

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 102 of 2020

STATE

V

MARIKA LUTU

Counsel : Ms. Saini Naibe with Ms. Rukalesi Uce for the State
Ms. Alanieta Bilivalu for the Accused

Dates of Trial : 22-25 & 28 November 2022

Judgment : 1 March 2023

Sentence Hearing : 24 March 2023

Sentence : 24 April 2023

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TT" or simply "T".

SENTENCE

[1] Marika Lutu, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offences:

FIRST COUNT

(Representative Count)

Statement of Offence

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

Particulars of Offence

MARIKA LUTU, between the 1st day of January 2020 and the 30th day of April 2020, at Veisaru, Ba, in the Western Division penetrated the vagina of **TT**, a child under the age of 13 years old, with his finger.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MARIKA LUTU, on the 1st day of May 2020, at Veisaru, Ba, in the Western Division, penetrated the vagina of **TT**, a child under the age of 13 years old, with his finger.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 5 days. The complainant (TT), her mother Amelini Saulo, Dr. Bharti Devi and Dr. Emali Druma, testified on behalf of the prosecution. You testified on your own behalf.
- [3] At the conclusion of the evidence and having reviewed the totality of the evidence, this Court found you not guilty of the two counts of Rape. However, this Court found you guilty of the lesser offence of Sexual Assault, by touching the complainant's genitalia with your finger, contrary to Section 210 (1) of the Crimes Act No. 44 of 2009 ("Crimes Act"), in respect of both counts one and two.
- [4] It was proved during the trial that, between the 1 January 2020 and the 30 April 2020, at Veisaru, in Ba, you unlawfully and indecently assaulted the complainant by touching her genitalia with your finger.
- [5] It was further proved during the trial that on the 1 May 2020, at Veisaru, in Ba, you unlawfully and indecently assaulted the complainant by touching her genitalia with your finger.
- [6] The complainant was only 4 years of age at the time you committed the above offences on her, and as such, she was a juvenile. It is an admitted fact that the complainant's date of birth is 30 May 2015. At the time she testified in Court she had turned 7.

[7] You are the the step-grandfather of the complainant. It is admitted that the complainant is the biological daughter of Amelini Saulo and that you were the de-facto partner of Amelini Saulo’s biological mother Taina.

[8] 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.

[9] I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to punish and to deter offenders or other persons from committing such offences and also to signify that the Court and the community denounce the commission of such offences.

[10] Section 4 (3) of the Sentencing and Penalties Act stipulates the factors that a Court must have regard to in sentencing offenders for a domestic violence offence.

(3) In sentencing offenders for an offence involving domestic violence, a court must also have regard to —

(a) any special considerations relating to the physical, psychological or other characteristics of a victim of the offence, including —

(i) the age of the victim;

(ii) whether the victim was pregnant; and

- (iii) whether the victim suffered any disability;*
- (b) whether a child or children were present when the offence was committed, or were otherwise affected by it;*
- (c) the effect of the violence on the emotional, psychological and physical well-being of a victim;*
- (d) the effect of the offence in terms of hardship, dislocation or other difficulties experienced by a victim;*
- (e) the conduct of the offender towards the victim since the offence, and any matter which indicates whether the offender —*
 - (i) accepts responsibility for the offence and its consequences;*
 - (ii) has taken steps to make amends to a victim, including action to minimise or address the negative impacts of the offence on a victim;*
 - (iii) may pose any further threat to a victim;*
- (f) evidence revealing the offender's —*
 - (i) attitude to the offence;*
 - (ii) intention to address the offending behaviour; and*
 - (iii) likelihood of continuing to pose a threat to a victim; and*
- (g) whether the offender has sought and received counselling or other assistance to address the offending behaviour, or is willing to undertake such counselling or seek such assistance.*

[11] The offence of Sexual Assault in terms of Section 210 (1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[12] In the cases of *State v. Abdul Khaiyum* [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012) and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.

[13] It was held in *State v Laca* (supra) “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.”

“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).”

