

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 225 of 2019

STATE

V

EMONI SAUKIWERE

Counsel : Mr. Muhammed Rafiq with Ms. Sheenal Swastika and Mr. Unal Lal
for the State

Ms. Nimita Sharma with Ms. Shaheen Ali for the Accused

Dates of Trial : 18 and 20-22 July 2022

Closing Submissions : 25 July 2022

Judgment : 23 August 2022

Sentence Hearing : 31 August 2022

Sentence : 21 September 2022

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

SENTENCE

[1] Emoni Saukiwere, in terms of the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offence:

COUNT

Statement of Offence

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

Particulars of Offence

EMONI SAUKIWERE, between the 6th day of December 2019 and the 7th day of December 2019, at Nadi, in the Western Division, penetrated the vagina of **MN**, with his penis, without her consent.

- [2] You pleaded not guilty to charge against you and the ensuing trial was held over 4 days. The prosecution called the complainant, MN, her mother, Anaseini Marama, and PC 4199 Jolame Tuidroto, in support of their case. You exercised your right to remain silent. However, you called one witness, Apenisa Nalagi, in support of your case.
- [3] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty of the lesser or the alternative charge of Defilement of a Young Person between 13 and 16 Years of Age (Defilement), contrary to Section 215(1) of the Crimes Act No. 44 of 2009 (Crimes Act) and convicted you of the said charge.
- [4] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

- [5] I have duly considered the above factors in determining the sentence to be imposed on you.
- [6] In terms of Section 215 (1) of the Crimes Act, *“(1) A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.”*

- [7] The offence of Defilement in terms of Section 215 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.
- [8] As at December 2019, the complainant would have been 14 years and 6 months old. Her date of birth being 5 May 2005.
- [9] The applicable tariff for the offence of Defilement is a suspended sentence to 4 years imprisonment. The law and tariff in relation to the offence of Defilement remains the same as found in the Penal Code (Chapter 17). However, it must be borne in mind that in terms of Section 156(1) (a) of the Penal Code, the maximum penalty originally prescribed for the offence of Defilement was 5 years imprisonment.
- [10] In *Livina Namami v. The State* [1995] 41 FLR 152 (17 July 1995); where the accused appellant appealed the sentence of 2½ years imprisonment on a charge of Defilement of his girlfriend, aged 15½ years, His Lordship Justice Fatiaki held:

".....On the facts of this case there can be little doubt that this was a case of "a virtuous friendship (between two young people) that ended with them having sexual intercourse with one another." Certainly it falls within that category of offending where "... it is inappropriate to pass sentences of a punitive nature."

In this case the learned trial magistrate sentenced the appellant on an incorrect factual basis in that the complainant was not then under 15 years of age at the time of the offence. Furthermore no consideration appears to have been given to the minimal age difference between the parties and finally, as conceded by learned State counsel, there is no record that the learned trial magistrate was aware that the appellant was a student at the time of sentencing him.

Insofar as it may be possible to give some guidance in the matter, on a charge of Defilement under Section 156(1) (a) of the Penal Code (Cap. 17), this Court is firmly of the view that in the absence of aggravating factors and subject to a favourable Social Welfare Officer's report, where the age difference between the accused and the complainant is less than 4 years, a non-custodial sentence is appropriate.

In the light of the above and for the foregoing reasons the appeal was allowed and the appellant and his father were ordered to enter into a recognizance of \$100 to keep the peace and be of good behaviour for a period of 12 months and further conditioned that the appellant was not to associate with the complainant."

- [11] In *Elia Donumainasava v State* [2001] FJHC 25; Haa32j.2001S (18 May 2001); Her Ladyship Madam Justice Shameem held:

“A charge under section 156(1) (a) of the Penal Code is specifically designed for consensual sexual intercourse with girls under the age of consent. The offence is clearly designed to protect young girls, who have entered puberty and who are experiencing social and hormonal changes, from sexual exploitation. The offence carries a maximum of 5 years imprisonment. Reported cases in Fiji and abroad show that sentences passed range from suspended sentences (usually where the accused and victim are both of the same or similar age, and are in a relationship) to 3/4 years imprisonment where the accused is in a position of trust in relation to the victim, and much older than her.”

- [12] In *State v Kabaura* [2010] FJHC 280; HAC117.2010 (9 August 2010); His Lordship Justice Goundar said:

“The tariff for this offence is from a suspended sentence to four years imprisonment; suspended sentences reserved for virtuous friendship offending while the higher side of the range is for offenders who are older and in position of trust with the victim (Etonia Rokowaqa v. State Criminal Appeal No. HAA37 of 2004); Elia Donumainasava v. State Criminal Appeal No. HAA032 of 2001).”

