

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 13 of 2020

STATE

V

LIVAI QORAQORA BUEBOTO

**Counsel** Mr. Taitusi Tuenuku for the State  
Ms. Losana Taukei with Mr. Alifereti Waqavakatoga for the  
Accused

**Dates of Trial** 9-12 May 2023

**Judgment** 1 August 2023

**Sentence Hearing** 16 August 2023

**Sentence** 5 October 2023

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

## SENTENCE

[1] Livai Qoraqora, you were charged with the following offences:

### COUNT 1

#### *Statement of Offence (a)*

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

#### *Particulars of Offence (b)*

**LIVAI QORAQORA BUEBOTO**, on the 4<sup>th</sup> day of January 2020, at Sigatoka, in the Western Division, unlawfully and indecently assaulted **MN** by touching her breast and kissing her on the lips.

## **COUNT 2**

### ***Statement of Offence (a)***

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

### ***Particulars of Offence (b)***

**LIVAI QORAQORA BUEBOTO**, on the 4<sup>th</sup> day of January 2020, at Sigatoka, in the Western Division, penetrated the vagina of **MN** with his fingers, without her consent.

## **COUNT 3**

### ***Statement of Offence (a)***

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

### ***Particulars of Offence (b)***

**LIVAI QORAQORA BUEBOTO**, on the 4<sup>th</sup> day of January 2020, at Sigatoka, in the Western Division, had carnal knowledge of **MN**, without her consent.

- [2] You pleaded not guilty to the charges and the matter proceeded to trial. The ensuing trial was held over 4 days. The complainant (MN), her father Luke Qautoka and Dr. Shymal Nikhil Chand, testified on behalf of the prosecution.
- [3] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that you had committed the offence you are charged with in Count 2. Accordingly, you were found not guilty and acquitted of the said charge.
- [4] However, this Court decided to call for your defence in respect of Counts 1 and 3. You testified on your own behalf.
- [5] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty and convicted you of counts 1 and 3 as charged.
- [6] It was proved during the trial that on 4 January 2020, at Sigatoka, you unlawfully and indecently assaulted MN, by touching her breast with your hands.
- [7] It was also proved during the trial that, on 4 January 2020, at Sigatoka, you penetrated the vagina of the complainant MN, with your penis, without her consent.
- [8] It is an agreed fact that the complainant is your cousin.

[9] As per the complainant's testimony her date of birth is 12 August 2002. Therefore, at the time you committed these offences on her she would have been 17 years old and as such a juvenile. At the time she testified in Court she had turned 20.

[10] In terms of the Victim Impact Statement filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. It is clear that the impact of your actions are continuing, as the complainant remains emotionally and psychologically traumatized by the incident.

[11] 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.*

[12] I have duly considered the above factors in determining the sentence to be imposed on you, which is primarily to punish and 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.

[13] 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."*

[14] Livai Qoraqora, I will first deal with the count of Rape that you have been found guilty and convicted (Count 3). The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 ("Crimes Act") carries a maximum penalty of imprisonment for life.

[15] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of **Mohammed Kasim v. The State** [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

*"...It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage."*

[16] In **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S; Pain J said:

*“The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences.”*

- [17] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16T of 2003S (23 April 2004); His Lordship Justice Anthony Gates stated:

*“Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences”.*

*“A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public’s disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly the sentence is set in order to protect women from such crimes: **Roberts and Roberts** (1982) 4 Cr. App R(S) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S.”*

- [18] His Lordship Justice Daniel Goundar, in the case of **State v. AV** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

*“...Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults on children. Children are our future. The Courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences”.*

- [19] 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.”*

**[20]** In the case of ***Felix Ram v. The State*** [2015] FJSC 26; CAV 12 of 2015 (23 October 2015); His Lordship Chief Justice Anthony Gates laid down the following factors that a Court should take into account when sentencing an offender who has been convicted of Rape:

*“(a) whether the crime had been planned, or whether it was incidental or opportunistic;*

*(b) whether there had been a breach of trust;*

*(c) whether committed alone;*

*(d) whether alcohol or drugs had been used to condition the victim;*

*(e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*

*(f) whether the impact on the victim had been severe, traumatic, or continuing;*

*(g) whether actual violence had been inflicted;*

*(h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*

*(i) whether the method of penetration was dangerous or especially abhorrent;*

*(j) whether there had been a forced entry to a residence where the victim was present;*

*(k) whether the incident was sustained over a long period such as several hours;*

*(l) whether the incident had been especially degrading or humiliating;*

*(m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*

*(n) Time spent in custody on remand;*

*(o) Extent of remorse and an evaluation of its genuineness;*

*(p) If other counts or if serving another sentence, totality of appropriate sentence.”*

**[21]** His Lordship Justice Goundar in ***State v Apisai Takalaibau*** – Sentence [2018] FJHC 505; HAC 154 of 2018 (15 June 2018); making reference to statistics of Aggravated Burglary cases filed in the High Court in 2017 and 2018, stated that “A factor that influences sentencing is the prevalence of the offence in the community.....The more prevalent is an offence, the greater the need is for deterrence and protection of the community.”

