

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 5 of 2022**

**STATE**

vs.

**JOSEFA CAVUILATI BOSEIKADAVU WAQABACA**

**Counsel:** Ms. A. Vavadakua for the State  
Ms. L. Filipe & Ms. L. Ratidara for the Accused

**Date of Hearing:** 06<sup>th</sup> – 07<sup>th</sup> December, 2022

**Date of Closing Submission:** 20<sup>th</sup> December, 2022 & 16<sup>th</sup> January, 2023

**Date of Judgment:** 16<sup>th</sup> January, 2023

**Date of Sentence/Mitigation Submission:** 20<sup>th</sup> January, 2023

**Date of Sentence:** 26<sup>th</sup> January, 2023

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**SENTENCE**

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*(The names of the victims are suppressed they will be referred to as "C.T & S.R.")*

**Introduction**

1. Josefa Cavuilati Boseikadavu Waqabaca, you were found guilty and convicted on the 16<sup>th</sup> of January 2023 of count No. 1 of Rape contrary to Section 207 (1) and (2)(a) and (3) of the Crimes Act, 2009 and of counts 3 and 4 of Sexual Assault Contrary to Section 210 (1) (a) of the Crimes Act, 2009 by this Court after trial of which I presided. Both the prosecution and

the defence tendered comprehensive written submissions on sentencing and mitigation respectively. Accordingly you appear today to be sentenced for the said offences.

### Circumstances of the Offending

2. The complainant is CT, born on 29<sup>th</sup> of August 2008, and it is admitted that she was 12 years at the relevant time. You are almost 64 years old and “CT” is your wife’s brother’s child. The father of the victim had died sometime before and the mother is said to be at St. Giles Mental Hospital. The victim, her sister and the brother have been in the care and looked after by your step son and his wife Camari for almost 6 years prior to the incident. They have been living in one of the room of the house owned by you.
3. The victim was an orphan and was destitute. You no doubt provided with accommodation and material things to some extent. However you took advantage of CT knowing very well that she will succumb to your sexual advances. You have on one occasion engage in sexual act in inserting your penis into her vagina and also you to suck her breast to satisfy your sexual desires. Then you expose her to movies depicting similar sexual acts which clearly shows your depravity. You then threaten to deny her little benefits, you have been affording to her. You by threats or otherwise and kept the girl silent and ensured that she did not tell anybody immediately. You have clearly taken advantage of a girl of 12 years in this way surreptitiously until Camari was informed by the victim and her sister and this became known.
4. When this abuse was so made known to the victim’s adopted mother Camari the family confronted you and then you tendered an apology and also give an undertaking that you will not repeat such acts. However despite this you continued to engage in your sexual escapade unabated and in total disregard of your undertaking to the family. This clearly shows your depravity and the persistent desire to satisfy your lust in uttered disregard of the child’s wellbeing or the consequences.
5. On one occasion you did penetrate her vagina, and then also suck her breast. Despite your seniority in age it is thus apparent that you have taken advantage of an extremely vulnerable

girl who was young enough to be your granddaughter. These are the sordid acts I am reluctantly compelled to reproduce to lay the bare facts of this offending which is necessary.

### Sentencing regime

6. The maximum penalty prescribed for Rape contrary to Section 207 (1) and (2) (b)/(a) and (3) of the Crimes Act is life imprisonment as this undoubtedly is considered to be a very serious offence. The tariff is between 11 years and 20 years imprisonment. Determining this tariff Gates C.J., in **Aitcheson v. State** ([\[2018\] FJSC 29](#); CAV0012.2018 (2 November 2018) held that,

*“The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20<sup>th</sup> 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.”*

7. As for sexual assault in **State v Laca** - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012), Justice Paul Madigan considering the tariff for the offence of sexual assault stated thus,

*“6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in **Abdul Kaiyum** HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.*

*7. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:*

#### **Category 1** (the most serious)

*Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.*

#### **Category 2**

- (i) *Contact between the naked genitalia of the offender and another part of the victim's body;*
- (ii) *Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
- (iii) *Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*

**Category 3**

*Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)''.*

8. The maximum penalty for the offence of sexual assault under Section 210 (1) (a) is ten years imprisonment. As the law stands now the tariff for sexual assault is between 2 - 8 years' imprisonment. The act of sucking the breasts will come within category 3.

