

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 223 of 2020

BETWEEN: STATE

PROSECUTION

A N D: SOLOMONI QARIKAULEVU

ACCUSED PERSON

Counsel : Ms. M. Vosawale for the State
Ms. L. Manulevu for Accused

Date of Sentence : 22nd October 2020

SENTENCE

1. Mr. Solomon Qarikaulevu, you pleaded guilty to the offence of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act, which carries a maximum penalty of life imprisonment. The particulars of the offence are that:

Statement of Offence

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

Particulars of Offence

SOLOMONI QARIKAULEVU on the 23rd of July 2020 at Vunibau Village, Serua, in the Central Division, had carnal knowledge of **ORISI RAICAMA VITUKAWALU** a child under 13 years of age.

2. Satisfied by the fact that you have fully comprehended the legal effect of your plea and your plea was voluntary and free from influence, I now convict you to this offence of Rape.
3. According to the summary of facts, which you admitted in open court, you had called the complainant while he was playing rugby with his friends on the afternoon of 23 July 2020. The complainant was 12 years old at that time. When the complainant came to you, you had told him to follow you. You had then went to the riverbank, and the complainant followed you. At the riverbank, you gave the complainant FJ\$5, asking him to engage in sexual conduct with you. You then made the complainant lie on his chest on the ground. You had then penetrated the anus of the complainant with your penis
4. Rape is one of the most humiliating and distressing invasions of the integrity of the human body. It becomes more serious when it is involved with a child victim. Hence, I find the Rape of this nature is a very serious crime. In this case, the complainant was sexually abused by a person who is known to him. This form of sexual exploitation of children by the known adult is a serious offence.
5. The Fiji Court of Appeal in **Subramani v State [2018] FJCA 82; AAU0112.2014 (1 June 2018)** discussed the appropriate approach of sentencing the offenders of this nature, where the Fiji Court of Appeal held that:

"The offence of Rape of young person related to the appellant is a serious offence. In this case the complainant was 11 years old and the appellant was her grand uncle (her grandfather's brother). The authorities indicate that whilst rehabilitation is a factor to be considered when fixing a non-parole period, so also are deterrence, denunciation, condign punishment and community protection and expectations. The appropriate person to balance these objectives in each case is the sentencing judge. In the present case, given the age of the appellant, rehabilitation is not a particularly relevant matter whereas the expectations of the community and the protection of young girls should be reflected in both the head sentence and

the non-parole term so as to send a strong signal that the courts will impose appropriate sentences in such cases."

6. The Supreme Court of Fiji in **Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018)** held that the increasing prevalence of crimes of this nature demands the courts to consider widening the tariff for the Rape against children. The Supreme Court of Fiji held that:

"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."

Purpose of the Sentence

7. In view of the serious nature and prevalence of the crimes of this nature, the main purpose of this sentence is founded on the principle of deterrence. It is a responsibility of the Court to deter offenders or other persons from committing offences of the same or similar nature and protect the community from offenders of this nature. A harsh and long custodial sentence is inevitable for the offences of this nature to demonstrate the gravity of the offence and reflect that civilized society denounces such crimes without any reservation.

Tariff

8. Gates CJ in **Aitcheson v State (Supra)** held that the tariff for the Rape of a child is between 11 - 20 years' imprisonment period. However, Justice Vinsent Perera in **State v Vosatokaera - Sentence [2020] FJHC 334; HAC233.2019 (22 May 2020)** found the tariff as stipulated in **Aitcheson v State (Supra)** only applies for penile penetration of the vagina, where his Lordship held that:

"The offence of Rape in Fiji can be committed at least in nine different ways given the relevant physical act;

Section 207(2) (a):

- (i) Penile penetration of the vagina*
- (ii) Penile penetration of the anus of a female*
- (iii) Penile penetration of the anus of a male*

Section 207(2) (b):

- (iv) Penetration by an object or a body part other than a penis, of the vulva*
- (v) Penetration by an object or a body part other than a penis, of the vagina*
- (vi) Penetration by an object or a body part other than a penis, of the anus of a female*
- (vii) Penetration by an object or a body part other than a penis, of the anus of a male*

Section 207(2) (c):

- (viii) Penetration of a female victim's mouth by the accused with his penis*
his penis;
- (ix) Penetration of a male victim's mouth by the accused with his penis.*

It should be noted that the sentencing tariff of 11 years to 20 years imprisonment has been established having regard to only the first form of Rape listed above."

