: *Ms. Devi of the Legal Aid Commission*

Date of Sentencing Hearing: 17 April 2019
Date of Sentencing: 23 April 2019

SENTENCE

1. **T.D** you were found guilty after trial of the offence of **RAPE** contrary to Section 207 (2) (a) and (3) of the **CRIMES ACT 2009.**

2. Judgment was entered on 11 February 2019.

3. The Legal Aid Commission filed your plea in mitigation on 5 April 2019.

4. I now proceed to punishment.

Maximum Penalty & Tariff

5. The maximum penalty for this offence is life imprisonment.

6. The victim of this crime was 6 years old when you raped her.

7. In **Aitcheson v. The State** [2018] FJSC 29; CAV 0012.2018 (2 November 2018), the Supreme Court of Fiji per Gates C.J prescribed a tariff of 11 to 20 years imprisonment for those who rape children.

Aggravating Factors

8. You were 14 years old at the time of the offending. Old enough to know that what you were doing was both morally *and* criminally wrong.

9. The victim was 6 years old, a mere child. She was more than half your age. You had known each other your whole lives.

10. What you did scared her. I have no doubt that this event has left her traumatised. You pulled her into a secluded room and there you overpowered and raped her. What you did was predatory. She screamed in pain.

11. It is extremely sad that this young child was violated in such a manner. She was sexually innocent and as a result she will have been harmed psychologically and will suffer for it when she reaches her own age of sexual maturity.

Mitigating Factors

12. You are a young, first offender. You are now 22 years old and you farm yagona in order to help your family. You are single and currently reside with your parents.

Special Statutory & Legal Considerations

13. Counsel for the State conceded that you are to be sentenced as a juvenile and not as an adult.

14. This was a fair concession. In **Komaisavai v. The State** [2017] FJCA 43; AAU 154 of 2015 (28 April 2017), the Court of Appeal per Calanchini P observed:

> "*Under section 30 (1) of the* ***Juveniles Act*** *no child can be ordered to be imprisoned for any offence and a young person shall not be ordered to be imprisoned for more than 2 years for any offence. It stands to reason then, that the second Appellant could not have been sentenced to a term of imprisonment of more than 2 years. The sentence passed of 5 years and 6 months represents an arguable error in the exercise of the sentencing discretion since the appellant is entitled to be sentenced to the less severe sentence that applied to him as a juvenile at the time the offence was committed.*"

15. Section 14 (2)(n) of the **Constitution** guarantees the following:

> "(2) *Every person charged with an offence has the right –*
>
> (n) *to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing...*"

16. The ratio of the Court of Appeal in **Komaisavai**, supra honours the spirit of that guarantee.

17. Section 30 (3) of the **Juveniles Act 1973** provides:

> *"A young person shall not be ordered to be imprisoned for more than 2 years for any offence."*

18. In my respectful view Section 30 (3) of the **Juveniles Act 1973** restricts sentencing discretion for all offences except murder, attempted murder, manslaughter, and wounding with intent to do grievous bodily harm to 2 years or less: *see s. 31 of the **Juveniles Act 1973*** but does not change the objective seriousness of certain offences as compared to other offences within the range of offences captured by Section 30 (3) of the **Act**.

19. In short, section 30 (3) of the **Juveniles Act 1973** says that a court of law may only order imprisonment up to 2 years for any offence *not* that the new maximum penalty for offences not covered by section 31 of the **Juveniles Act 1973** becomes 2 years when young people are involved. Maximum penalties and tariffs do not fall completely by the way-side.

Sentencing

20. In the circumstances, I pick a starting point of 11 years imprisonment and I increase that period by 4 years for the aggravating factors noted above. Your period of incarceration is now imprisonment for a period of 15 years.

21. I reduce period of incarceration to 2 years imprisonment in light of the fact that you were 14 years old at the time of the offending. Pursuant to section 2 of the **Juveniles Act 1973**, a young person "means a person who has not attained the age of 14 years but who has not attained the age of 18 years." You were a young person within the meaning of section 30 (3) of the **Act.**

22. I further reduce your period of incarceration by 6 months in recognition of the fact that you were a first offender at the time of the offending *and* in recognition of the fact that you have committed no offence in the eight years between your 14th birthday and your 22nd.