[22] This has been affirmed by the Supreme Court in **Alfaaz v. State** [2018] FJSC 17; CAV0009.2018 (30 August 2018); where it was recognized that the prevalence of cases of child rape calls for harsher punishments to be imposed by Courts. Their Lordships held:

*“According to the statistics released by the Director of Public Prosecutions Office it appears that a number of rape victims as well as victims under the age of 18 years and victims in domestic relationships or relatives were also victims of other serious sexual offences. The rape of children is a very serious offence and it is very frequent and prevalent in Fiji. The courts must impose harsh penalties dictated by the legislation. The courts should not leniently look at this kind of serious cases of rape of children of tender years when punishing the offenders.”*

[23] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

[24] However, in the case of **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates stated that the sentencing tariff for the Rape of a juvenile should now be increased to between 11 and 20 years imprisonment. His Lordship held:

*“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.”*

[25] In **Aitcheson v State** (*Supra*), it was said:

*“[72] Undoubtedly it has been accepted by the society that rape is the most serious sexual offence that could be committed on a woman. Further it is said that; “A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female.””*

[26] In determining the starting point within the said tariff, the Court of Appeal, in **Laisasa 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.”*

**[27]** In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 11 years imprisonment for the count of Rape.

**[28]** The aggravating factors are as follows:

- (i) You are an older cousin of the complainant. 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 17 years of age, at the time you committed this offence on her. At the time of the offending you were 42 years of age. Therefore, you were over 25 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) I find that there was some degree of planning and premeditation on your part in committing this offence. You were aware that the complainant was at home with only her younger cousins and that no adults were at home at the time.
- (vi) The complainant has been emotionally and psychologically traumatized by your actions and the harm is said to be continuing.
- (vii) The frequent prevalence of the offence of Rape in our society today.
- (viii) You are now convicted of multiple offending.

**[29]** Considering the aforementioned aggravating factors, I increase your sentence by a further 4 years. Now your sentence is 15 years imprisonment for the count of Rape.

**[30]** Livai Qoraqora, you are now 46 years of age (Your date of birth being 8 August 1977). You are said to be married, with 9 children and 4 grandchildren. The children are biologically said to be your brother’s children, whom you consider as your own, since

you have married your brother's wife after your brother's passing. You are a farmer by occupation earning approximately \$100.00 per week. You reside at Naviyago Village, Nadroga, Sigatoka.

- [31] Unfortunately, the above are all personal circumstances and cannot be considered as mitigating circumstances.
- [32] Character references have been provided on your behalf by the Roko Tui Nadroga/Navosa and Mr Atunaisa Made, Mata-ni-Tikina, Naqalimare (The District Representative of your clan), which this Court has duly considered.
- [33] However, as per the Previous Convictions Report filed, it is noted that there are two previous convictions recorded against you: one on 15 March 1999 and the other on 24 September 2014. The last conviction dates back to 24 September 2014, where you had been sentenced by the Sigatoka Magistrate's Court (Case No. C.F. 188 of 2014), by imposing on you a fine of \$100.00 (in default 10 days imprisonment), for the offence of Indecently Insulting or Annoying any Person.
- [34] In terms of Section 3 of the Rehabilitation of Offenders (Irrelevant Convictions) Act No. 11 of 1997 [Rehabilitation of Offenders (Irrelevant Convictions) Act], the term "irrelevant conviction" has been defined in the following manner:

*3. For the purposes of this Act, a conviction is irrelevant:-*

*(a) where there is no direct relationship between that conviction and the particular matter in respect of which it is sought to take that conviction into account; or*

*(b) if the rehabilitation period has expired.*

- [35] Section 4 of the Act broadly defines what "direct relationship" means; while Section 5 of the Act defines the term "rehabilitation period" as follows:

*5.-(1) Notwithstanding subsection (2), the rehabilitation period applicable to a conviction is:*

*(a) in case of a person who is seventeen years or over, ten years; or*

*(b) in case of a person who is under the age of seventeen years,-*

*(i) seven years, for a term of imprisonment or detention not exceeding two years under section 30 or 31 of the Juveniles Act; or*

*(ii) ten years, for a term of imprisonment or detention exceeding two years under section 31 of the Juveniles Act.*

*(2) Subject to subsection (1), the rehabilitation period applicable to Part III, is five years.*

[Emphasis is my own].

[36] Section 6(1) of the Rehabilitation of Offenders (Irrelevant Convictions) Act provides:

*6.-(1) The rehabilitation period commences:-*

*(a) on the date of conviction; or*

*(b) where a custodial sentence was imposed, on the date: on which the convicted person was unconditionally released from imprisonment; or*

*(c) where the release of a convicted person from detention is subject to a condition or other penalty imposed by the Court, when the condition or that other penalty is fulfilled.*

[37] Therefore, in terms of the Rehabilitation of Offenders (Irrelevant Convictions) Act, your rehabilitation period would have commenced on the date of your conviction and sentence imposed by the Magistrate's Court of Sigatoka, which was on 24 September 2014.

[38] You have committed the offences you have been convicted for in this case on 4 January 2020, which is clearly within the rehabilitation period of 10 years. Therefore, unfortunately, Court cannot consider you as a person of previous good character or grant you any discount in lieu of this fact.

[39] Furthermore, I find no other mitigating circumstances in this case to grant you any discount. As such, your sentence will remain at 15 years imprisonment for the count of Rape.

[40] Livai Qoraqora, you have been found guilty and convicted of one count of Sexual Assault in terms of Section 210 (1) (a) of the Crimes Act (Count 1).

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

[42] 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.

[43] 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)."

[44] In this case, as per Count 1, it has been proved that you unlawfully and indecently assaulted the complainant, by touching her breast with your hands. Therefore, in my opinion, the offence in Count 1 should be categorized under Category 3 above.

[45] As such, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years imprisonment for the first count of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act.

[46] Considering the aggravating factors aforementioned, which are common for all offences, I impose on you a sentence of 5 years' imprisonment for the first count of Sexual Assault.

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

Count 1- Sexual Assault contrary to Section 210 (1) of the Crimes Act – 5 years' imprisonment.

Count 3 – Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years' imprisonment.

I order that both sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 15 years.

