

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 78 OF 2013

STATE

-v-

KOLAIA RALULU

Counsel :                      Mr. A. Datt for the State  
   Ms. K. Vulimainadave for Accused

Date of Judgment:            26<sup>th</sup> April, 2017

Date of Sentence              5<sup>th</sup> May, 2017

**SENTENCE**

1. Mr. Ralulu, you pleaded guilty on your own free will to one count of Abduction of a young person under 18 years of age with intent to have carnal knowledge contrary to Section 211 of the Crimes Decree. You pleaded not guilty to the 2<sup>nd</sup> count of Rape contrary to Section 207 (1) and (2) of the Crimes Decree and faced trial.

2. You and victim were attending the same school in Ba and were involved in a romantic relationship. You met the victim in October, 2012, when she went to a carnival in Ba with her mother, cousin and aunt. With the intention of having carnal knowledge of her, you asked her to accompany you towards a supermarket which was away from the carnival ground. Victim agreed and came with you without her mother's knowledge. Victim's mother had not permitted you to take her anywhere. At that time victim was approximately 16 years and 9 months old and you were approximately 18 years and 7 months old. You knew that she was under 18 years of age although you did not know her exact age. Upon reaching the place near the supermarket, you and victim sat under a rain tree and started kissing.
3. When you agreed above summary of facts filed by State, Court convicted you of Abduction as charged having been satisfied that your plea was unequivocal, and facts proved the elements of offence.
4. After a fully defended trial, Assessors unanimously found you not guilty of Rape. Having disagreed with Assessor's opinion, this Court found you guilty of Rape as charged and convicted you accordingly on facts briefly described below.
5. On the 13<sup>th</sup> day of April 2013 you met the victim at the Ba bus stand. You told her to meet you before going home. Despite that request, she got into a bus and went to her uncle's daughter's house. You followed her when she was walking towards home and invited her to go to your sister's place to which she agreed. While walking towards your sister's place you told her to have some rest near a cane field. She refused and wanted to get back home. When she was trying to

leave, you held her hand and took her to a cane field and pushed her down. You took off your ¾ trousers and then took off her underwear, disregarding her opposition. You put your penis into her vagina. She did not agree to what you were doing. She was in pain trying to push you.

6. Having filed mitigating submission through your Counsel you now come before this Court for sentencing.
7. The maximum sentence for Abduction of a young person under 18 years of age with intent to have carnal knowledge is 5 years imprisonment.
8. The tariff for the above offence was set out by Madigan J in appeal judgment State v Kartik [2012] FJHC 840; HAA003.2012 (7 February 2012) as between 12 months and 3 years.
9. Circumstances of your offending in respect of the 1<sup>st</sup> count are not that serious. Victim was approximately 17 years old and the age gap between you and victim was less than two years. You had been dating her for almost a year. You did not force or trick her when you took the victim out of her mother's possession.
10. In Kartik (Supra) accused and complainant had known each other and wished to marry when she was of competent age. The age difference was 6 years and victim had willingly gone with accused to spend a night in a motel. Madigan J in that case selected a starting point of 3 years.
11. Having considered the nature and culpability of the offending I pick a starting point of 3 years for Abduction count.

12. Before looking at aggravating and mitigating factors, I now turn to the second and more serious offence of Rape to craft the head sentence in a context where a concurrent sentence is preferable in this case.
13. Maximum sentence for Rape is imprisonment for life.
14. The tariff for juvenile Rape cases is now well settled. The tariff set between 10 and 16 years imprisonment by the Court of Appeal in Anand Abhay Raj (Crim App. No AAU0038 of 2010) was affirmed by the Supreme Court in Anand Abhay Raj (Cri. App. No CAV0003 of 2014) and therefore, applicable in this case.
15. In Raj, (supra) the accused was the step father of the victim who was 10 years of age at the time of first offending. Age gap between the accused and victim was 28 years. Victim was subjected to rape on four occasions over a period of one year. Sentencing Judge had selected a starting point of 12 years for each of 4 representative counts.
16. Circumstances of the offending in your case are quite different from those in Raj (supra). In this case victim was in a romantic relationship with you and was dating for some time. Victim was not of a very tender age and was on threshold of adulthood. You had just passed 18 years of age at that time. There was no repetition of offending. There is no victim impact statement (except evidence of pain the victim suffered at the time of penetration) for me to be satisfied that she had suffered more than what an average rape victim would have suffered.

