

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 173 of 2015

BETWEEN : STATE

AND : FILIPE TUISAWAU KORONIBAU

Counsel : Ms Bogitini for the State
Ms Radrole for the Accused

Dates of Hearing : 23, 24 & 25 September 2019

Closing Speeches : 25 September 2019

Date of Summing up: 27 September 2019

Date of Judgment : 30 September 2019

Date of Sentence : 28 November 2019

(The victim's name is suppressed, and she is referred to as AF)

SENTENCE

1. Filipe Tuisawau Koronibau, you stand convicted for two counts of rape, one count of sexual assault and another count of pornographic activities involving juveniles. The statements of offences and particulars of offences are as follows;

Count 1

Statement of Offence

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

Particulars of Offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division, penetrated the vagina of AF with his fingers without her consent.

Count 2

Statement of offence

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

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division penetrated the vagina of AF with his tongue without her consent.

Count 3

Statement of offence

Sexual Assault: Contrary to Section 210(1)(a) of the Crimes Act 2009.

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by fondling and sucking her breast.

Count 4

Statement of offence

Pornographic activities involving juveniles: Contrary to Section 62A (1)(b) of the Juveniles (Amendment) Act 1997.

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division in private, participate in a video recording of pornographic activities involving AF, a juvenile.

2. You pleaded not guilty to all four counts on 03 March 2016. The trial commenced on 23 September 2019. After three days of trial you were found guilty to the above counts and were convicted accordingly. Now this court is obligated to structure your sentence keeping in mind the purposes and principles of sentencing set out in the Sentencing and Penalties Act, as well as other various factors arise in this particular situation.
3. Also, this court is mindful of the need to protect the victim from further victimization in any form. Therefore, once again I will draw attention to the prior order for name suppression in order to avoid release of any information which would reveal the identity of the victim.
4. The victim was 15 years of age and you were 42 years of age at the time the offences were committed. Her parents were separated, and she was living with her grandmother. The victim referred to you as her uncle. Further she said that you were like a father to her and she respected you as the son of chief Roko Tui Dreketi.
5. It was proved at the trial that between 01 January 2013 and 31 December 2013 the victim visited your house and had a cup of tea. After having the tea, the victim felt dizzy and she lied down on a bed. Then you approached her and started touching her body. You licked and penetrated her vagina with your tongue. On the same day while touching her vagina, you inserted your fingers into her vagina. Further you fondled and sucked her breasts. The victim was awake when you were doing those acts. However, she said that she felt “different and weird” and she could not move. She was in an impaired mental

and physical state and it was proved that she did not freely and voluntarily consent to the sexual activities. It was also proved that you video recorded intimate details of the sexual activities with the victim. Thereby you in private, participated in a video recording of pornographic activities involving the victim, who was a juvenile at that time. The victim did not report the incident to anyone out of fear and for the respect she had for you. In July 2015 your wife randomly picked a USB flash drive which was on your bed. When she opened the flash drive, she found two video clips among other images. She recognized you and the victim in those videos and reported the matter to the police.

6. The following aggravating factors were observed in this case;

a) Abuse of trust-

You are the maternal uncle of the victim. She treated you as a father. You used your esteemed public persona to gain the trust of the victim. You were in a position of authority. You had a responsibility to protect the victim. But you violated that responsibility and exploited the relationship for your personal sexual gratification. You breached the trust, and the breach is indeed gross.

b) Age difference-

The victim was 15 years and you were 42 years. The age disparity is 27 years and it is substantial.

c) Vulnerability of the victim-

The victim's parents were separated, and she was living with her grandmother. She was emotionally and financially dependent on you. You took advantage of her vulnerability by reasons of age and financial dependency.

d) Emotional and psychological impact-

The victim has stated in the victim impact statement that this incident has haunted her life for the last 5 years. The victim impact statement reveals

that she is emotionally disturbed and her relationship with her family members is also affected as result of this incident.

