

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 123 of 2021**

**STATE**

**V**

**ASWAK ALI**

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

**Dates of Trial** : 4-5 October 2023

**Judgment** : 7 November 2023

**Sentence Hearing** : 22 February 2024

**Sentence** : 6 March 2024

*The name of the complainants are suppressed. Accordingly, the first complainant will be referred to as "RM" and the second complainant will be referred to as "RAD".*

## **PUNISHMENT/SENTENCE**

[1] Aswak Ali, you were charged with the following offences:

### **COUNT ONE**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**ASWAK ALI**, between the 1<sup>st</sup> day of January 2018 and the 31<sup>st</sup> day of December 2018, at Nadi, in the Western Division, unlawfully and indecently assaulted **RM** by rubbing the anus of **RM** with his penis.

## COUNT TWO

### *Statement of Offence*

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

### *Particulars of Offence*

**ASWAK ALI**, between the 1<sup>st</sup> day of October 2021 and the 28<sup>th</sup> day of October 2021, at Nadi, in the Western Division, unlawfully and indecently assaulted **RM** by rubbing the anus of **RM** with his penis.

## COUNT THREE

### *Statement of Offence*

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

### *Particulars of Offence*

**ASWAK ALI**, between the 1<sup>st</sup> day of April 2020 and the 30<sup>th</sup> day April 2020, at Nadi, in the Western Division, penetrated the mouth of **RAD**, a child under the age of 13 years, with his penis.

## REPRESENTATIVE COUNT

## COUNT FOUR

### *Statement of Offence*

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

### *Particulars of Offence*

**ASWAK ALI**, between the 1<sup>st</sup> day of October 2021 and the 28<sup>th</sup> day October 2021, at Nadi, in the Western Division, penetrated the mouth of **RAD**, with his penis, without his consent.

- [2] At the very outset, it must be stated that your date of birth is 30 April 2002 [This is confirmed by the Admitted Facts filed in this case]. Thus you would have turned 18 only on 30 April 2020. Prior to that date you should be considered as a juvenile. Therefore, at the time of the offending in respect of Counts 1 and 3, Aswak Ali you were a juvenile. At the time of the offending in respect of Counts 2 and 4, Aswak Ali you were an accused.

- [3] You pleaded not guilty to the charges and the matter proceeded to trial. The ensuing trial was held over 2 days. The prosecution, in support of their case, called the first complainant (RM), the second complainant (RAD), and their mother Nazia Begum Moidean. The two complainants are biological brothers. You are a cousin brother of the two complainants.
- [4] At the end of the prosecution case this Court decided that there was no evidence tendered by the prosecution in respect of the second count of Sexual Assault. Accordingly, you were found not guilty and acquitted of the second count of Sexual Assault.
- [5] The matter proceeded to trial in respect of the other counts. You exercised your right to remain silent.
- [6] At the conclusion of the evidence and having reviewed the said evidence, this Court found you guilty of the first count of Sexual Assault and the third and fourth counts of Rape as charged. Accordingly, you were convicted of the fourth count of Rape with which you were charged.
- [7] It was proved during the trial that, between 1 January 2018 and the 31 December 2018, at Nadi, you unlawfully and indecently assaulted the first complainant RM, by rubbing the anus of RM with your penis.
- [8] It was also proved during the trial that, between 1 April 2020 and the 30 April 2020, at Nadi, you penetrated the mouth of the second complainant RAD, with your penis, and at the time RAD was a child under the age of 13 years.
- [9] It was further proved during the trial that, between 1 October 2021 and the 28 October 2021, at Nadi, you penetrated the mouth of the second complainant RAD, with your penis, without his consent.
- [10] The first complainant's date of birth is 16 September 2006. Thus, at the time of the offending he was between 11-12 years of age (in respect of Count 1). At the time he testified in Court he had turned 17.
- [11] The second complainant's date of birth is 17 July 2008. Thus, at the time of the offending he was 11 years of age (in respect of Count 3) and 13 years of age (in respect of Count 4). At the time he testified in Court he had turned 15.
- [12] In terms of the Victim Impact Statement filed in Court, it is recorded that both the complainants have been emotionally and psychologically traumatized by your actions.
- [13] Aswak Ali, 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.*

**[14]** 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.

**[15]** 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.*

**[16]** Furthermore, 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.”*

[17] Aswak Ali, 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.

[18] 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.”*

[19] 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.”*

[20] 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.”*

[21] 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”.*

[22] 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.”*

[23] 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.”*

[24] 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.”

[25] 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.”*

[26] 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.

[27] 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 (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.”*

[28] 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.”*

[29] In terms of the Juveniles Act (as amended) a "juvenile" has been defined to mean a person who has not attained the age of eighteen years, and includes a child and a young person. A "child" means a person who has not attained the age of fourteen years; while a "young person" means a person who has attained the age of fourteen years, but who has not attained the age of eighteen years.

[30] Aswak Ali, as stated before, your date of birth is 30 April 2002. Therefore, at the time of the offending in respect of Counts 1 and 3, Aswak Ali you were a juvenile (a "young person"). At the time of the offending in respect of Count 4, Aswak Ali you were an accused.

