

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 246 OF 2017S

STATE

vs

VAKENI DONU

Counsels : Mr. I. Rakaria for State
Mr. I. Romanu for Accused
Hearings : 1 and 2 April, 2019.
Summing Up : 3 April, 2019.
Judgment : 3 April, 2019.
Sentence : 4 April, 2019.

SENTENCE

1. In a judgment delivered yesterday, you were found not guilty and acquitted of the following counts, in the following information, but found guilty and convicted of the lesser offence of attempted rape, on the facts as partly alleged in count no. 1 and 2:

"First Count

Statement of Offence (a)

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence (b)

VAKENI DONU, on the 2nd day of August 2017, at Draubuta, Tokatoka, Tailevu in the Eastern Division, penetrated the anus of MLR, a child under the age of thirteen years with his penis.

Second Count

Statement of Offence (a)

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence (b)

VAKENI DONU, on the 2nd day of August 2017, at Draubuta, Tokatoka, Tailevu in the Eastern Division, penetrated the vagina of MLR, a child under the age of thirteen years with his penis."

2. The brief facts of the case were as follows. On 2 August 2017, the date of the incident, the female complainant (PW1) was 9 years old. She was a class 4 student at a primary school in Tailevu. She lived with her parents and 3 brothers aged 8, 6 and 3 years old. She was the eldest in her family. The accused was 21 years old at the time. His mother was the complainant's father's sister. The accused and the complainant were first cousins, and their families lived next to each other in the same village.
3. After school on 2 August 2017, the complainant was peeling potatoes in their family kitchen. She went out to get water. The accused then grabbed her and carried her to a nearby bush. She tried to escape to no avail. The accused later told her to take off her clothes. She did so under duress. The accused then told her to kneel down on her hands in a "dog like standing position". He then tried to insert his penis into her anus. The complainant said it was painful. However, the accused could not insert his penis into the complainant's anus because it was small. Then the accused ordered the complainant to lie on the ground on her back facing up. He then tried to insert his penis into her vagina. Again, the accused was unable to insert his penis into the complainant's vagina because it was small. There was redness around the vaginal area.
4. The matter was reported to police. An investigation was carried out. The complainant was medically examined at CWM Hospital on 4 August 2017. He appeared in the Nausori Magistrate Court on 7 August 2017 charged with raping the complainant. He had been tried in the High Court and had been acquitted of raping the complainant, but found guilty of attempting to rape her, at the material time, twice.
5. The offence of "attempted rape" is a serious one, and Parliament had prescribed a maximum sentence of 10 years imprisonment for the offence (see section 208 of the Crimes Act 2009). This maximum sentence was somewhat similar to the offence of

“attempted rape” in section 151 of the repealed Penal Code, Chapter 17. Thus, the case laws on sentencing on attempted rape under the Penal Code will be applicable to the offence under the Crimes Act 2009.

6. In **Jioji Aunima v State**, Fiji Law Reports, Volume 1, 2001, pages 213 to 217, Her Ladyship Madam Justice Shameem, after reviewing the sentence authorities for attempted rape in Fiji, set the tariff for attempted rape a sentence of 12 months to 5 years imprisonment. The final sentence will depend on the aggravating and mitigating factors in the case. The above authority had survived for 18 years, and I treat the same as binding in this case.
7. The aggravating factors, in this case, were as follows:
 - (i) **Breach of Trust.** The 9 year old female complainant is the accused’s first cousin. The accused’s mother is the complainant’s father’s sister. So, the two are first cousins. The accused is 21 years old, 12 years older than the complainant. In a village setting, the elders are supposed to look after the young. This is especially so when they are first cousins. The complainant trusted you as a cousin. But you abused the trust she had in you by attempting to rape her twice. You have to understand that this kind of behaviour cannot be tolerated in society, especially in a village setting. You will have to serve a prison sentence, as a warning to others.
 - (ii) **Sexual Offence Against a Child.** The courts had repeatedly said in the past, and it will say again that, it will not tolerate the sexual abuse of children in our society. Our children are the future of this country. The court expects children to grow up in our society without been repeatedly abused. You will have to serve a prison sentence as a warning to others.
 - (iii) By offending against the child, you showed no regards to her right to personal safety, no regards to her rights as a human being and no regards to her right to live a peaceful and happy life.
8. The mitigating factors were as follows:
 - (i) At the age of 23 years old, this is your first offence;
 - (ii) You had been remanded in custody awaiting trial since 7 August 2017, that is, approximately 1 year 8 months ago.

9. On the lesser offence of "attempted rape" for count no. 1, I start with a sentence of 3 years imprisonment. I add another 3 years for the aggravating factors, making a total of 6 years imprisonment. I deduct 1 year 8 months from the above, for time already served while remanded in custody, leaving a balance of 4 years 4 months. For being a first offender, I deduct another 1 year 4 months from 4 years 4 months, leaving a balance of 3 years imprisonment.
10. I repeat the above process and sentence for the lesser offence of "attempted rape" for count no. 2.
11. The summary of your sentences are as follows:
 - (i) Lesser Offence of Attempted Rape for Count No. 1: 3 years imprisonment
 - (ii) Lesser Offence of Attempted Rape for Count No. 2: 3 years imprisonment
12. Because the offences relate to an attack on a child, and the need for deterrence, I make the above sentence consecutive to each other, making a final total sentence of 6 years imprisonment.
13. Mr. Vakeni Donu, for attempting to rape the complainant twice, on 2 August 2017, at Tailevu in the Eastern Division, I sentence you to 6 years imprisonment, with a non-parole period of 5 years imprisonment, effective forthwith.
14. Pursuant to section 4 (1) of the Sentencing and Penalties Act 2009, the above sentence is designed to punish you in a manner which is just in the circumstances, to protect the community, to deter other would-be offenders and to signify that the court and community denounce what you did to the complainant on 2 August 2017.
15. The complainant's name is permanently suppressed to protect her privacy.
16. A Domestic Violence Restraining Order is issued against the accused, his agents or whatever, in the terms provided under Form 3 of the Domestic Violence (Prescribed Forms) Rule 2009, and by the authority of the Domestic Violence Act 2009, to protect the complainant and her immediate family, until further orders of the court.

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



Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : I. Romanu, Barrister & Solicitor, Suva.