7. The following personal circumstances were submitted in mitigation on your behalf;

- i) You are 48 years of age and divorced. Your three children are living with their mother. You are currently in a relationship and you have a one year and six months old baby. Your partner and the child are financially dependent on you.
- ii) You are a former military officer and engaged in military services both locally and overseas for 11 years.
- iii) You have reached up to university level education and have undertaken undergraduate studies in law and management.

8. It should be noted that personal circumstances carry only a little mitigating value. However, you are a first offender and the only significant mitigation factor is absence of previous criminal records against you.

9. The maximum sentence for rape is imprisonment for life. In **Aitcheson v State** [2018] FJSC 29; CAV 0012.2018 (2 November 2018) the Supreme Court enhanced the tariff for child rape considering the obvious increase of sexual offences in the recent past. Chief Justice Gates (as he then was) observed the following;

“[24] The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.

[25] The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms."

10. The maximum punishment for sexual assault is imprisonment for ten years. Tariff for sexual assault is 2 – 8 years as per State v Laca [2012] FJHC 1414; HAC252.2011 (14 November 2012) and in that case sexual assault offending is divided into three categories as a guideline for the purpose of sentencing;

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim's body;

(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

11. In the present case the offending in relation to the third count falls within the scope of the third category.

12. Section 62A (1) prescribes the punishment for pornographic activities involving juveniles as follows;

- (i) In the case of a first offender, to a fine not exceeding \$ 25,000 or a term of imprisonment not exceeding 14 years, or both; or
- (ii) In the case of a second or subsequent offence, to a fine not exceeding \$ 50,000 or life imprisonment or both.

13. There is no set tariff for this offence in Fiji, let alone any reported previous conviction or a sentence for this offence. In absence of any sentencing guidelines in respect of this particular offence it would be pertinent to review sentencing guidelines adopted in other similar jurisdictions.

14. Section 228B of the Queensland Criminal Code Act 1899 carries a similar offence for making child exploitation material.

“A person who makes child exploitation material commits a crime.

Maximum penalty-

- (a) If the offender uses a hidden network or an anonymizing service in committing the offence - 25 years.
- (b) Otherwise - 20 years imprisonment.”

15. However, it appears that the sentences imposed by the Australian courts across the states are too lenient compared to other jurisdictions. In R v MBM[2011] QCA 100 the original sentence of 2.5 years suspended after 8 months was considered too high in a case where a person was charged with making five home made movies of the niece showering and fondling her breasts and touching her vagina, along with other charges for possession of images of other

children. He succeeded in the appeal against severity of the sentence and received 12 months imprisonment suspended after 3 months with an operational period of two years.

16. This court has perused a number of decisions in different states in Australia in respect of possession and making of child exploitation material. (R v Rogers [2009] QCA 10, R v Finch [2006] QCA 60, R v Hurt [2019] ACTSC 148, DPP v Latham [2009] TASSC 101, Cluett v The Queen [2019] WASCA 111, R v Turvey [2018] SASCFC 68). However, it was seen that penalties and sentencing approaches greatly differ from one state to the other in Australia.
17. The learned State Counsel invited this court to consider the UK Sentencing Guidelines in respect of the 4th Count. This court places its gratitude on record for the extensive research done by the learned State Counsel which was of immense help to structure a sentence for the offence of pornographic activity involving juveniles in this case.
18. Section 1 of the Protection of Children Act 1978 of United Kingdom carries an offence similar to Section 62A of the Juveniles Act in Fiji. The punishment for the offence is stated in Section 6 of the Protection of Children Act of UK and it prescribes an imprisonment of ten years or a fine or both. Also, Section 160 of the Criminal Justice Act 1988 sets out an offence for possession of indecent photograph of child, where the maximum punishment is 5 years imprisonment or a fine or both.
19. Although the maximum punishment prescribed for the corresponding offences in Fiji is considerably higher than that of UK, it would be useful to examine the sentencing guidelines in UK for the purpose of sentencing in this case.
20. UK Sentencing Council has divided the offences involving indecent or pornographic material of children into three categories as follows;

