

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2016

STATE

v

JOSEFA VODONAYALEWA

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Mr. Lisiata Qetaki for the Accused

Dates of Trial : 26-28 June 2018

Summing Up : 2 July 2018

Judgment : 4 July 2018

Sentence : 10 July 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "JK."

SENTENCE

- [1] Josefa Vodonayalewa you have been found guilty and convicted of the following offences for which you were charged:

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Act 2009.

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, unlawfully and indecently assaulted JK by fondling her breasts.

COUNT 2

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, penetrated the vagina of **JK** with his finger, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of **JK** with his tongue, without her consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of **JK** with his penis, without her consent.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 3 days. The complainant, **JK**, an Assistant Pastor (lay Pastor), **Semi Vueti**, and **Waisake Yavala Dakai**, a Minister of the Methodist Church gave evidence for the prosecution.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you guilty of all four charges. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors and found you guilty and convicted you of the said charges.

- [4] It was proved during the trial that, between 1 August 2013 and 31 August 2013, at Gau Island, you unlawfully and indecently assaulted JK by fondling her breasts.
- [5] It was also proved during the trial that, during the period 1 August 2013 and 31 August 2013, at Gau Island, you penetrated the vagina of JK with your finger, without the consent of the complainant and that you knew or believed that the complainant was not consenting, or that you were reckless as to whether or not she was consenting.
- [6] It was further proved during the trial that, during the period 1 December 2013 and 31 December 2013, at Gau Island, you penetrated the vagina of JK with your tongue, without the consent of the complainant and that you knew or believed that the complainant was not consenting, or that you were reckless as to whether or not she was consenting.
- [7] And finally it was proved that, during the period 1 December 2013 and 31 December 2013, at Gau Island, you penetrated the vagina of JK with your penis, without the consent of the complainant and that you knew or believed that the complainant was not consenting, or that you were reckless as to whether or not she was consenting.
- [8] You are the paternal grandfather of the complainant. The complainant was only 14 years and 9 months of age, as at August 2013, and four months older in December 2013, the time you committed the above offences on her (her date of birth is 25 October 1998), and as such, she was a juvenile.
- [9] The complainant clearly testified that during the month of August 2013, you unlawfully and indecently assaulted her by fondling her breasts. She testified that during the course of the same incident you had penetrated her vagina, with your finger, without her consent.
- [10] The complainant further testified that during the month of December 2013, you had penetrated her vagina, with your tongue, without her consent. During the course of the same incident you had penetrated her vagina, with your penis, without her consent.
- [11] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [12] 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.
- [13] 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; AAU 21 of 93 (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."

- [14] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16T of 2003S (23 April 2004); His Lordship Justice Anthony Gates stated:

"Parliament has prescribed the sentence of life imprisonment for rape. 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".

*"A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public's disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly the sentence is set in order to protect women from such crimes: **Roberts and Roberts** (1982) 4 Cr. App R(S) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S."*

- [15] In **The State v Lasaro Turagabeci and Others** (supra) Pain J had said:

"The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences."

- [16] His Lordship Justice Daniel Goundar, in the case of **State v. AV** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

"...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".

- [17] In the case of **State v. Tauvoli** [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

“Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and the Courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound.”

[18] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 03 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

[19] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa 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.”

[20] 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 imprisonment for the second count of Rape (Count 2).

[21] The aggravating factors are as follows:

- (i) You are the paternal grandfather of the complainant. Her father had passed away in the year 2000. Thereafter, her mother had remarried. You and your wife have taken care of the complainant since then. The complainant considered you as her own father.
- (ii) Being her grandfather you should have protected her. Instead you have breached the trust expected from you and the breach was gross.
- (iii) There was a large disparity in age between you and the complainant. The complainant was merely 14 years of age at the time you first committed the offences on her (and had just turned 15 when you committed the

offences set out in Counts 3 and 4). At the time you were 63 years of age. Therefore, there was a difference in age of nearly 50 years.

- (iv) You took advantage of the complainant's vulnerability, helplessness and naivety.
 - (v) You have exposed the innocent mind of a child to sexual activity at such a tender age.
 - (vi) You are convicted of multiple offending.
- [22] You are now 68 years of age, married and residing with your wife and granddaughter. You are said to be having a hip problem and finding it hard to walk and you require the assistance of a walking stick. These are all personal circumstances and cannot be considered as mitigating circumstances.
- [23] As per the Antecedent Report filed it was submitted by the State there are no previous convictions recorded against you. Therefore, this Court considers you as a person of previous good character.
- [24] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 15 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 13 years imprisonment for Count 2.
- [25] Similarly, 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 imprisonment for the third count of Rape (Count 3).
- [26] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 15 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 13 years imprisonment for Count 3.
- [27] Similarly, 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 imprisonment for the fourth count of Rape (Count 4).
- [28] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 15 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 13 years imprisonment for Count 4.
- [29] The offence of Indecent Assault in terms of Section 212 of the Crimes Act carries a maximum penalty of 5 years imprisonment.

