

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 135 of 2021

STATE

V

SAILOSI KADANAVATU

Counsel : Mr. Simione Seruvatu for the State
Ms. Nimita Sharma with Mr. Raymond Filipe for the Accused

Sentence Hearing : 24 April 2024

Sentence : 22 May 2024

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

SENTENCE

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

SAILOSI KADANAVATU, on the 18th day of June 2021, at Nadi, in the Western Division, had carnal knowledge of **AVA**, a child under the age of 13 years.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SAILOSI KADANAVATU, on the 18th day of June 2021, at Nadi, in the Western Division, penetrated the mouth of **AVA**, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SAILOSI KADANAVATU, on the 20th day of June 2021, at Nadi, in the Western Division, had carnal knowledge of **AVA**, a child under the age of 13 years.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

SAILOSI KADANAVATU, on the 21st day of June 2021, at Nadi, in the Western Division, penetrated the vagina of **AVA**, a child under the age of 13 years, with his tongue.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

SAILOSI KADANAVATU, on the 24th day of June 2021, at Nadi, in the Western Division, had carnal knowledge of **AVA**, a child under the age of 13 years.

- [2] This matter was first called before the High Court on 8 December 2021. The Information was filed in Court on 2 February 2022, and served on you on 16 February 2022. The matter was then adjourned for plea. When the plea was first taken, on 5 April 2022, you pleaded not guilty to all the charges. [As per the original Information filed Count 4 was a charge of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act)].
- [3] On 20 September 2022, the State filed the Amended Information.
- [4] After the conclusion of all pre-trial issues this matter was fixed for trial from 4-8 March 2024.
- [5] Accordingly, the trial in the matter was scheduled to commence on 4 March 2024. On the said day, your Learned Counsel submitted to Court that you are willing to take a progressive approach in this matter, only in relation to Count 5. The Learned State Counsel moved for time to consider and the matter was adjourned to the 5 March 2024.
- [6] On 5 March 2024, the Learned State Counsel made an oral application to enter a Nolle Prosequi in terms of Section 49 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), in respect of Counts 1, 2, 3 and 4. Accordingly, you were discharged in respect of the charges for which the Nolle Prosequi was entered (Counts 1, 2, 3 and 4).
- [7] On the same day, you pleaded guilty to Count 5 in the Amended Information. This Court was satisfied that you pleaded guilty to Count 5 on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your guilty plea.
- [8] On the same day, the Summary of Facts were filed in Court and were read out and explained to you. You said you understood and agreed to the same. Accordingly, Court found your guilty plea in respect of Count 5 to be unequivocal. I found that the facts support all elements of the count of Rape in the Amended Information, and found the said count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the fifth count of Rape as charged.
- [9] Sailosi Kadanavatu, I now proceed to pass sentence on you in respect of the said Count 5.
- [10] The Summary of Facts filed by the State was as follows:
1. *The accused in this matter is Sailosi Kadanavatu, 33 years old, farmer of Buduka Settlement, Nadi at the time of the alleged offence.*
 2. *The complainant in this matter is AVA, 11 years old, student of Buduka Settlement, Nadi at the time of the alleged offence and was born on the 14th of February 2010.*
 3. *The accused is the step-father of the complainant.*
 4. *On the 24th of June 2021, at about 9.00 p.m. the complainant was at home with her mother, Sera Tuinavatu Tuinai (hereinafter referred to as PW1) when they had an*

argument because she was suspicious about the accused relationship with the complainant. As a result of the argument, the complainant ran away from home towards where the cattle were grazing.

5. *After the complainant ran away, PW1 and the accused had run out to look for her.*
6. *The accused then managed to locate the complainant who was hiding behind a rain tree. He then took her to the farm shed, told her to take off her pants and panty, took off his pants and inserted his penis into her vagina.*
7. *After having sexual intercourse with her, the accused and the complainant returned back to the house. Upon reaching the house, the complainant admitted to her aunt, Vikaili Qili that the accused had sexual intercourse with her.*
8. *The matter was then reported to Nadi Police Station and the accused was arrested. When the accused was caution interviewed, the accused admitted the following:*

*No. 114 Question: After you reach the shed, then what did you do?
Answer: We reached the shed, we started hugging each other and after we started kissing each other whereby we ended up having sex.*

No. 115 Question: It is alleged on Thursday the 24th of June 2021, at an abandoned shed in Buduka you had sexual intercourse with Asenaca even though you knew she was a minor, what can you say about this?

Answer: Yes I admit that we had sex on this date even though I knew she was a minor but this was the first time.