**Objective seriousness, culpability and harm of the offending**

9. 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.”*

10. Rape as well as sexual assault are physical invasions committed on the victim under a coercive circumstance. Therefore, the degree of invasion of the victim's bodily integrity and sexual autonomy is an indispensable factor in determining the gravity and impact of the crime on the victim. The degree of invasion should be ascertained based on the level of harm and culpability.
11. You have been found guilty of sexual crimes of utmost gravity. The offences involve the exploitation and abuse of a vulnerable child on three occasions over a period of time. There

are many features that aggravate the culpability and harm factors. You subjected her to repeated abuse. The victim was threatened, coerced and intimidated to facilitate the commission of the offences and to make the likelihood of her reporting them remote. The complainant felt both fear and misguided loyalty to you. She was reluctant to tell others promptly, as to what you were doing to her. No doubt this encouraged you to carry on your depraved conduct some time taking advantage of the opportunities you had whilst living in the same house.

12. This court did not have the benefit of a victim impact report however it is quite natural that being had a very significant and long-lasting psychological impact on the minor a vulnerable complainant which must be considered in sentencing.

13. The aggravating factors are as follows:

(i) Serious Breach of Trust. You, acknowledged that you were a elder relative old enough to be a grandfather to the child and now it is proved that you raped and sexually abused her. You occupied a position of power and trust in relation the child. Such a position of power over the other who is a minor render such sexual activity morally wrong and punishable within the realms of the criminal law. CT was vulnerable to your seniority in age. You were in a position of trust. The culture and the traditions of your society expects you to protect children in the family and the community and the elders enjoy the respect of the young. You taking advantage of this culture sexually exploited CT a minor child. As echoed in many a judicial pronouncement, sexual exploitation of children within their own home and neighborhood by known elders has become a social menace. Therefore, I find this offending is a serious. The rape of a child is an appalling and perverse use of male power exploiting to the full the position of power which you held over her. She was raped in the safety of her own home so to say, by a person from whom she was entitled to expect protection and care. You have violated the trust which the complainant placed on you and abused that position of trust

- (ii). There was a considerable disparity in age between you and the complainant. The complainant was 12 years old at the time you committed these offences on her and you were 64 years and so you were 52 years her senior in age.
- (iii) You sexually abused her and raped her multiple times which required planning, scheming and there was premeditation.
- (v) You took advantage of the complainant's vulnerability, helplessness and innocence and you have caused untold misery to her adopted family.
- (vi) You have exposed the innocent mind of a child to sexual activity at such a tender age you had no regard to her rights as a child and a human being and her right to have a happy, unmolested and peaceful childhood.

The mitigating factors are as follows:

- (i). You are now 65 years of age retired and unemployed. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.
- (ii). You provided shelter and accommodation to the victim,
- (iii). There is no Antecedent Report filed, however it is submitted that you have no previous convictions which is not denied by the Prosecution. Therefore, this Court considers you as a person of previous good character.

### Sentence

14. Your offences are so serious that only a custodial sentence can be justified. The least possible sentences I can impose, having regard to the aggravating and mitigating factors of the case, will be as follows:
- a. We will start with the count No. 01 the serious offences of rape, the, I pick and start with a sentence of 11 years imprisonment. I add 4 years for the aggravating factors, making a total sentence 15 years imprisonment. As for the mitigating factors I will I

deduct 3 years leaving a balance of 12 years imprisonment. Thus, for the rape count I sentence you to 12 years imprisonment.

