

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No HAC 89 of 2011

BETWEEN:

STATE

Prosecution

- v -

DAVID SPOWART

Accused

Date of Hearing: 16, 19, 22 July 2013

Date of Sentence: 24 July 2013.

Counsel: Mr T. Qalinauci for the State.
Ms M. Tarai (L.A. C) for the accused.

SENTENCE

[1] On the 19th July in this Court the accused having been advised by the Legal Aid Commission, entered a plea of guilty to one count of rape. On the 22nd July 2013 he agreed the relevant facts and he was therefore found guilty and convicted.

- [2] The charge was contrary to S.207 (1), 2(a) and (3) of the Crimes Decree 2009 and alleges that on a day in April 2011 in Lautoka, the accused had carnal knowledge of (name suppressed) without her consent.
- [3] The facts of the case are that the accused aged 71 at the time was staying at the home of the victim aged 5, he being the stepfather of the victim's mother.
- [4] On a day in April 2011 the accused and the young victim were in the victim's father's bedroom. The accused was kissing her and touching her vagina. This was witnessed by the victim's elder brother sitting on the stairs with a view into the room. A few days later this brother told their mother what he had seen. The mother questioned the girl who told her mother that the accused had touched her, kissed her and had put his "moli"(penis) into her "moli" (vagina). It was very painful.
- [5] The Police were informed and the child examined at Lautoka Hospital. The medical report noted that the hymen was torn with other signs of injury and the doctor concluded that the injury was consistent with blunt force such as a finger or penis.
- [6] In an interview under caution the accused admitted that he had penetrated the victim with his fingers and had tried to insert his penis into her vagina.
- [7] Rape of children are becoming much more common before the Court but that doesn't make it any less serious a crime. The tariff for rape of a child has been set by recent cases such as **State v NK** HAC 155 of 2010 and **State v Simione Talenasila** HAC 11 of 2010 to be 10 to 15 years imprisonment.

[8] In extensive written mitigation, Counsel for the accused tells me that he is now 74 years old and is very deaf. He is a widower with one daughter who is married with her own family. He explains that the offence came about when the victim climbed on to his shoulder to reach a bookshelf and he was overcome by lust.

[9] The aggravating features of this offending are the breach of trust in a domestic context and the enormous age difference (67 years). The Court must also take into account the psychological harm that has almost certainly been occasioned to the young victim.

[10] The mitigating features of this case are that:

- He is a first offender (which at 74 years of age is quite an achievement);
- He has entered a plea of guilty as soon as he was given legal advice;
- He is very remorseful;
- He co-operated with the authorities at the outset;
- His deafness will add to his hardship in prison;
- He has served 2 years and 2 months in remand;
- He is aged 74.

[11] In recognition of the sentencing authorities I take a starting point of 12 years imprisonment. For the aggravating features referred to in paragraph 9 above I add a further 6 years bringing the sentence up to 18 years. For his remorse, co-operation and deafness I deduct 6 years bringing the sentence back to 12 years.

- [12] From that 12 years I deduct a full third to acknowledge his plea of guilty at first opportunity after receiving legal advice bringing his sentence down to 8 years.
- [13] Whereas for a very young offender the Court would make allowances in reduction of sentence, this Court believes that an additional allowance should be made for a very elderly offender. While not detracting from the seriousness of this crime, a normal sentence for this crime could see the accused end his days in prison. Despite his utterly shameful behaviour he should still have the prospect of release from prison before his death, given that he has lived 74 years without a previous conviction. For the two years spent already in remand and as an act of mercy given his advanced age I further reduce the 8 year sentence to 5 years and that is the sentence that the accused will serve. He is to serve 4 years of that term before he is eligible for parole.
- [14] While the sentence is well outside the accepted range, or “tariff” for rapes of children it is not to be taken as authority to pull the tariff down. It is a truly exceptional sentence in the circumstances and is passed as an act of mercy on a 74 year old who has pleaded guilty, has already served two years and is very remorseful.
- [15] I make a Domestic Violence Restraining Order in favour of the victim against the accused as perpetrator.

P. Madigan

Judge

At Lautoka

24 July 2013