

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

High Court Criminal Case No. HAC 34 of 2019

BETWEEN : STATE

AND : SUTUWETI TUISAVURA

Counsel : Ms U. Tamanikaiyaroi for the State
Ms M. Singh and Ms S. Hazelman for the Accused

Date of Hearing : 14,15 & 16 October 2020

Closing Speeches : 16 October 2020

Date of Summing up: 19 October 2020

Date of Judgment : 21 October 2020

Date of Sentence : 26 October 2020

(The name of the victim is suppressed and will be referred to as "TS")

SENTENCE

1. You, Sutuweti Tuisavura are convicted of the following offences after a full trial.

Count one

Statement of Offence

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

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his finger without her consent.

Count two

Statement of Offence

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

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his penis without her consent.

Count three

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

Sutuweti Tuisavura on the 17th day of June 2016, at Moala in the Central Division, unlawfully and indecently assaulted TS, by touching her breast.

2. You were indicted for the above offences on 14 March 2019. You pleaded not guilty to all three counts and the trial commenced on 14 October 2020. At the end of the trial the assessors returned with a unanimous opinion that you are guilty to all three counts. Accordingly, on 21 October 2020 you were convicted of the first, second and third counts by this court.
3. As per the evidence adduced in this case you are related to the victim and she calls you Momo, meaning uncle. The victim was living with her grandparents and her aunt, as her mother was living elsewhere. She was 15 years at the time

of the commission of these offences and you were 40 years old. On 17 June 2016 you encountered the victim and her boyfriend in the village public convenience. It was late in the night and you told the victim's boyfriend to go home. You lied to the victim that you will inform her grandparents that she was caught in the public convenience with her boyfriend. Then you held her by her wrist and took her to a vacant house. You threatened the victim to be quiet. You touched her breasts while she was crying. You pulled down her pants and started touching her vagina. You inserted your index finger into her vagina without the consent of the victim. Subsequently you inserted your penis into her vagina without her consent. The victim was frightened and was in pain. You threatened her that you will do something that she has never seen in her life if she tells someone about the incident.

4. I have observed the following aggravating features in your offending.
5. You preyed on the victim at a time she was in a vulnerable situation. You used your position to intimidate her and took advantage of the circumstances. You shamelessly exploited the opportunity and breached the trust being an elderly relative of the victim. The State submitted that there is some degree of planning as you took a different route through the outskirts of the village to take the victim to a vacant house in a secluded area. However, the circumstances demonstrate more of a situation where you have improvised a *modus operandi* to fulfil your lustful desires after your encounter with the complainant and her boyfriend.
6. The victim in her victim impact statement states that she was happy, and she used to enjoy with her friends before this incident. However, she says that after the incident she felt scared and did not want to see the face of the Accused. It clearly demonstrates psychological impact on the victim.

7. In her victim impact statement, she further says that as a result of what the Accused did to her, she lost her virginity. I must note that loss of virginity is considered an aggravating factor in rape: **State v Mani [2018] FJHC 1097; HAC182.2016 (16 November 2018); Senilolokula v State [2018] FJSC 5; CAV0017.2017 (26 April 2018).**
8. I note that the age disparity between you and the victim is 25 years.
9. I have also considered the mitigation submissions tendered by your counsel.
10. You are married with two children. You are the sole breadwinner. You are a first offender. You have asked for leniency.
11. However, it must be noted that family and personal circumstances carry only a little mitigating value in sexual offences. In **Rokolaba v State [2018] FJSC 12; CAV0011.2017 (26 April 2018)** it was stated;

“In these serious cases of sexual offending very little mitigation can be derived from being “married with children” and “sole breadwinner”. For a crime as serious as this, imprisonment must necessarily be imposed for a substantial period. Families invariably suffer greatly when the supporting member is to be imprisoned. In the absence of strong social security support, vulnerable relatives of the accused, elderly or sickly parents, children at school and overworked wives and mothers have to endure harsh misfortune as a result of the accused person’s serious offending.”
12. Similarly, your clear records also cannot be considered as significant mitigation as the sexual offences in this case involves abuse of trust: **Senilolokula v State [2018] FJSC 5; CAV0017.2017 (26 April 2018).**

13. The maximum punishment for rape is life imprisonment. In **Aitcheson v State [2018] FJSC 29; CAV 0012.2018 (2 November 2018)** the Supreme Court remarked as follows while enhancing the tariff for child rape;

“[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.”