[14] In this case it has been proven that you touched the genitalia of the complainant with your finger. This is contact with the genitalia of the complainant using part of your body other than the genitalia, and would clearly come under category 2 (ii) above.

[15] In the case of *State v. Bulivakarua* [2014] FJHC 928; HAC 54 of 2013 (17 December 2014); His Lordship Justice Rajasinghe held:

“This is a case of sexually abusing of a child under the age of 13 years old by a close family member within the family environment. Sexually assaulting children by close family members in manipulating the family environment and the relationship they have with the victim is a prevalent offence in the society, which needs greater judicial intervention with responsibility in order to

demonstrate that such offences are condemned and denounced by the civilised society without any reservation.”

[16] 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.”

[17] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentences at 2 years for the counts of Sexual Assault.

[18] The aggravating factors are as follows:

- (i) You are the step-grandfather of the complainant. It was revealed in evidence that the complainant had been looked after by you and your de-facto partner (her grandmother), since she was one year old. The complainant refers to you as Tai Marika. Being so, you should have protected and safeguarded the complainant. Instead you have breached the trust expected from you and the breach was gross.
- (ii) There was a large disparity in age between you and the complainant. The complainant was only 4 years of age, at the time you committed these offences on her. At the time of the offending you were 58 years of age. Therefore, you were over 54 years older than the complainant.
- (iii) You took advantage of the complainant’s vulnerability, helplessness and naivety.

- (iv) You have exposed the innocent mind of a child to sexual activity at such a tender age and thereby robbed the complainant of her innocence.
- (v) The frequent prevalence of such sexual offences in our society today.
- (vi) You are now convicted of multiple offending.

[19] Considering the aforementioned aggravating factors, I increase your sentences by a further 6 years. Now your sentence is 8 years for the counts of Sexual Assault.

[20] Marika Lutu, you are now 61 years of age (Your year of birth being 1961). You were in a de-facto relationship with the complainant's grandmother. However, it is stated that since the inception of this case the two of you have separated. You are said to be having 3 children from your previous relationship all who are now adults.

[21] Your residence is said to be at Veisaru, in Ba. However, since your bail conditions required you to reside elsewhere, for the duration of this case, you lived at Drasa, Vitogo, in Lautoka.

[22] You are said to be earning \$70.00 per week from casual employment, such as cutting sugarcane. In addition, you are said to be receiving social welfare assistance in the sum of \$100.00 per month.

[23] Unfortunately, the above are all personal circumstances and cannot be considered as mitigating circumstances.

[24] In terms of the Previous Convictions Report filed in Court, there is one previous conviction recorded against you, for the offence of Arson, which was way back in 1980. Therefore, this Court considers you as a person of recent good character. You have also promised not to re-offend and submitted that you are willing to reform if given the opportunity to do so. Accordingly, considering the aforesaid mitigating factors I reduce 2 years from your sentences. Now your sentences will be 6 years imprisonment for each of the counts of Sexual Assault.

[25] In the circumstances, your sentences are as follows:

Count 1- Sexual Assault contrary to Section 210 (1) of the Crimes Act – 6 years' imprisonment.

Count 2 – Sexual Assault contrary to Section 210 (1) of the Crimes Act – 6 years’ imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 6 years.

[26] Accordingly, I sentence you to a term of 6 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 4 years of that sentence.

[27] Section 24 of the Sentencing and Penalties Act reads thus:

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”

[28] You had been in custody for this case from 1 June 2020 to 21 August 2020, when you were granted bail by the High Court. That is a period of approximately three months. Your bail had been revoked on 19 October 2020 for not complying with the orders imposed by Court. Thereafter, your bail had been re-instated on 17 November 2020. Thus you were in remand for a further period of one month. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 4 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[29] In the result, your final sentence is as follows:

Head Sentence - 6 years’ imprisonment.

Non-parole period - 4 years’ imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 5 years’ and 8 months imprisonment.

Non-parole period - 3 years’ and 8 months imprisonment.

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



AT LAUTOKA
Dated this 24th Day of April 2023


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.**