

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 207 OF 2011

STATE

-v-

OTETI SIVONATOTO

Counsels : **Mr. J. Niudamu for the State**

: **Ms. J Nair for the accused**

Date of Sentence : **27 March 2014**

(Name of the victim is suppressed she is referred to as MN)

SENTENCE

1. You are charged as follows:

First Count
Statement of Offence

RAPE: Contrary to Section 207 (1) and 2 (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

OTETI SIVOINATOTO between September 2010 and May 2011 at Lautoka in the Western Division had carnal knowledge of **MN** without her consent.

Second Count
Statement of Offence

ABORTION: Contrary to Section 234 (1) and 4 (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

OTETI SIVOINATOTO between April 2011 and August 2011 at Lautoka in the Western Division did an act on **MN**, with intent to procure abortion.

2. When the case was taken up for trial on 24.3 2014 accused pleaded guilty to the 2nd count of abortion and admitted the summary of facts on 25.3.2014.

3. Summary of facts for the second count are as follows:

Sometimes in March 2011, the complainant (MN) was not having her menses. At the time, she was staying with the accused (Mr Oteti Sivoinatoto) at Bandila Crescent, Rifle Range in Lautoka. The complainant then told the accused (Mr Oteti Sivoinatoto) sometimes in April 2011 and August 2011 that her menses were not coming and she thought that she was pregnant. The accused then gave the complainant rum which was mixed with milk for the complainant to drink to abort the baby. The complainant drank and nothing happened.

On the following day, the complainant after returning from school, the accused mixed her a strong tea to drink to abort the baby but it was again unsuccessful. On another occasion sometimes in April 2011 and August 2011, the accused gave the complainant two (2) raw eggs to drink to abort the baby.

The matter was reported to the Police and he was charged for Abortion contrary to Section 234 (1) (4) (b) of the Crimes Decree 2009. The accused was then cautioned interviewed by the Police and he admits to giving various things to the Complainant to drink in order to abort the baby, but those attempts failed.

4. After carefully considering your Plea for the 2nd count to be unequivocal, this Court found you guilty for Abortion contrary to Section 234 (1) and 4 (b) of the Crimes Decree No. 44 of 2009.

5. After trial, the majority of the assessors found you Guilty for the Rape count. One assessor found you Guilty for Defilement.

6. I concurred with the majority verdict and found you guilty for the 1st count of Rape.

7. Following facts were revealed in the evidence. That in 2010 in one night accused had come to complainant's room wearing a towel. Accused had undressed her and inserted his penis into her vagina. It was painful and she had started crying. She had tried to move but accused was holding her. She did not consent to sexual

intercourse at anytime. She had not reported the matter to Police as the accused used to threaten her with a knife and slap her.

8. Accused **Oteti Sivoinatoto** you stand convicted for one count of Rape and one count of abortion.
9. The tariff for rape is well settled since the Judgment of Hon. Mr. Justice A.H.C.T. Gates (as then he was) in **State v Marawa**[2004] FJHC 338; HAC 0016T.2003S (23 April 2004). The starting point of a rape of an adult is 7 years. The tariff is 7 years to 15 years.
10. In **Mohamed Kasim v The State** (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993; 27 May 1994, The Court of Appeal observed:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. 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. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

11. The tariff for the rape of children differs from that of adults and takes the tariff of 10 to 15 years.
12. In **State v Mario Tauvoli** [2011] FJHC 216, HAC 027.2011 Hon. Mr. Justice Paul Madigan held that:

“Rape of children is a very serious offence in deed and it seems to be very prevalent in Fiji at the time. The legislation had 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.”

In this case 42 year step father was sentenced for 13 years with non parole period of 10 years for digital rape of 14 year old step daughter.

13. In **State v Anthony** [2012] FJHC 1013; HAC 151.2010 Hon. Mr. Justice Priynatha Nawana held that:

“The accused’s engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl of MB’s standing is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and asses even by psychologists and sociologists. The depravity of the accused in committing the offence should be denounced to save little children for their own future; and, the men of the accused’s caliber should not be allowed to deny the children of their legitimate place in the community. In passing down the sentence in case of this nature, deterrence is therefore, of paramount importance.”

14. It was held further by Hon. Mr. Justice Priynatha Nawana that:

“The accused had not shown any remorse or repentance. On the contrary, he relentlessly castigated the witnesses saying that they were making up a false allegation at the expense of the little girl to avenge an unsubstantiated previous incident of refusing a loan to MB’s mother. This added, in my view, insult to the injury. While court recognizes that the accused was entitled to advance any proposition in support of his case, court equally recognizes that it should show its displeasure by showing no mercy in the matter of sentence when such allegations are found to be totally ill-founded as in this case.”

15. Considering the above, I commence your sentence at 11 years imprisonment for the charge of Rape.

16. Aggravating factors;

- (a) The victim was of a younger and tender age,
- (b) You completely breached the trust shared between you and the victim,
- (c) Victim was subjected to more than one sexual act,
- (d) You had made the victim sexually active at a young age,
- (e) You had traumatized the life of the victim.

Considering all, I increase your sentence by 3 years now the sentence is 14 years imprisonment.

17. Mitigating circumstances:

- (a) You are first offender at the age of 64 years,
- (b) You seek forgiveness from this court.

Considering above, I reduce 1 year from your sentence now your sentence is 13 years imprisonment.

18. Considering section 18 (1) of the Sentencing and Penalties Decree, I impose 10 years as non parole period.

19. The maximum sentence for the second charge is 25 years.

20. There is no set tariff for the offence.

21. In **State v Mudaliar** [2006] FJHC 47; HAC 015.2005S (17 May 2006) Hon. Mr. Justice A.H.C.T. Gates (as he then was) ordered a sentence of 3 years imprisonment for a specialist obstetrician who carried out an abortion. However, this conviction and sentence was later set aside by the Supreme Court and a re-trial was ordered.

22. In **Devi v State** [1992] FJHC 30; [1992] 38 FLR 94 (3 June 1992) a sentence of 2 years imprisonment for manslaughter for death following illegal abortion was suspended for 2 years by the Court of Appeal after serving 5 months.

23. I take a starting point of 2 years and add 2 years for the aggravating factors including the age of the victim, nature of relationship between you and victim and the repeated attempts of abortion. I deduct 1 year for the mitigation mentioned above. Another 1 year to be deducted for the Guilty plea and the final sentence is 2 years for the 2nd count.

24. Your sentences are as follows:

- (i) 1st count of Rape - 13 years
- (ii) 2nd count of Abortion - 2 years

25. The Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013) cited with approval the following citation of D.A. Thomas, Principles of Sentencing (2nd edition, 1979) p. 56-57 which was cited in High Court of Australia judgment **Mill v The Queen** [1988] HCA 70:

“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; “when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences.”

26. Considering the totality principle, I order the sentences for both charges to run concurrently.

Summary

27. You are sentenced to 13 years imprisonment for the 1st count of Rape and 2 years imprisonment for the 2nd count of abortion. Both sentences to run concurrently. You will not be eligible for parole until you complete serving 10 years of imprisonment.
28. Having considered the nature of the relationship you had with the victim, I order a permanent **Domestic Violence Restraining Order (DVRO)** in place, identifying victim MN as the protected person. You are hereby ordered not to have any contact with the victim directly or by any other means, unless otherwise directed by this Court.
29. 30 days to appeal to Court of Appeal.

Sudharshana De Silva
JUDGE

At Lautoka
27th March 2014

**Solicitors: Office of the Director of Public Prosecution for State
P & Nair Lawyers for Accused**