[31] Section 30 of the Juveniles Act imposes certain restrictions on the punishments which Courts could order against juvenile offenders. The Section provides that:

*“(1) No child shall be ordered to be imprisoned for any offence.*

*(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.*

***(3) A young person shall not be ordered to be imprisoned for more than two years for any offence."***

*Emphasis is mine.*

**[32]** Aswak Ali, I will first deal with the charges of Rape in Counts 3 and 4, which was in respect of the second complainant. 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 fourth count of Rape.

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

- (i) Breach of trust. You are an older cousin brother of the second complainant. You were also his neighbour at Mulomulo in Nadi. Being so, you should have protected and safeguarded the second complainant. Instead you have breached the trust expected from you and the breach was gross.
- (ii) There was a disparity in age between you and the second complainant. The second complainant was 11 years of age (in respect of Count 3) and 13 years of age (in respect of Count 4). At the time of the offending, you were 18 years of age (in respect of Count 3) and 19 years of age (in respect of Count 4). Therefore, you were over 6 years older than the second complainant.
- (iii) You took advantage of the second complainant's vulnerability, helplessness and naivety.
- (iv) You have exposed the innocent mind of a child to sexual activity at a tender age, and thereby robbed the complainant of his innocence.
- (v) The frequent prevalence of the offence of Rape in our society today, especially cases of child Rape.
- (vi) This Court finds that your actions were pre-planned.
- (vii) The second complainant has been emotionally and psychologically traumatized by your actions.
- (viii) You are now convicted of multiple offending.

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

**[35]** Aswak Ali, you are said to be in a de-facto relationship and your partner is said to be 5 months pregnant. Prior to being remanded after your conviction, you were said to be employed as an IT Technician Manager, earning approximately \$200.00 per week. You are said to be the sole breadwinner of your family.

- [36] However, the above are all personal circumstances and cannot be considered as mitigating circumstances.
- [37] You have submitted to Court a letter from your employer, Abdul Jameel, Director, All Time Solutions. He confirms that you had been employed for 2 years at the company and have been a valuable member of the team. It is stated that your role in the company was as the head technician of CCTV. In that role you had consistently demonstrated exceptional skills and dedication in carrying out your duties. Your work ethic, professionalism and inter-personal skills have been commendable, making you an integral part of the organization.
- [38] Aswak Ali, you are now 21 years of age (Your date of birth being 30 April 2002). You are a first offender and a person of previous good character. The State too confirms this position. At the time you committed the offending in Count 3, you were just below the age of 18 years. At the time you committed the offending in Count 4, you were 19 years of age. Therefore, you are a very young offender.
- [39] Considering the fact that you are a first offender and a person of previous good character and also a very young offender, I reduce 4 years from your sentence. As such, your sentence is 11 years imprisonment for the fourth count of Rape.
- [40] Considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, and also taking into consideration the aggravating factors and mitigating factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, Aswak Ali, I impose on you a punishment of 2 years imprisonment for the third count of Rape.
- [41] I will now deal with the offence of Sexual Assault (Count 1). 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 first complainant RM, by rubbing the anus of RM with your penis. Therefore, in my opinion, the offence in Count 1 should be categorized under Category 1 above.

[45] Accordingly, considering the objective seriousness of the offence and taking into consideration the nature and the gravity of the offence and your culpability and degree of responsibility for the offence, and also taking into consideration the aggravating factors [As set out in paragraph 33, which mutatis mutandis would be applicable in relation to the first complainant] and mitigating factors, and the restrictions placed on this Court in terms of the provisions of Section 30(3) of the Juveniles Act, Aswak Ali, I impose on you a punishment of 2 years imprisonment for the first count of Sexual Assault.

[46] In the circumstances, your punishment/sentences are as follows:

Count 1- Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act - 2 years imprisonment.

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

Count 4- Rape contrary to Section 207 (1) and (2) (c) of the Crimes Act – 11 years imprisonment.

I order that all sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 11 years.

[47] Accordingly, I sentence you to a term of 11 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 8 years imprisonment.

[48] 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.”*

[49] You were arrested for this case and produced in the Magistrate’s Court of Nadi on 1 November 2021 and remanded into custody. You were granted bail by the High Court of Lautoka on 30 November 2021. Therefore, you had been in remand custody for a period of one month. Thereafter, on 7 November 2023, upon your conviction for this case, you were remanded into custody. Accordingly, you have been in custody for a total period of 5 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 5 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

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

Head Sentence - 11 years imprisonment.

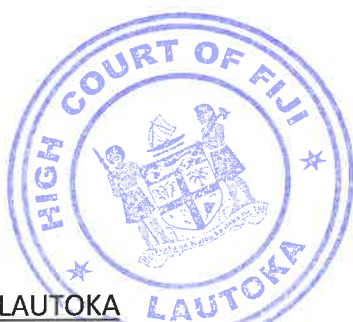
Non-parole period - 8 years imprisonment.

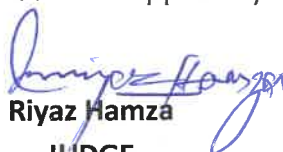
Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 10 years and 7 months imprisonment.

Non-parole period - 7 years and 7 months imprisonment.

[51] 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 6<sup>th</sup> Day of March 2024

**Solicitors for the State:**

**Office of the Director of Public Prosecutions, Lautoka.**

**Solicitors for the Accused/Juvenile: Office of the Legal Aid Commission, Lautoka.**