| | Possession | Distribution | Production |
|-------------------|---|--|--|
| Category A | Possession of images involving penetrative sexual activity. Possession of images involving sexual activity with an animal or sadism. | Sharing images involving penetrative sexual activity. Sharing images involving sexual activity with an animal or sadism. | Creating images involving penetrative sexual activity. Creating images involving sexual activity with an animal or sadism. |
| Category B | Possession of images involving non-penetrative sexual activity. | Sharing of images involving non-penetrative sexual activity. | Creating images involving non-penetrative sexual activity. |
| Category C | Possession of other indecent images not falling within categories A or B. | Sharing of other indecent images not falling within categories A or B. | Creating other indecent images not falling within categories A or B. |

21. Once the category of the offence is determined the UK Sentencing Council proposes the following starting points and sentencing ranges to be applied when sentencing;

| | Possession | Distribution | Production |
|-------------------|---|--|---|
| Category A | Starting point 1 year's custody | Starting point 3 years' custody | Starting point 6 years' custody |
| | Category range 26weeks' - 3 years' custody | Category range 2 - 5 years' custody | Category range 4-9 years' custody |
| Category B | Starting point 26weeks'custody | Starting point 1 year's custody | Starting point 2 years' custody |
| | Category range High level community order - 18 months' custody | Category range 26 weeks' - 2year's custody | Category range 1 - 4 years' custody |
| Category C | Starting point High level community order | Starting point 13 weeks' custody | Starting point 18 months' custody |
| | Category range Medium level community order - 26 weeks' custody | Category range High level community order - 26 weeks' custody | Category range 1- 3 years' custody |

22. Although the aforementioned guidelines are not definitive guidelines for Fiji, it would be worthwhile to be guided by this approach, as far as practical, to achieve uniformity in sentencing for this particular offence. As per the fourth count in this case you are convicted for participating in a video recording of pornographic activities involving a juvenile. In view of the above UK sentencing guidelines this offence falls within the category "A" where it prescribes a starting point of 6 years and a sentence range of 4-9 years. However, it should be borne in mind that the maximum punishment for this offence is 14 years imprisonment in Fiji, whereas it is 10 years in UK.
23. The courts in Fiji will have to set an appropriate tariff in time to come after carefully considering more cases, prevalence of similar offences, pattern of offending in this jurisdiction, deterrence and other important factors. In the meantime, I decide to adopt the UK sentencing guidelines to tailor an appropriate sentence in respect of the fourth count.
24. Further the State has drawn the attention of this court to the English guideline judgment of *R. v Oliver & Ors*, [2002] EWCA Crim 2766 (21 November 2002). It sheds light to identify aggravating factors in pornographic activities involving juveniles. Paragraph 20 of *R. v Oliver & Ors* sets out the following factors which are capable of aggravating seriousness of a particular offence;
- (i) If the images have been shown or distributed to a child.
 - (ii) If there are a large number of images. It is impossible to specify precision as to numbers. Sentencers must make their own assessment of whether the numbers are small or large. Regard must be had to the principles presently applying by virtue of *R v Canavan, Kidd and Shaw* (1998) 1 Cr App R 79.
 - (iii) The way in which a collection of images is organized on a computer may indicate a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material. An offence will be less serious if images have been viewed but not stored.

- (iv) Images posted on a public area of the internet, or distributed in a way making it more likely they will be found accidentally by computer users not looking for pornographic material, will aggravate the seriousness of the offence.
- (v) The offence will be aggravated if the offender was responsible for the original production of the images, particularly if the child or children involved were members of the offender's own family, or were drawn from particularly vulnerable groups, such as those who have left or have been taken from their home or normal environment, whether for the purposes of exploitation or otherwise, or if the offender has abused a position of trust, as in the case of a teacher, friend of the family, social worker, or youth group leader.
- (vi) The age of the children involved may be an aggravating feature. In many cases it will be difficult to quantify the effect of age by reference to the impact on the child. But in some cases that impact may be apparent. For example, assaults on babies or very young children attract a particular repugnance and may, by the conduct depicted in the image, indicate the likelihood of physical injury to the private parts of the victim. Some conduct may manifestly (that is to say, apparently from the image) have induced fear or distress in the victim, and some conduct which might not cause fear or distress to an adolescent child, might cause fear or distress to a child of, say, 6 or 7.

