

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 183 of 2020

STATE

V

VONIVATE VITUKUTUKU

Counsel : Mr. Joeli Nasa for the State
Ms. Benazir Muhammed for the Accused

Dates of Trial : 15-17 August 2023

Judgment : 31 October 2023

Sentence Hearing : 22 February 2024

Sentence : 29 February 2024

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

SENTENCE

[1] Vonivate Vitukutuku, you were charged with the following offence:

FIRST COUNT

Statement of Offence (a)

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

Particulars of Offence (b)

VONIVATE VITUKUTUKU, on the 22nd day of October 2020, at Sigatoka, in the Western Division, had carnal knowledge of **LH**, without her consent.

- [2] You pleaded not guilty to the charge and the matter proceeded to trial. The ensuing trial was held over 3 days. The complainant (LH) and witnesses Miliana Natuiyaga, Mereula Batimala and Miriama Livanalagi, testified on behalf of the prosecution. You exercised your right to remain silent.
- [3] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty and convicted you of the count of Rape as charged.
- [4] It was proved during the trial that, on 22 October 2020, at Sigatoka, you penetrated the vagina of the complainant LH, with your penis, without her consent.
- [5] As per the complainant's testimony her date of birth is 23 June 2005. Therefore, at the time you committed this offence on her she would have been 15 years old and as such a juvenile. At the time she testified in Court she had turned 18.
- [6] 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.
- [7] Vonivate Vitukutuku, 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.

- [8] 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.

[9] Furthermore, Section 4(2) of the Sentencing and Penalties Act provides that a Court must also consider the following factors when sentencing an offender:

(2) In sentencing offenders a court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[10] Vonivate Vitukutuku, 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.

[11] 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."

[12] 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.”

- [13] 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.”*

- [14] 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”.

- [15] 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.”

[16] 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.”

[17] 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.”

[18] 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.”

[19] 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.

[20] However, in the case of **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates (with Justice Saleem Marsoof and Madam Justice Chandra Ekanayake agreeing) 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 (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.”*

[21] 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.””

[22] 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.”

[23] Vonivate Vitukutuku, 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.

[24] The aggravating factors are as follows:

- (i) There was a large disparity in age between you and the complainant. The complainant was 15 years of age, at the time you committed this offence on her. At the time of the offending you were 27 years of age. Therefore, you were over 12 years older than the complainant.
- (ii) You took advantage of the complainant’s vulnerability, helplessness and naivety.
- (iii) You have exposed the innocent mind of a child to sexual activity at a tender age, and thereby robbed the complainant of her innocence.
- (iv) The frequent prevalence of the offence of Rape in our society today, especially cases of child Rape.
- (v) Your conduct was intentional and deliberate. You were well aware that the complainant was highly intoxicated at the time. You used this opportunity to sexually exploit the complainant and to satisfy your carnal desires.
- (vi) By your actions you inflicted actual violence on the complainant thereby causing her severe pain and physical injuries. In spite of the complainant trying to resist, you had held on to her and thrown her towards the ground from the taxi. Thereafter, you had dragged her towards the bushes. While you were doing so, the complainant had fallen into a drain. When she was trying to stand up you had struck her with a big stick on the right side of her head. This made the complainant unconscious.
- (vii) The incident had been especially degrading or humiliating to the complainant. You had stripped the complainant naked while she was in a state of unconsciousness. After fulfilling your carnal desires, you had left the complainant naked and fled the scene, while people gathered there.

(viii) The complainant has been emotionally and psychologically traumatized by your actions and the harm is said to be continuing.

[25] Considering the aforementioned aggravating factors, I increase your sentence by a further 8 years. Now your sentence is 19 years imprisonment for the count of Rape.

[26] Vonivate Vitukutuku, you are now 30 years of age (Your date of birth being 9 December 1993). You are said to be married, with 2 children aged 4 years and 1 year respectively. You are a farmer by occupation earning approximately \$50.00 per week. You are said to be the sole breadwinner of your family.

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

[28] You are a first offender and a person of previous good character. The State too confirms this position.

[29] Considering the fact that you are a first offender and a person of previous good character I reduce 2 years from your sentence. As such, your sentence is 17 years imprisonment for the count of Rape.

[30] Accordingly, I sentence you to a term of 17 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 14 years imprisonment.

[31] 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.”

[32] You were arrested for this case and produced in the Magistrate’s Court of Sigatoka on 26 October 2020. You were granted bail by the Magistrate’s Court of Sigatoka on the same day. However, your bail had been revoked by the High Court of Lautoka, on 17 March 2021. You had been enlarged on bail once again by the High Court of Lautoka, on 5 July 2022. Therefore, you had been in remand custody for a period of 16 months. Thereafter, on 31 October 2023, upon your conviction for this case, you were remanded into custody. Accordingly, you have been in custody for a total period of about 20 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 20 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 17 years imprisonment.

Non-parole period - 14 years imprisonment.

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

Head Sentence - 15 years and 4 months imprisonment.

Non-parole period - 12 years and 4 months imprisonment.

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




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 29th Day of February 2024

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