23. Your period of incarceration is now 1 year and 6 months.

24. I recognise that at 14 years of age, you are at the bottom end of the young person spectrum. I turn to consider your level of moral culpability and I consider it to be quite high in all the circumstances of the offending. At the end of the day, you preyed upon a person more than half your age and you raped her. Fourteen or eighteen, what you did was objectively very serious. I decline to reduce your sentence further.

25. For authorities for this approach see **State v. A.T and Ors – Sentence** [2019] FJHC 122; HAC 53.2014 (22 February 2019) per Aluthge J. at [16]:

> "[16] *The age of the offender will be significant in the sentencing exercise in relation to non-consensual offences, especially if an offender is very young and the disparity in age between the offender and the victim is very small. The young and immaturity of an offender must always be potential mitigating factors for the*

*courts to take into account when passing sentence. However, where the facts of a case are particularly serious, the young of the offender will not necessarily mitigate the appropriate sentence (**R v. Paiwant Asi-Akram** [2005] EWCA Crim 1543; **R v. Patrick M** [2005] EWCA Crim 1679).*

Underline mine.

26. You have evidenced no remorse for what you did.

27. Against the need to denounce and deter the rape of children, to adequately punish you for the crime you committed and to properly protect the community, I recognise that there is a strong legislative and common law drive to rehabilitate young, first offenders.

28. In **Prasad v. State** [1994] FJLawRp 2; [1994] 40 FLR 151 (30 September 1994), the High Court of Fiji per Kepa J. accepted that sentencing courts must work from the premise that young, first offenders should not be sent to prison unless there are compelling reasons to do so.

29. In **State v. Mocevakaca** [1990] FJLawRp 5; [1990] 36 FLR 19 (14 February 1990), the High Court of Fiji per Fatiaki J., as his Lordship then was, observed:

> *"Needless to say, in the case of young first offenders there can rarely ever be any conflict between the general public interest and that of the offender.*
>
> *If I may say so society has no greater interest that that its young people should become useful law-abiding citizens and the difficult task of the Courts is to determine what punishment or treatment gives the best chance of achieving that end. The realization of that objective is the primary and by far the most important consideration in sentencing young first offenders."*

30. In **Navisa v. The State** [2006] FJHC 6; HAA 148J.2005S (9 February 2006), the High Court of Fiji per Shameem J. offered this guidance:

> *"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."*

31. In my view, a fine as punishment would not serve as condign punishment for the rape you perpetrated on a 6 year old child.

32. Instead, a suspended period may work better as a control mechanism in this instant case to deter you from committing other offences in the future while fostering your rehabilitation.

33. As Madigan J. put it in **State v. Y.M** [2011] FJHC 58; HAC 002.2011 (10 February 2011):

> "[9] *The Courts duty to the community is to pass harsh sentences for crimes of sexual abuse against children. This duty must be balanced nevertheless by the Court's duty to keep children away from the influence of hardened criminals, and to have the legislature's wishes not to have children imprisoned for more than 2 years effected."*

34. Substitute the word "children" for "young person" and you have precisely this situation here. In any event, you have a constitutional and common law right to be treated as if you were 14 years old now, the age you were at when you committed this offence.

Result

35. **T.M** I order that you serve 1 and 6 months for the rape of **S.N.** Pursuant to section 26 (2)(b) of the **Sentencing and Penalties Act 2009**, I suspend this term of imprisonment for a period of 3 years.

36. What this means is that you must not commit another offence in the next 3 years. If you commit another offence in that period, and are convicted, you will be liable to whatever punishment is imposed in respect of that offence *and* you will be liable to serve the 1 year and 6 month term that I have suspended on this day.

37. **28 days to appeal.**

Seini K Puamau
Resident Magistrate

Dated at Labasa this 24th day of April 2019.