- b. As for count No. 3, of Sexual assault of exposing to an indecent movie though it does not come within any of the categories specified in the decision of Luca I will apply the category 3 the lowest range of the tariff. As such I pick a sentence of 2 years imprisonment as there is no physical contact. I add a modest 4 years for the aggravating factors, making a total of 6 years imprisonment for the count of sexual assault. For the mitigating factor as aforesaid will deduct 3 years, leaving a balance of 3 years imprisonment.
  - c. As for count No. 4, of Sexual assault of sucking the breasts which will be category 3 the intermediate range of the tariff. As such I pick a sentence of 4 years imprisonment. I add a modest 4 years for the aggravating factors, making a total of 8 years imprisonment for the count of sexual assault. For the mitigating factor as aforesaid will deduct 3 years, leaving a balance of 5 years imprisonment
15. I am satisfied that you are manipulative; you are somewhat of a sexual predator of a prepubescent child to some extent. On the one hand this is a case which would justify a long 'denunciatory' sentence. I bear in mind that, such a sentence is one of last resort and in the circumstances of this offending in my judgment, justice and protection of the public can and should be achieved by such a long sentence.
  16. However, I also have to bear in mind totality. To that end and arrive at a just compromise between the competing factors and interest of the society and direct and order that, the sentences that of the Rape count and that of the two sexual assault counts to run concurrently. The total sentence then is 12 year's imprisonment.
  17. In view of the reasons discussed above, I sentence you to a total concurrent period of twelve (12) years imprisonment for the count No 1 of Rape and counts No. 3 and No.4 of sexual assault and for which you stand convicted.

### Non-Parole period

18. Having considered the seriousness of this crime, the purpose of this sentence, and opportunities for rehabilitation, I find that an eight (08) year non-parole period would serve the purpose of this sentence. Hence, you are not eligible for parole for eight (08) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.
  
19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim the purpose of this sentence is to punish you in a manner that is just in all the circumstances, protect the community, deter like-minded offenders and to clearly manifest that the court and the community denounce what you did to the complainant and in a manner which is just in all the circumstances of the case.

### Head Sentence

20. Accordingly, I sentence you to a period of twelve (12) years imprisonment for the counts of Sexual assault and Rape as charged and convicted. However, you are not entitled to parole for eight (08) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

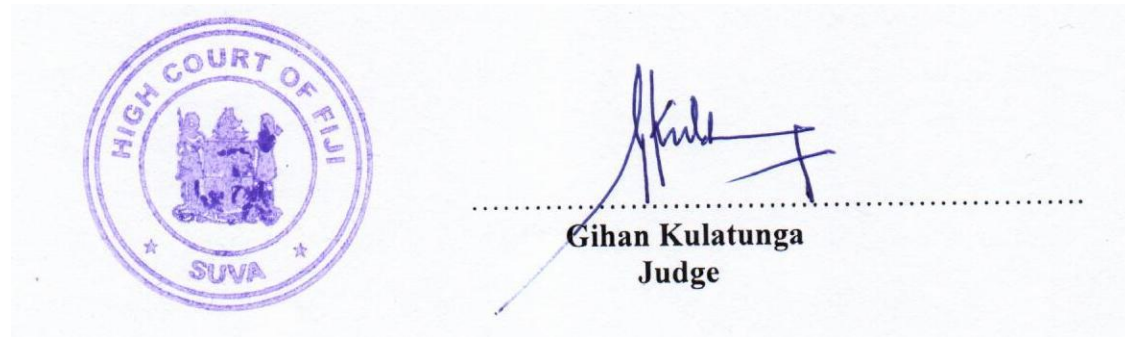
### Actual Period of the Sentence

21. You were in arrested remanded for this case on 29<sup>th</sup> December 2021 and had been in remand up to 23<sup>rd</sup> August 2022. You have been in custody for a period of almost 8 months. In terms of the provisions of Section 24 of the Sentencing and Penalties Act I hold that the said period of 8 months be considered as imprisonment that you have already served.
  
22. Accordingly, the actual sentence is a period of is eleven (11) years, two (02) months and imprisonment with a non-parole period of seven (07) years, two (02) months.
  
23. Since this incident involves domestic violence, I am satisfied that there are sufficient grounds to consider making an order under the Domestic Violence Act. I accordingly make a permanent Domestic Violence Restraining Order against you with standard non-molestation conditions and no contact conditions pursuant to Section 24 and 28 of the Domestic Violence Act. The above Domestic Violence Restraining Order will be in force until this Court or any other competent Court is varied or suspended it. Furthermore, if you



breached this restraining order, you will be charged and prosecuted for an offence pursuant to section 77 of the Domestic Violence Act.

24. The complainant's name is permanently suppressed to protect her privacy.
25. You have thirty (30) days to appeal to the Fiji Court of Appeal if you so desire.



**At Suva**  
26<sup>th</sup> January, 2023.

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