

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 207 OF 2013

STATE

-v-

NAVITALAI NAIVALULEVU

Counsels : Ms. L. Latu for the State
Ms. L. Raisua for the accused

Date of Trial : 7 August 2014 - 12 August 2014

Date of Summing Up : 13 August 2014

Date of Judgment : 13 August 2014

Date of Sentence : 20 August 2014

(Name of the victim is suppressed. She is referred to as AN)

SENTENCE

1. The accused is before the Court for sentence, after being convicted to the following charges.

FIRST COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 18th of August 2012 and 2nd day of September 2012 at Vatukoula in the Western Division, inserted his finger into the vagina of **AN**, a 10 year old girl.

SECOND COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 18th of August 2012 and 2nd day of September 2012 at Vatukoula in the Western Division, inserted his finger into the vagina of **AN**, a 10 year old girl.

THIRD COUNT
Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) and (2) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 03rd of September 2012 and 30th day of September 2012 at Vatukoula in the Western Division, indecently assaulted **AN** by licking and sucking the vagina of the said **AN**.

FOURTH COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAVITALAI NAIVALULEVU between the 03rd of September 2012 and 30th day of September 2012 at Vatukoula in the Western Division, inserted his penis into the vagina of **AN**, a 10 year old girl.

2. You pleaded not guilty to above charges. Following trial lasting four days in this Court you were found guilty on above counts against you.
3. After considering the unanimous verdict of Guilty of the assessors and having reviewed the evidence and summing up in this trial, the Court decided to concur with the verdict of the assessors and found you guilty of the above charges.
4. The following facts were proven in evidence during the trial. The victim in this matter is your grandniece. You have raped her thrice and sexually abused her once when she was 8 years old. These incidents have happened at your home, where the victim was living with her mother.

5. You had no remorse for your above conduct.
6. According to the Victim Impact Statement filed, there is change in the behavior of the victim after this incident.
7. According to the Crimes Decree the maximum punishment for rape is imprisonment for life. It is a serious offence.
8. The tariff for rape is well settled since the Judgment of then A.H.C.T. Gates J 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.
9. 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."

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

12. In **State v Anthony** [2012] FJHC 1013; HAC 151.2010 Nawana J 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."

13. It was held further by Nawana J 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."

14. Considering the above, I commence your sentence at 12 years imprisonment for each charge of Rape.

15. Aggravating factors;

- (a) The victim is of a younger and tender age,
- (b) Victim was subjected to more than one sexual act,
- (c) The accused had made the victim sexually active at a young age,
- (d) The accused had traumatized the life of the victim,
- (e) The accused showed no remorse for his actions and no repentance,
- (f) The accused breached the trust bestowed on him by the victim.

Considering all, I increase your sentence by 4 years now the sentence is 16 years imprisonment.

16. Mitigating circumstances:

- (a) You are first offender at the age of 63 years.

Considering all, I reduce 1 year from your sentence now your sentence is 15 years imprisonment.

17. You were in remand from 30.10.2013 for a period of 9 months and 20 days. I deduct that period from above sentence. Now your sentence is 14 years 2 months and 10 days.

18. Considering Section 18 (1) of the Sentencing and Penalties Decree, I impose 12 years as non- parole period.

19. The maximum penalty for the offence of Sexual Assault is 14 years imprisonment.

20. Hon. Mr. Justice Paul Madigan in State v Laca [2012] FJHC 1414; HAC 252.2011 (14 November 2012) followed the United Kingdom's Legal Guidelines for sentencing which 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

- (a) Contact between the naked genitalia of the offender and another part of the victim's body;
- (b) Contact with the genitalia of the victim by the offender using part of his or her body other than genitalia, or an object;
- (c) Contact between either the clothed genitalia of the offender and naked genitalia of the victim; or the naked genitalia of the offender with 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 genitalia).

21. The tariff for the offence of Sexual assault is between 2 to 8 years imprisonment as decided in Abdul Khaiyum HAC 160/2010 by Hon. Mr. Justice Paul Madigan.

22. Considering all above, I order a sentence of 6 years for the count of sexual assault.

23. Your sentences are as follows:

- | | | | |
|-------|---|---|--------------------------------|
| (i) | 1 st count of Rape | - | 14 years 2 months and 10 days |
| (ii) | 2 nd count of Rape | - | 14 years 2 months and 10 days. |
| (iii) | 3 rd count of Sexual Assault | - | 6 years |
| (iv) | 4 th count of Rape | - | 14 years 2 months and 10 days. |

24. 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:

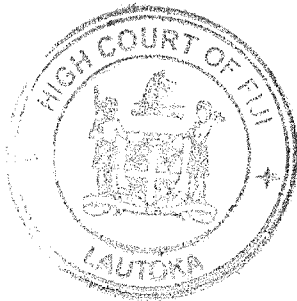
"The effect of the totality principle is to require a sentence who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate 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."

25. Considering the totality principle and your age, I order all the sentences to run concurrently.
26. Having considered the Domestic nature of the relationship you had with the victim, I order a permanent **Domestic Violence Restraining Order (DVRO)** in place, identifying victim AN 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.

Summary

27. You are sentenced to 14 years and 2 months and 10 days imprisonment. You will not be eligible for parole until you complete serving 12 years of imprisonment.
28. 30 days to appeal to Court of Appeal.




Sudharshana De Silva
JUDGE

At Lautoka
20th August 2014

Solicitors: Office of the Director of Public Prosecution for the State
Office of the Legal Aid commission for the Accused