17. Having considered the objective seriousness of the offending, I pick a starting point of 10 years at the bottom edge of the tariff.
18. Now I would consider aggravating and mitigating circumstances. You have breached trust reposed on you as her boyfriend. This is the only aggravating factor in this case.
19. Your Counsel has submitted a long list of compelling mitigating factors in her submission. I considered all of them to arrive at a sentence that is just and reasonable in the circumstances of this case and proportionate to the offending. In doing so I am mindful of Section 4 of the Sentencing and Penalties Act.
20. You are a quite young person having a bright future. You had just passed adulthood when you committed these offences.
21. You are a first offender. You had maintained a clear record until you were involved in this unfortunate incident.
22. You pleaded guilty to the first count albeit not at fist available opportunity.
23. You cooperated with police and seek forgiveness and leniency of this court.
24. Certificates and academic credentials you have submitted to this court are quite fascinating. They indicate that you have a bright future. You are pausing university education at its tail end to become an automotive engineer.

25. Character certificates you have filled show that you are a helpful person in the community having a good character. You are attached to the church activities. It seems that the behavior you displayed in this offending was a one- off event.
26. Against the backdrop of these compelling mitigating circumstances, I would explore the possibility of deviating from existing tariff confirmed by the Supreme Court in Raj (Supra).
27. The Sentencing and Penalties Decree 2009 in my opinion does not stifle the hands of the trial judge thus taking away the judicial discretion in sentencing even where there is a tariff imposed by an Apex Court.
28. In Kasim v State [1994] FJCA 25; Aau0021j.93s (27 May 1994) the Court of appeal observed:

*While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. 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. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point. (emphasis added)*

29. There are instances where Judges of the High Court had deviated from existing tariff when they found the sentencing within tariff either disproportionately excessive or unjust in all the circumstances of the case.

30. In State v Nayate Vatu [2015] FJHC 263; HAC 231.2011 (23 April 2015) Justice Madigan sentenced a 21 year old to seven years' imprisonment for two counts of juvenile rape with a non-parole period of five years. In rationalizing his finding Justice Madigan stated;

*".....It appears to be extremely important in this case that a balance be struck between expectations of the community that such activity be punished and retribution be afforded the victim with the need to recognize the folly of such a young man with a clean record and the destruction that a long sentence would wreak on his entry into adulthood. Whilst every attempt must be made to keep a young offender from prison and to rehabilitate him (her) when faced with a serious crime or crimes, a Court must act in the interests of the public and their expectations and act to deter others who might want to follow the same course of action...."*

31. In his concluding remarks His Lordship further observed;

*"... I am aware that this final sentence of seven years is below the tariff for rape of a child and it is in no way meant to distort the tariff already recognized by the Supreme Court. It is a lenient sentence in recognition of the youth of the accused and his remorseful plea of guilty saving the child from giving evidence.*

32. In *State v Seniqai* [2011] FJHC 375; HAC 010.2011 (8th July 2011) Justice Gounder sentenced an 18 year old rapist to 5 years' imprisonment, below the tariff. Imposing a prison term without fixing a non- parole period, His lordship observed;

*"...You are 18 years old. Unfortunately, you are another unemployed without any meaningful purpose in life. You left school after completing Form 4. The International Convention on the Rights of a Child applies to you because of your age. I bear in mind that a prison sentence should be the last resort for a child....."*

*" ....I sentence you to 5 years imprisonment. The purpose of your sentence is to denounce your offence and to deter you and others from committing this type of offence. Due to your youth I do not fix a non-parole period..."*

Having considered all these facets, I proceed to sentence you as follows:

33. After adjusting the sentence for above mitigating factors, I arrive at a sentence of two years' imprisonment for Abduction charge (1<sup>st</sup> count)
34. For Rape count, I add one year to the starting point to reflect the only aggravating factor brining the interim sentence to 11 years imprisonment and deduct 5 years to reflect compelling mitigating circumstances to arrive at a sentence six years' imprisonment.
35. Having considered your age and to establish conditions for your rehabilitation, I fix a non-parole period of 4 years.



36. Considering the totality principle and Section 22 of the Sentencing and Penalties Act, I order your sentences to be concurrent.

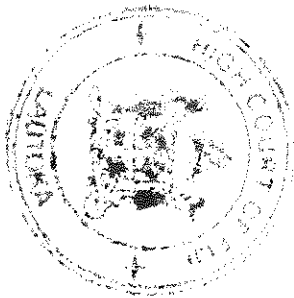
37. Now your final sentence is as follows

1<sup>st</sup> Count (Abduction) - 2 years' imprisonment.

2<sup>nd</sup> Count (Rape) - 6 years' imprisonment

Both sentences to be served concurrently. You are eligible for parole after 4 years.

38. You have 30 days to appeal to the Court of Appeal.



A handwritten signature in black ink, appearing to read 'Aruna Aluthge'.

Aruna Aluthge

JUDGE

At Lautoka

5<sup>th</sup> May, 2017

Solicitor : Office of the Director of Public Prosecution for the State

: Legal Aid Commission for the Accused