

Particulars of Offence

'A' on the 18th day of June, 2012 at Serua in the Central Division inserted his fingers into the vagina of 4 year old A.R. without her consent.

2. Ms. A.R., the six year (6) old victim told court that one day her "Tutua" (means Grandfather in Seruan dialect) touched and poked (tonoka) her "ivi" (means vagina in Seruan dialect) by his hand. She referred to you as her "Tutua". It was revealed that Ms. A.R. is your son's daughter and thus, you stand as her biological grandfather.
3. The victim had been examined by Doctor Salma Sahinaz Khan at Navua Hospital after been sedated. She had observed two lacerations, at 3 o'clock and 9 o'clock positions on the hymen and a slight inflammation around the vaginal orifice. The doctor opined that Ms. A.R.'s 'hymen was not intact' and that is most likely due to a blunt force been inserted into her vagina.
4. Before proceeding to sentence you, it was noted that the Director of Public Prosecutions has not filed their sentencing submissions at the Court Registry on or before 16th of May 2014 and unfortunately up till today, as ordered by this court on 25th of April 2014. I assume that the prosecution has nothing to submit to court on your sentence. The only impediment occurs with this non-co-operation is the absence of the Victim Impact Report. Yet for all, the impact on a small girl of four years (4) after this kind of tragic experience is quite understood. Therefore, whilst been deeply concerned about the non-compliance of the court's directives by the prosecution, I will now proceed to finalize your sentence.
5. In terms of section 207 (2) (b), if a person penetrates the vulva, vagina or anus of another person to any extent with a thing or a part of his body other than the penis without consent, that also amounts to the offence of rape. It is in that context, insertion of your finger to Ms. A.R.'s vagina amounted to rape. There is no issue of 'consent' in this instance, as Ms. A.R., being less than ten years (10) old, is not capable of giving 'consent' to perform any sexual act.

6. The maximum sentence for the offence of rape is life imprisonment. The tariff ranges from 10 – 15 years imprisonment when a child victim is involved. (see **Mark Mutch v The State**, *Criminal Appeal No. AAU 0060 of 1999, Fiji Court of Appeal*; **State v Lepani Saitava**, *Criminal Case No. HAC 10 of 2007, High Court, Suva*; **The State v AV**, *Criminal Case No. HAC 192 of 2008, High Court, Suva*; **State v VV**, *Criminal Case No. 084 of 2009, High Court, Suva* and **State v Waqabaca**, *Criminal Case No. HAC 139 of 2008, High Court, Suva*).
7. In this background, I take a starting point of 11 years imprisonment to commence the sentencing process.
8. Ms. A.R. was around four years of age whilst you were around 63 years at the time of the commission of the offence. The age gap is 59 years. The most grief stricken factor is that Ms. A.R. is your biological granddaughter. You have manifestly breached her trust. This aggravating background will receive you further 4 years imprisonment.
9. The learned counsel, on behalf of you, submitted that you are 65 years of age, married with a son and three (3) grandchildren. One grandson, Ms. A.R.'s brother, is been looked after by you and your wife. You, been the sole breadwinner, supported your family by farming and fishing. The counsel submits that the prison environment might not be favourable for your age. You, at last, acknowledged the seriousness of the offence and seek court's forgiveness. The offence was committed only once without any violence been deployed. You are willing to reform, if you get any opportunity and promise not to re-offend. Most importantly, you are a first offender. Having considered all the above mitigating factors, I reduce 3 years imprisonment from your interim sentence of 15 years imprisonment.
10. Your final sentence now stands at 12 years imprisonment.
11. This court discussed the principles when sentencing an elderly accused in **State v Samuela Kiniboi**, *Crim. Case No. HAC 162 of 2012, (7th of August 2012)*. In **Samuela Kiniboi** (*supra*), the accused pleaded guilty for two counts, Attempted Rape and Rape, contrary to section 208 and section 207 (1) (2) (b) of the Crimes Decree No. 44 of 2009. He was 71 years of age when

committed the offences and 72 when sentenced to 10 years imprisonment for the above mentioned charges.

12. The learned defence counsel drew the attention of court to **State v David Spowart**, Crim. Case No. HAC 89 of 2011, (24th of July 2013), and asked for a lenient sentence. Madigan J imposed a sentence of 5 years imprisonment to the 74 years old accused in **David Spoward** (supra) and said that it is well outside the tariff for rapes of children and it should not be taken as an authority which pulls the tariff down.
13. This court re-iterates that the egregiousness of your act and the brazen attitude towards your own granddaughter will not in any way help you to get any further concessions.
14. You are sentenced to 12 years imprisonment with a non-parole period of 8 years. A longer term of non-parole period was not imposed because of your elderly age.
15. Finally, I note that you are in custody since 25th April 2014. In terms of section 24 of the Sentencing and Penalties Decree 2009, I order that one month to be reduced from your final sentence. Now, your sentence is 11 years and 11 months imprisonment.




Janaka Bandara
Judge

At Suva

Office of the Director of Prosecution for State

Office of the Legal Aid Commission for the Accused