14. In relation to the first count you have penetrated the vagina of the victim with your finger without her consent.

15. In relation to the second count you have penetrated the vagina of the complainant with your penis without her consent.

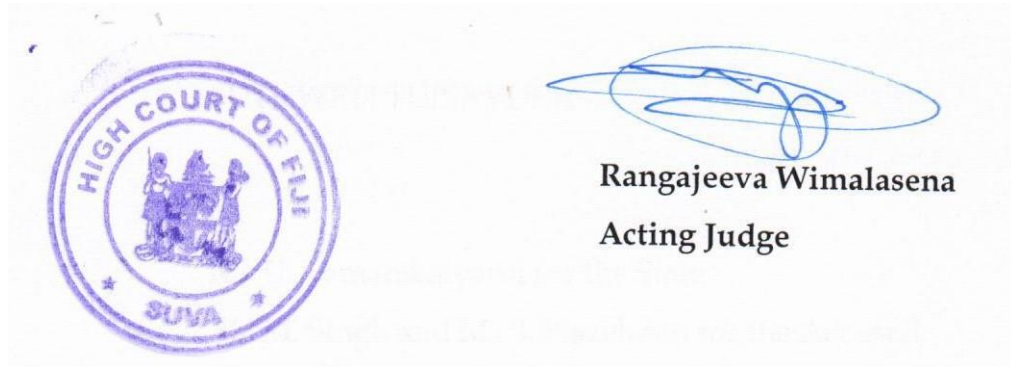
16. In a recent sentence, **State v Vosatokaera - Sentence [2020] FJHC 334; HAC233.2019 (22 May 2020)** Justice Perera noted that the tariff in **Aitcheson v State (supra)** is applicable only to cases where there is penile penetration of the vagina while setting out nine different forms of rape.

17. A similar approach was adopted in **State v Tui - Sentence [2020] FJHC 642; HAC03.2020 (14 August 2020)** as well.
18. However, in the most recent case, **State V Qarikaulevu HAC 223.2020 (22 October 2020)** Justice Rajasinghe discussed this issue at length where His Lordship remarked that the modern understanding of the law of rape focuses on the protection of sexual autonomy from harm of non-consensual penetrative sexual activities.
19. Accordingly it is very clear that the offence of rape introduced in section 207 of the Crimes Act is a gender neutral offence where anatomy and gender no longer loom large in the offence as opposed to the old definition of rape in the repealed Penal Code, which was considered as an offence against morality. Any intrusive penetration sexualized in nature, of an orifice of another person's body could be equally humiliating, frightening, invasive and unwanted.
20. This position is more buttressed by the remarks made by the Supreme Court in **Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015)**;
- "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"
21. Therefore, I am of the view that the tariff introduced in **Aitcheson v State** (supra) is applicable to the first count of rape as well regardless of the fact that penetration is by a finger.

22. 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 the bottom of the range is recommended for less serious assaults such as brushing of covered breasts or buttocks.
23. I am satisfied that the offences that you committed are founded on the same facts and are of similar character. Therefore, I decide to impose an aggregate sentence on you pursuant to section 17 of the Sentencing and Penalties Act.
24. Having regard to the principles of denunciation, deterrence and the primacy of protecting the community I have to impose a sentence proportionate to the crimes that you have committed. Further it should be noted that the Courts always denounce any form of sexual offences on children with abhorrence. I am conscious of the fact that exposure to sexual activities at young ages could leave scars in their minds for the rest of their lives.
25. Having taken into account the objective seriousness of the offences I pick 11 years as the starting point for your aggregate sentence. I add 3 years for aggravating circumstances. I deduct 2 years for mitigation.
26. As such I impose an aggregate sentence of 12 years imprisonment on you.
27. Pursuant to section 24 of the Sentencing and Penalties Act the time in remand custody has to be regarded as a period of imprisonment already served by you. Therefore, I deduct 4 months and 14 days from your aggregate sentence to reflect the time you spent in remand custody.
28. Accordingly, you should serve an aggregate sentence of 11 years 7 months and 14 days imprisonment and you are eligible for parole after 8 years.

29. After taking into consideration the domestic relationship between you and the victim I issue a permanent domestic violence restraining order for non-molestation and for non-contact.

30 days to appeal to the Court of Appeal.



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Solicitors

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused