

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 316 of 2015

STATE

V

PAULA SERU

Counsel : Ms. Lavenia Bogitini for the State
Ms. Lavinia David with Mr. Uraia Koroi for the Accused

Dates of Trial : 29-31 January 2019

Summing Up : 1 February 2019

Judgment : 4 February 2019

Sentence Hearing: 20 & 26 February 2019

Sentence : 7 March 2019

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

SENTENCE

[1] Paula Seru, you have been found guilty and convicted of the following offence for which you were charged:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

PAULA SERU, on the 22nd day of June 2015, at Mualevu Village, Vanuabalavu, in the Central Division, penetrated the vagina of **LL**, a 3 year old girl, with his finger.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 3 days. The complainant, LL, her mother, Rigieta Saulekaleka, and the Medical Officer, Dr. Ilikini Naitini, testified on behalf of the prosecution. You opted to remain silent.
- [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 the charge. Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors. Accordingly, this Court found you guilty and convicted you of the said charge.
- [4] It was proved during the trial that, on 22 June 2015, at Mualevu Village, Vanuabalavu, you penetrated the vagina of LL, with your finger, and at the time LL was a child under 13 years of age.
- [5] It has been agreed between the parties that the complainant was 3 years old at the time of the incident and, as such, she was a juvenile. The complainant's mother, Rigieta Saulekaleka, confirmed that the complainant's date of birth was 26 July 2012. Thus at the time the complainant testified in Court she was 6 years of age.
- [6] The complainant testified as follows: "Seru told me that he was going to buy me chewing gum and then he touched my vagina". The witness used the term "mimi" to refer to her vagina. She explained that you had used your finger to touch her mimi and showed her right index finger to depict this. When asked if the finger went inside the mimi or outside the mimi, the witness clearly said "inside the mimi". She also testified that she was standing at the time and that you were lying down. The complainant also said that you had put your finger into her mimi for a short time and that it was painful.
- [7] As per the Victim Impact Statement filed by the State, it is noted under emotional and/or psychological effects, that the complainant is slow to respond, has feeling of fear and suffers from memory loss.

[8] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) stipulates the purposes for which sentencing may be imposed by a Court; and sets out 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.

[9] 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.

[10] 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.”

[11] 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.”*

[12] 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.”

[13] 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”.

[14] 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.”

[15] His Lordship Justice Goundar in **State v Apisai Takalaibau** – Sentence [2018] FJHC 505; HAC 154 of 2018 (15 June 2018); making reference to statistics of Aggravated Burglary cases filed in the High Court in 2017 and 2018, stated that “A factor that influences sentencing is the prevalence of the offence in the community.....The more prevalent is an offence, the greater the need is for deterrence and protection of the community.”

[16] This has been recently affirmed by the Supreme Court in **Alfaaz v. State** [2018] FJSC 17; CAV0009.2018 (30 August 2018); where it was recognized that the prevalence of cases of child rape calls for harsher punishments to be imposed by Courts. Their Lordships held:

“According to the statistics released by the Director of Public Prosecutions Office it appears that a number of rape victims as well as victims under the age of 18 years and victims in domestic relationships or relatives were also victims of other serious sexual offences. The rape of children is a very serious offence and it is very frequent and prevalent in Fiji. The courts must impose harsh penalties dictated by the legislation. The courts should not leniently look at this kind of serious cases of rape of children of tender years when punishing the offenders.”

[17] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 0003 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.

[18] However, in the recent case of **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates stated that the sentencing tariff for the Rape of a juvenile should now be increased to between 11 and 20 years imprisonment. His Lordship held:

*“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.”*

[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 11 years imprisonment for the count of Rape.

[21] The aggravating factors are as follows:

- (i) The complainant was of very tender age (only three years old) at the time of the incident.
- (ii) You took advantage of the complainant’s vulnerability, helplessness and naivety.
- (iii) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- (iv) There was a large disparity in age between you and the complainant. The complainant was 3 years of age at the time you committed this offence on

her. At the time you were said to be 33 years of age. Therefore, there was a difference in age of 30 years.

- [22]** Paula Seru, you are now said to be 37 years of age.
- [23]** As per the Antecedent Report filed it was submitted by the State that there are no previous convictions recorded against you.
- [24]** The State submits that the fact that you do not have any previous convictions is of little value considering the circumstances of the offending in this case. However, this Court cannot agree with this contention of the State and considers you as a person of previous good character and will grant you an appropriate concession for same.
- [25]** Paula Seru it has been established that you are suffering from an intellectual disability. Therefore, prior to the trial proper commencing in this case, an Inquiry was held to ascertain whether, considering your intellectual disability, this Court should act under the provisions of Section 108 (2) of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”).
- [26]** At the end of the said Inquiry, Court was satisfied that due to your intellectual disability, though you are not insane or of unsound mind, you were not in a position to duly understand the proceedings of this Court. Accordingly, Court made a ruling that it is appropriate to proceed to hear the evidence in this case in terms of the provisions of Section 108 (2) of the Criminal Procedure Act.
- [27]** During the said Inquiry, Court heard the testimony of Dr. Kiran Gaikwad, Acting Medical Superintendent, St. Giles Hospital. As per the order made by this Court on 19 October 2018, Dr. Gaikwad conducted a psychiatric evaluation on you. Pursuant to the said psychiatric evaluation, the Doctor had tendered a comprehensive Report, dated 8 November 2018. The said Report was tendered to Court as X1 during the inquiry.
- [28]** The Doctor confirmed that you had been previously assessed on four different occasions at the St. Giles Hospital and the relevant Psychiatric Reports had also been tendered to this Court. Court is in possession of the said Psychiatric Reports, which are as follows:
- (i) Report dated 12 November 2015, by Dr. Jay Lincoln, Medical Superintendent, St. Giles Hospital.
 - (ii) Report dated 17 May 2016, by Dr. Peni Moi Biukoto, Medical Superintendent and Consultant Psychiatrist, St. Giles Hospital.
 - (iii) Report dated 12 February 2018, by Dr. Kiran Gaikwad.
 - (iv) Report dated 15 October 2018, by Dr. Elizabeth Koroivuki, Senior

Medical Officer, St. Giles Hospital.

- [29] In his latest Report (X1), Dr. Gaikwad has stated as follows: *“It has been noted that while the examining Doctors (above) differed in opinion about fitness to stand trial, all have agreed that the Accused has some degree of intellectual disability and suffers from organic personality disorder, secondary to Epilepsy and has concluded that he was aware of his actions at the time of the alleged crime in their reports.”*
- [30] The doctor has said in his report that you were born prematurely, at 8 months gestation, at Lomaloma Hospital. You had delayed developmental milestones such as talking and walking. At age 5, you started to have seizures. From the records it is said that you were not on any epileptic treatment until 2011, when you were first assessed at St. Giles Hospital.
- [31] As per Dr. Gaikwad’s opinion, you are diagnosed with Organic Personality Disorder due to secondary Epilepsy. You are also suffering from a Mental Retardation, specifically Intellectual Disability. You are receiving medications for Epilepsy and Hypertension.
- [32] Dr. Gaikwad testified that intellectual disability is synonymous with mental retardation. It is a condition where a person’s cognitive functioning and learning ability is impaired. There can be different degrees of intellectual disability – borderline, mild, moderate, or severe – based on a person’s behaviour. The Doctor was of the opinion that the degree of your intellectual disability, is somewhere between borderline and mild.
- [33] Based on the recommendations of Dr. Gaikwad, this Court directed that you be examined by a psychologist. Accordingly, Ms. Elenani Vuru, Senior Psychologist, Fiji Corrections Service, conducted a psychological assessment on you and has submitted to Court her Psychological Assessment Report, dated 14 January 2019.
- [34] During the sentencing hearing in this case, the testimony of Ms. Elenani Vuru, Senior Psychologist, Fiji Corrections Service was also received. The Psychological Assessment Report prepared by her, dated 14 January 2019, was tendered to Court as X2 during the said hearing.
- [35] Ms. Vuru confirmed that there are facilities at the Corrections Centres in Fiji to accommodate persons who are suffering from intellectual disabilities, similar to your condition.
- [36] His Lordship Justice Goundar in ***State v. Solomone Vakalalabure*** [2018] FJHC 384; HAC106.2018 (9 May 2018); discussed whether mental illness is relevant to sentencing, and if it is, to what extent. His Lordship held as follows:

“In R v Anderson [1981] VR 155; (1980) 2 A Crim R, it was held that the fact that an offender was, or is, suffering from a mental illness either at the time of the commission of the offence or at the time of sentencing may be taken

into account at sentencing. Further, an offender's mental condition can have the effect of reducing a person's moral culpability and matters such as general deterrence, retribution and denunciation have less weight (Muldrock v The Queen (2011) 244 CLR 120 at [53]; R v Israil [2002] NSWCCA 255 at [23]; R v Henry (1999) 46 NSWLR 346 at 354). This is especially so where the mental condition contributes to the commission of the offence in a material way (DPP (Cth) v De La Rosa (2010) 79 NSWLR 1 at [177]; Skelton v R [2015] NSWCCA 320 at [141])."

[37] Therefore, I am of the opinion, considering all the facts and circumstances of this case, that this Court should consider your intellectual disability as a mitigating circumstance.

[38] Considering the aforementioned aggravating factors (as stated in paragraph 21 above), I increase your sentence by a further 4 years. Now your sentence is 15 years imprisonment for the count of Rape. Considering your previous good character, I reduce one year from your sentence. For your intellectual disability, I reduce a further 4 years from your sentence. Your sentence is now 10 years imprisonment for the count of Rape.

[39] Accordingly, I sentence you to a term of 10 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 8 years of that sentence.

[40] 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."

[41] You have been in remand custody since 2 September 2015, the time you were taken into custody for this case. Accordingly, you have been in custody for a period of about 3 years and 6 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 3 years and 6 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[42] In the result, you are sentenced to a term of imprisonment of 10 years with a non-parole period of 8 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

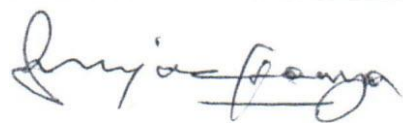
Head Sentence	-	6 years and 6 months.
Non-parole period	-	4 years and 6 months.

[43] In terms of Section 163 (1) of the 2013 Constitution of Fiji, the term disability has been defined to include any physical, sensory, mental, psychological or other condition, or illness that –

- (a) has, or is perceived by significant sectors of the community to have, a significant adverse effect on an individual's ability to participate fully and effectively in society on an equal basis with others; or
- (b) forms the basis of unfair discrimination.

[44] Paula Seru, like any other person with disabilities, your rights are protected in the Constitution and the International Conventions on the Rights of Persons with Disabilities. Rule 5 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) creates an obligation on the prison administrations to make all reasonable accommodation and adjustments to ensure that prisoners with disabilities have full and effective access to prison life on an equitable basis. The Fiji Corrections Service is obliged by law to provide you with full and effective access to prison life on an equitable basis. You will have other recourse if there is a failure to comply with this obligation.

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



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

Dated this 7th Day of March 2019

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