9. *The accused was initially charged with five (5) counts of Rape; three counts pursuant to Section 207 (1), (2) (a) and (3), one count pursuant to Section 207 (1), (2) (b) and (3) and one count pursuant to Section 207 (1), (2) (c) and (3).*
10. *On the 5th of March 2024, we made an oral application pursuant to Section 49 (1) of the Criminal Procedure Act 2009 to file a Nolle Prosequi in respect of counts 1, 2, 3 and 4. Attached is a copy of the Amended Information filed on 20th September 2022.*
11. *The accused now stands charged for only one count (count 5 in the Amended Information) of Rape: contrary to Section 207 (1), (2) (a) and (3) of the Crimes Act 2009.*

[11] Sailosi Kadanavatu, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[12] The complainant's date of birth is 14 February 2010. Therefore, at the time you committed this offence on her, the complainant was just 11 years of age and, as such, a juvenile. You are the step-father of the complainant.

[13] 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] Sailosi Kadanavatu, I have duly considered the above factors as well in determining the sentence to be imposed on you.

[18] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.

[19] 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.”

[20] In the case of **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.”

[21] In **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.”

[22] 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”.

[23] 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.”

[24] 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."

[25] 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."

[26] This has also 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."

[27] In the case of ***Anand Abhay Raj v. The State*** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014); Chief Justice 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.

[28] 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."*

[29] 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."

[30] 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."

[31] Sailosi Kadanavatu, 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.

[32] The aggravating factors are as follows:

- (i) Breach of trust. You are related to the complainant. You are her step-father. Being so, you should have protected 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. At the time of the incident the complainant was only 11 years of age. At the time you were 35 years of age. Therefore, you were 24 years older than the complainant at the time of the offending or more than three times older than her.
- (iii) You took advantage of the complainant's vulnerability, helplessness and naivety and thereby paid no regard to her personal security or privacy.
- (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 the offence of Rape in our society today, especially cases of child Rape.

[33] In mitigation you have submitted as follows:

- (i) You have submitted that you are truly remorseful of your actions.

(ii) You have fully co-operated with the Police when you were taken in for questioning and subsequently charged for this matter instead of trying to circumvent the course of justice.

(iii) That you entered a guilty plea during the course of these proceedings.

[34] Sailosi Kadanavatu, you are now 38 years of age (Your date of birth being 23 October 1985). You are said to have studied up to Secondary School only. You have three children of your own- a 10 year old daughter and an 8 year old son from your previous marriage and a 1 year 4 months old daughter from your de-facto relationship with the complainant's biological mother. Prior to being remanded for this case, you were said to be residing at Buduka Settlement in Nadi. You were said to be the sole breadwinner of the family during the four years you were living together in a de-facto relationship with the complainant's biological mother. However, the above are all personal circumstances and cannot be considered as mitigating circumstances.

[35] Sailosi Kadanavatu, considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence for the count of Rape would be 16 years imprisonment.

[36] Sailosi Kadanavatu, you cannot be considered as a first offender and as such a person of previous good character. As per the previous convictions report filed in Court, you had been convicted by the High Court of Suva of two counts of Sexual Assault and on 23 May 2016, imposed a sentence of 4 years 4 months and 25 days imprisonment with a non-parole period of 3 years 4 months and 25 days imprisonment.

[37] However, I accept your remorse as genuine and also the fact that you fully co-operated with the Police in this matter. Accordingly, considering the above mitigating factors, I deduct one year from your sentence. Now your sentence for the count of Rape would be 15 years imprisonment.

[38] You entered a guilty plea only when the trial in the matter was about to commence. Therefore, your guilty plea must be considered as a belated one. Nevertheless, in doing so you saved some of the resources of this Court, instead of proceeding with the matter for trial. More importantly, you saved the complainant from having to give evidence and thereby re-live the incident all over again. For your guilty plea I grant you a further discount of 3 years. Now your sentence for the count of Rape would be 12 years imprisonment.

[39] Accordingly, I sentence you to a term of 12 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 10 years imprisonment.

[40] 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.”

[41] You were arrested for this case and produced in the Nadi Magistrate’s Court on 28 June 2021 and remanded into custody. On 23 August 2021, you were granted bail. Thereafter, upon your conviction for this charge, you were remanded into custody once again by this Court on 5 March 2024. You have remained in custody since that day. Accordingly, you have been in custody for a total period of about 4 ½ months. The period you have been 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.

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

Head Sentence - 12 years imprisonment.

Non-parole period - 10 years imprisonment.

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

Head Sentence - 11 years and 7 months imprisonment.

Non-parole period - 9 years and 7 months imprisonment.

[43] 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 22nd Day of May 2024

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