25. In the present case you are responsible for making the original pornographic videos. You involved your niece in making the videos and abused the position of trust. I consider those as specific aggravating factors in respect of the fourth count.

26. Section 17 of the Sentencing and Penalties Act states;

"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."

27. I am of the view that the offences pertaining to count 1, 2 and 3 form a series of offences of the same or a similar character and therefore it is appropriate to impose an aggregate sentence on you in respect of the first, second and third counts. However, I decide to sentence you separately for the fourth count.

28. Having taken into account the objective gravity of the offences and the harm caused to the victim, I pick a starting point of 14 years for the aggregate sentence for the first, second and the third counts. For the aggravating factors I enhance the aggregate sentence by 4 years. For your personal circumstances and for absence of previous criminal records I deduct 2 years.

29. In view of the sentencing guidelines discussed above it is my considered opinion that 6 years would be an appropriate starting point for the fourth count given the objective seriousness of the offence. I add 4 years for aggravation. I deduct 2 years for mitigation.

30. Accordingly, I arrive at the following sentences for you;

- I impose 16 years imprisonment as the aggregate sentence for the first, second and the third counts.
- I impose 8 years imprisonment for the fourth count.

31. You had been in remand custody for 5 months and 8 days from 10 October 2015 to 17 March 2016. Again, you have been in remand custody from 30 September 2019 after conviction, pending sentence. Pursuant to section 24 of the Sentencing and Penalties Act any period of time spent in custody is regarded as a period of imprisonment already served by the offender.

32. Thus, I deduct 7 months and two weeks from your sentences to reflect the time that you were in remand custody.

33. I will now consider the issue of setting a non-parole period. On 30 August 2019 the Supreme Court decided in *Nacani Timo V State Criminal Petition No: CAV*

0022 of 2018 that it is not mandatory for a court to award a non-parole period to every convict and the power to fix a non-parole period should be exercised by courts only in exceptional cases.

34. However, by the Corrections Services (Amendment) Act 29 of 2019 which came in to force by gazette notification no 42, dated 22 November 2019, Section 18 of the Sentencing and Penalties Act was also amended taking away the court's discretion to decline fixing a non-parole period, by deleting Section 18(2). Section 18 (1) of the Sentencing and Penalties Act reads as follows after the said amendment;

“When a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole”.

35. As a result, the decision in Nacani Temo with regard to setting a non-parole period is no more applicable. Now, the courts have to necessarily fix a non-parole period in view of the said amendment to Section 18.

36. Your actions are disturbing and abhorrent. You have demonstrated callous disregard for the victim by making video recordings of what you did to her. You have made her fall prey to you as an irresponsible and reckless adult. In sexual offences against children, it is important that the sentences clearly reflect deterrence and abhorrence of such crimes. Also, the sentence must be proportionate to the gravity of the offences and the degree of culpability of the offender.

37. That said, I decide to order the sentences to run concurrently having borne in mind the one transaction and totality principles.

38. Accordingly, you should serve a total period of 15 years, 4 months and 2 weeks imprisonment after the remand period is deducted. You are eligible for parole after 12 years.

39. In addition, I issue a permanent domestic violence restraining order for non-molestation and for non-contact to ensure the safety of the victim.

40. Pursuant to Section 62A (8) of the Juveniles Act I order the Deputy Registrar to notify the Commissioner of Police forthwith, to enter the details of this conviction in the register maintained for persons convicted under Section 62A of the Juveniles Act.

30 days to appeal.



Rangajeeva Wimalasena

Acting Judge



At Lautoka

28 November 2019

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Legal Aid Commission