- [13] This tariff was followed by His Lordship Justice Madigan in *State v Raovuna* [2011] FJHC 59; HAC 021.2010 (10 February 2011) where he stated:

“The facts at trial revealed that in the last week of May 2010, you (the accused) had gone to stay with your uncle at Seaqaa. While there you came into contact with the victim Katarina and you and she had several meetings over 3 days and you each considered the other to be a romantic friend. On the evening of the 30th May 2010, you and Katarina found yourselves at a house in the settlement where sexual intercourse took place between you. The assessors and the court were obviously of the view that it was consensual.”

- [14] Similarly, in *State v Raibevu* [2012] FJHC 1040; HAC27.2011 (27 April 2012); His Lordship Justice Madigan held:

“.....the usual range of sentences (for Defilement) is from a suspended sentence for protagonists in a "virtuous relationship" whilst the higher end of the range is for offenders who are older and in a position of trust. (Rokowaqa CA 37/2004, Kabaura HAC 117/2010). In the case of

Donumainasuva CA 32/2001, Shameem, J said "The offence is clearly designed to protect young girls who have entered puberty and experiencing social and hormonal changes, from sexual exploitation."

- [15] In the case of **State v Vetaukula** [2014] FJHC 500; HAC46.2013 (8 July 2014); the accused, who was the turaga-ni-koro of the village, and who pleaded guilty to the defilement of a 15 year old girl in the same village, was sentenced to 18 months imprisonment. Goundar J said:

"The maximum penalty for defilement is 10 years imprisonment. The tariff is between suspended sentences to 4 years imprisonment (Elia Donumainasava v State [2001] HAA 32/015, 18 May 2001). Suspended sentences are appropriate in cases of non-exploitative relationship between persons of similar age. Custodial sentences are appropriate in cases of sexual exploitation of younger girls by old men or men who hold positions of authority over the girls."

- [16] The Learned Counsel for the State has brought to the attention of this Court that in the case of **State v Petero Mawi** [2019] FJHC 324; HAC17.2017 (12 April 2019); His Lordship Justice Perera held:

"I have decided that the appropriate tariff for the offence of defilement is an imprisonment term between 02 years and 08 years. This tariff should be regarded as the range of the sentence on conviction after trial. The sentencing court may decide to suspend the sentence in line with the provisions of section 26 of the Sentencing and Penalties Act where appropriate."

- [17] However, it is the opinion of this Court to follow the tariff that has been commonly applied over the past several years, conscious of the fact that the maximum penalty for the offence of Defilement has now been increased to 10 years imprisonment.

- [18] 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."

[19] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 18 months imprisonment for the charge of Defilement.

[20] Emoni, the aggravating factors are as follows:

- (i) You were a neighbour of the complainant at Keolaiya in Sabeto and known to her family. In the circumstances, you should have protected and safeguarded the complainant. Instead you have breached the trust expected from you.
- (ii) There was a disparity in age between you and the complainant. The complainant was 14 years of age, at the time you committed this offence on her. At the time of the offending you were nearly 24 years of age. Therefore, you were 10 years older than the complainant.
- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (iv) I find that there was some degree of planning and premeditation on your part in committing this offence on the complainant. As the prosecution has submitted you had tricked the complainant into going to the area besides the Korobebe River, on the pretext of buying her a recharge for her phone.
- (v) You had unprotected sexual intercourse with the complainant.

[21] Emoni, in mitigation you have submitted that you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.

[22] Therefore, considering all the facts and circumstances of this case, the nature and gravity of the offending, your culpability and degree of responsibility for the offending, the aggravating factors and the single mitigating factor being your previous good character, I impose on you a sentence of 3 years imprisonment for the charge of Defilement.

[23] The next issue for consideration is whether your sentence should be suspended.

[24] Section 26 of the Sentencing and Penalties Act provides as follows:

- (1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[25] Emoni, you are now 26 years of age [Your date of birth being 27 November 1995]. You are said to be single and currently residing at Nadi with your elderly parents. You are doing subsistence farming to support your elderly parents. At the time of the offending, you were 24 years of age.

[26] Emoni you were taken into custody for this case and produced in Court on 10 of December 2019, when you were remanded into custody. You were granted bail by the High Court on 11 June 2020. Therefore, you have been in remand custody for this case for 6 months.

[27] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse....."

[28] Her Ladyship Madam Justice Shameem also held In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006);

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[29] Emoni, considering the fact that you are a first offender with a history of previous good character, that you are relatively young offender and the fact that you have already spent 6 months in custody for this case, it is my opinion that there is still chance for your rehabilitation, as provided for in Section 4 (1) of the Sentencing and Penalties Act. Therefore, I deem it appropriate to suspend your sentence.

[30] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentence for a period of 7 years.

[31] In the result, your final sentence would be 3 years' imprisonment, which term of imprisonment is suspended for a period of 7 years. You would be advised of the effect of breaching a suspended sentence.

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



AT LAUTOKA

Dated this 21st Day of September 2022

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

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