9. In **State v Vosatokaera (supra)**, the accused had penetrated the anus of the twelve years old victim with his fingers. The accused in **State v Vosatokaera (supra)** was sentenced to five years and four months imprisonment.

10. In **State v Tui - Sentence [2020] FJHC 642; HAC03.2020 (14 August 2020)**, the accused had penetrated the seven-year-old victim's mouth with his penis. While sentencing the accused to six years imprisonment, Justice Vinsent Perera found that:

"However, it is pertinent to note that Aitcheson (supra) involved six counts of Rape by penile penetration of the vagina where the relevant accused had raped his two biological daughters who were under the age of 13 years. It is therefore clear that the aforementioned tariff has been formulated having regard to the offence of Rape committed by penetration of the vagina by penis. This being a case where the accused had penetrated the victim's mouth by his penis, this case can be distinguished from Aitcheson (supra) for the same reasons I have explained in State v Vosatokaera [2020] FJHC 334; HAC233.2019 (22 May 2020).

Thus, I am unable to convince myself that, given the circumstances of the offending in this case, the sentence should be within the range of 11 years to 20 years imprisonment. The discretion provided by the legislature to the sentencing court is to punish an offender who had committed the offence of Rape contrary to section 207 of the Crimes Act with a term of imprisonment up to life. The legislature does not provide that a particular minimum term of imprisonment should be imposed in every case of Rape regardless of the manner and the circumstances of the offending. Therefore the sentencing tariff pronounced in Aitcheson (supra) cannot be taken to have imposed a minimum term of 11 years imprisonment for every offender charged with Rape where the victim is a child."

11. Accordingly, it appears that the High Court of Fiji is now applying different approaches to sentence the offenders of child rape cases. (*I do not wish to discuss the sentencing approach adopted in State v Lagolevu - Sentence [2020] FJHC 787; HAC52.2019 (25 September 2020), State v Tubunavau - Sentence [2019] FJHC 950; HAC346.2018 (30 September 2019) and State v Lesavua - Sentence [2020] FJHC 836; HAC110.2017 (13 October 2020) in this sentence*)

12. The learned Counsel for the Prosecution and the Defence filed detailed written submissions on this issue, emphasizing the tariff as stipulated in **Aitcheson v State (Supra)** is the appropriate sentencing guideline.
13. In the wake of these competing sentencing approaches, it is important to understand the jurisprudential principle of Section 207 of the Crimes Act. The offence of Rape under the repealed Penal Code was considered as an offence against morality. The offence of Rape under the Penal Code had been structured within the gendered male-female paradigm.
14. However, the modern understanding of the law of Rape focuses on the protection of sexual autonomy from the harm of non-consensual penetrative sexual activities. The central elements of the Rape are not the mechanical description of objects and body parts, but the physical invasion of a sexual nature committed on the victim under a coercive circumstance. (*vide The Prosecutor V Jean-Paul Akayesu Case No ICTR-96-4-T*).
15. The offence of Rape, as stipulated under Section 207 of the Crimes Act is not structured within the gendered male-female paradigm. The legislative drafters of the Crimes Act found any form of penetration to any of the orifices of the body as prescribed under Section 207 of the Crimes Act amounts to a physical invasion of a sexual nature, thus constituting the offence of Rape. Accordingly, Rape has not been primarily defined based on the gender of the victim's body, the place of the penetration, and the mode of the penetration. Rape is no longer an offence against morality, but it is an offence against the right to personal liberty and right to private and family life. (*vide Sections 9 and 24 of the Constitution*)
16. If the Court inclines to impose different ranges of sentences primarily depending on the form of the penetration, the place of the penetration and the gender of the victim, it would negate the legislative purpose of enacting the offence of Rape as an offence violating the bodily integrity and autonomy of the victim.
17. Hence, the sentence should not be based on the place of the penetration, the form of penetration and the gender of the victim. It should be found on the gravity, the harm, and the effect of the physical invasion and bodily integrity. In doing that, the Court,

undoubtedly, could consider the form and the place of the penetration and its effect on the victim. Still, it should not be the sole determiner to adopt different sentencing approaches.