[30] As held in *Ratu Penioni Rokota v. State* [2002] FJHC 168; HAA 68J of 2002S (23 August 2002); the applicable tariff for the offence of Indecent Assault is 12 months to 4 years imprisonment. This was followed by His Lordship Justice Vinsent Perera in *State v. Mohammed Zubair* [2017] FJHC 895; HAC 425 of 2016 (24 November 2017).

[31] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 months imprisonment for the first count of Indecent Assault.

[32] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 6 years. Considering your previous good character, I deduct 2 years from your sentence. Your sentence is now 4 years imprisonment for Count 1.

[33] In the circumstances, your sentences are as follows:

Count 1- Indecent Assault contrary to Section 212 (1) of the Crimes Act - 4 years imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 13 years imprisonment.

Count 3- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 13 years imprisonment.

Count 4- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 13 years imprisonment.

I order that all four sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 13 years.

[34] The next issue for consideration is whether this Court should grant you any concessions due to your advanced age.

[35] In *State v. Spowart* [2013] FJHC 352; HAC 89 of 2011 (24 July 2013), His Lordship Justice Madigan had sentenced a 74 year old man to a term of imprisonment of 5 years, with a non-parole period of 4 years, for the Rape of a 5 year old girl.

[36] Similarly in *State v. Banuve* [2016] FJHC 320; HAC 183 of 2015 (25 April 2016), His Lordship Justice Aluthge sentenced a 72 year old man to a term of imprisonment of 8 years, with a non-parole period of 5 years, for the Rape of an 8 year old girl.

[37] Having perused the said authorities, I am of the opinion that the said two cases must be distinguished from the present case. This is due to the fact that in both those cases the accused had entered a guilty plea at the first available opportunity, thereby

showing genuine remorse and, more importantly, relieving the complainants in the said cases from giving evidence in Court.

- [38] In *State vs. Cati* [2016] FJHC 705; HAC 224 of 2015 (5 August 2016), His Lordship Justice Perera in sentencing a 74 year old man to 10 years imprisonment with a non-parole period of 6 years, for the causing the Rape of a 4 year old girl, held as follows:

"It stands to reason that a term of imprisonment will bring you immense hardship given your old age and your impaired hearing. However, the harm you have done to the victim and to her future is not outweighed by the hardship you may endure in serving a prison term. The victim who is 8 years old now will suffer throughout her remaining lifetime due to your shameful conduct."

- [39] Her Ladyship Madam Justice Nazhat Shameem in the case of *Rokota v. The State* [2002] FJHC 168; HAA 68J of 2002S (23 August 2002) (supra) held as follows:

"...However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character."

- [40] Making reference to Principles of Sentencing (2nd Edition), by D. A. Thomas, Her Ladyship said:

"Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released."

- [41] Considering all the facts and circumstances of this case, especially the fact that the victim herself was merely 14 years of age at the time of the incident, I am not inclined to reduce the primary sentence or head sentence I am imposing on you.

- [42] Accordingly, I sentence you to a term of 13 years imprisonment.

- [43] However, in determining the non-parole period to be imposed on you, I have given due consideration to your advanced age and to the fact that you are having a disability in walking. Accordingly, pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 9 years imprisonment.

- [44] In doing so I have taken into consideration the judgement of the Court of Appeal in *Tora v. State* [2015] FJCA 20; AAU 63 of 2011 (27 February 2015), which was upheld by the Supreme Court in *Tora v. State* [2015] FJSC 23; CAV 11 of 2015 (22 October 2015).

[45] 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."

[46] You have been in remand custody from 21 December 2015 to 24 July 2017, when you were granted bail by this Court. Thereafter, you have been in remand custody since 4 July 2018, the day on which I delivered the Judgment in this case. Accordingly, you have been in custody for a total period of more than 1 year and 7 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 1 year and 8 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[47] In the result, you are sentenced to a term of imprisonment of 13 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	-	11 years and 4 months.
Non-parole period	-	7 years and 4 months.

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



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 10th Day of July 2018

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