

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 434 of 2016

STATE

V

APOROSA VIRIA

Counsel : Ms. Kimberly Semisi with Ms. L. Bogitini for the State
Mr. Lisiata Qetaki for the Accused

Sentence Hearing : 25 September 2017

Sentence : 9 October 2017

SENTENCE

[1] Aporosa Viria you were charged with the following offences:

FIRST COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

APOROSA VIRIA between the 1st day of January 2016 and the 19th day of November 2016 at Nabua in the Central Division penetrated the vagina of ANA VAELA with his finger without her consent.

SECOND COUNT

Representative Count

Statement of Offence

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

Particulars of Offence

APOROSA VIRIA between the 1st day of January 2016 and the 19th day of November 2016 at Nabua in the Central Division unlawfully and indecently assaulted ANA VAELA by squeezing her breasts.

- [2] When this matter was called on 13 December 2016, the State filed the Disclosures relevant to the case. On 3 February 2017, the Director of Public Prosecutions (DPP) filed the Information and a further set of Disclosures in the case.
- [3] On 13 February 2017, you were ready to take your plea. Accordingly, on that day, you pleaded guilty to count one on your own free will and you pleaded not guilty to count two of the Information.
- [4] Thereafter, the State filed Summary of Facts in respect of count one. On 21 June 2017, the Summary of Facts were read out and explained to you and you agreed to the same. I found count one in the Information proved on the Summary of Facts agreed by you. Accordingly, you were convicted on count one.
- [5] I now proceed to sentence you as follows.
- [6] The Summary of Facts filed by the State was that:

"The complainant is Ana Vaela, 14 year old, student of 56 Muslim League and the accused is Aporosa Viria, 64 year old, carpenter of Muslim League Settlement, Nabua.

The complainant and the accused are related. The accused is the complainant's granduncle. The accused is married to the complainant's father's aunt.

The complainant lived with the accused and his wife for about 3 years.

From the first week of January 2016 to the 19th November 2016, while the complainant was asleep, the accused would touch her vagina and insert his finger into her vagina without her consent. When the complainant would wake up, the accused would stop and go away.

On the 18th November 2016, the complainant's mother took her to her place and the accused got angry and brought her back to his house. The complainant's mother then sought police assistance in bringing her daughter back home. While at home, the complainant's mother asked her if anything had happened while staying at her grandfather's house and the complainant told her that her grandfather, the accused used to touch her vagina. The complainant's mother reported the matter to police.

The accused was arrested, interviewed under caution and then charged for the offence of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009."

- [7] You are the grand uncle of the complainant. The complainant was only 14 years of age at the time you committed the above offence on her, and as such, she was a juvenile.
- [8] The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 ("Crimes Act") carries a maximum penalty of imprisonment for life.
- [9] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of **Mohammed Kasim v. The State** [1994] FJCA 25 (27 May 1994); where it was stated:

"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."

- [10] In the case of **State v. Marawa** [2004] FJHC 338; His Lordship Justice Gates stated:

"Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences".

- [11] The High Court in the case of **State v. AV** [2009] FJHC 24 (2 February 2009) stated:

"Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults on children. Children are our future. The Courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual

abuse. Sexual offenders must be deterred from committing this kind of offences”.

[12] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 3 of 2014 (20 August 2014); Chief Justice Gates confirmed that the tariff for the Rape of a juvenile is between 10 years to 16 years imprisonment.

[13] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiaso Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

[14] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years for the count of Rape.

[15] The aggravating factors are as follows:

- (i) You are the grand-uncle of the complainant.
- (ii) There was a large disparity in age between you and the complainant, which was 50 years.
- (iii) Therefore, there has been a grave breach of trust.
- (iv) You committed these offences on the victim while she was asleep.
- (v) You took advantage of the complainant’s vulnerability and naivety.
- (vi) Your actions demonstrate a complete disregard of the clearly defined societal, religious and traditional rules that forbid sexual relations with a child.

[16] As personal circumstances you state that you are 64 years of age and that you are married. You were employed as a casual labourer to help provide for your family.

[17] In mitigation you have submitted as follows:

- (i) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying circumvent the course of justice.


- (ii) That you entered a guilty plea at the first available opportunity.
 - (iii) You have sought forgiveness from this Court and have assured that you will not re-offend.
- [18] You are not a first offender. In terms of the Previous Convictions Report filed in Court by the State, one previous conviction has been recorded against you over the past 10 years (For Assault Occasioning Actual Bodily Harm). Therefore, this Court cannot consider you as a first offender.
- [19] Considering the aforementioned aggravating factors, I increase your sentence by a further 6 years. Now your sentence is 16 years.
- [20] I accept that you have cooperated with the Police in this matter and I also accept your remorse as genuine.
- [21] I accept that you entered a guilty plea to count one at the first available opportunity. In doing so, you saved precious time and resources of this Court.
- [22] Accordingly, considering all the above mitigating factors, I deduct 5 years from your sentence. Now your sentence is 11 years.
- [23] In the circumstances, the sentences for count one will be 11 years imprisonment.
- [24] Accordingly, I sentence you to a term of imprisonment of 11 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 9 years of that sentence.
- [25] Section 24 of the Sentencing and Penalties Act reads thus:
- "If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*
- [26] You have been in remand for this case since 29 November 2016, the day you were arrested for this case. Accordingly, you have been in remand custody for approximately 10 months and 2 weeks. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 10½ months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[27] In the result, you are sentenced to a term of imprisonment of 11 years with a non-parole period of 9 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 10 years and 1½ months.

Non-parole period - 8 years and 1½ months.

[28] You have 30 days to appeal to the Court of Appeal if you so wish.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Office of the Legal Aid Commission, Suva.