18. The above discussed jurisprudential principle of Section 207 of the Crimes Act has been outlined in **Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015)**, where Gates CJ held that:

"The casting of the offence of Rape in the Crimes Decree is such that no distinctions are drawn as to gravity of offending dependent on the object used to penetrate or of the orifice of the victim penetrated. No separate penalties are prescribed. Sufficient no doubt is the unwanted invasion, the violation of the person, the forcible intrusion into the privacy and body of another"

19. Section 98 (6) of the Constitution has stated that the Supreme Court's decisions are binding on all other courts of the States. Premathilaka JA in **Daunivalu v State [2020] FJCA 127; AAU138.2018 (10 August 2020)** highlighted that the doctrine of "*stare decisis*" requires Lower Courts in the Hierarchy of Courts to follow the decisions of the Higher Courts.
20. Furthermore, I concur with the concern expressed by Justice Aluthge in **State v Mudu - Sentence [2020] FJHC 609; HAC116.2020 (30 July 2020)**, where his Lordship said that:

"...the end result is that there are two sentencing tariff regimes in Fiji for the same offence which is highly unacceptable. Due to the huge disparity between the two tariff regimes, sentencing decisions will lead to some degree of inconsistency, resulting in regular appeals. What is more concerned is the sense of injustice and discrimination that may be felt by the offenders receiving harsher punishments under the new tariff regime when equally situated offenders receive lenient sentences (under the old tariff regime) in a different court. In my opinion, the potential damage to the system would be greater when inconsistent sentences are passed than

when offenders receive lenient sentences. Therefore, an urgent intervention of the Court of Appeal is warranted to put this controversy to an end."

21. As a result of above-discussed reasons, it is my opinion that the tariff in **Aitcheson v State (Supra)** applies to any form of Rape as stipulated under Section 207 of Crimes Act. Accordingly I prefer to adopt the tariff outlined in **Aitcheson v State (Supra)**.

Level of Harm and Culpability

22. The complainant was twelve years old when this incident took place. You had lured the complainant to come to you by offering him five dollars (\$F5.00). You have then manipulatively executed your heinous plan of raping this young complainant. Therefore, I am satisfied that this is a premeditated crime. I accordingly find the level of harm and culpability in this offence is significantly high.

Starting Point

23. Having considered the seriousness of the crime, the purpose of the sentence, the level of culpability and harm, I select thirteen (13) years as the starting point.

Aggravating and Mitigating Factors

24. You have breached the trust that the complainant had in you as an elderly relative and neighbour. Instead of caring and looking after this small young complainant, you manipulatively used his naivety in childhood to satisfy your lustful sexual gratification. The age difference between you and the complainant is substantially high. He was twelve years old, and you were fifty-two years old when this offence took place. By committing this crime, you have exposed this twelve-year-old child to sexual activities at a very young age, thus preventing him from having a natural growth of maturity in his life. I consider these grounds as aggravating factors in this offending.
25. The learned Counsel for the Defence in her mitigation submissions submitted your personal and family background, which I do not find any mitigatory value.

26. The learned Counsel for the Defence submitted that you are a first offender; hence, you are entitled to a substantive discount. I find that your previous good character, especially the fact that you have not been tainted with any previous conviction for an offence of sexual nature, would have definitely allowed you to freely move around in the community without any suspicion of risk. The community has perceived you as a man of good character and not as a child pedophile and allowed you to be freely moved in the community. Moreover, there is no suggestion that you have significantly contributed to the community or have any reputation in the community as per Section 5 of the Sentencing and Penalties Act. Therefore, I do not find your previous good character has any significant mitigatory value. Hence, you are only entitled to a meager discount for your previous good character.
27. You pleaded guilty to this matter at the first opportunity. Therefore, you are entitled to a substantive discount for your plea of guilty.
28. In view of the reasons discussed above, I increase five (5) years for the aggravating factors to reach an interim period of eighteen (18) years. In view of your previous good character, I give you one (1) year discount. I reduce further three (3) years for an early plea of guilty and reach fourteen (14) years imprisonment as your final sentence.
29. Having considered the seriousness of this crime, the purpose of this sentence, your age, and opportunities for rehabilitation, I find twelve (12) years of the non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

30. Accordingly, I sentence you for **fourteen (14) years** imprisonment for the offence of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act. Moreover, you are not entitled to any parole for **twelve (12) years** pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

31. You have been in remand custody for this case for nearly (3) months before the sentence as the Court did not grant you bail. In pursuant to Section 24 of the Sentencing and Penalties Act, I consider three (3) months as a period of imprisonment that you have already served.
32. Accordingly, the actual sentencing period is **thirteen (13) years and nine (9) months** imprisonment with a non-parole period of **eleven (11) years and nine (9) months**.
33. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read 'R.D.R.T. Rajasinghe', is written over a dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

22nd October 2020

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.