

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. 14 of 2016

STATE

v

TAUSIA FUATA FABIANO

Counselors: Ms A. Vavadakua for the State
Mr. I. Rakaria with Miss M. Kumar
(L.A.C.) for the accused

Date of Conviction : 20 April 2017

Date of Sentence : 21 April 2017

SENTENCE

1. The accused has been convicted in this Court after trial on one count of rape.
2. He has been found to have raped his 27 year old first cousin who for the purposes of this sentence we shall refer to as Donna (not her real name).

3. Although 27 years, Donna has the mental age of a subteen and has great difficulty in coping with day to day life. She has relied on her mother since birth to guide and protect her.
4. On the 12 March 2016, Donna's mother went to town and left Donna in the care of the accused for a few hours. The accused was at the time staying temporarily in the family home.
5. Whilst alone, the accused took Donna into the bedroom, undressed her and raped her. When the mother returned she learned that something had occurred but Donna was too frightened to tell her the detail. All was revealed to an aunt about 10 days later and a report made to the Police.
6. The accused had said in evidence that Donna had insisted on sex and had raped him, a defence that wasn't believed; neither by the assessors nor the Court.

The Accused

7. In mitigation for the accused Counsel told the court that he is now 20 years of age and works as a carpentry assistant to his father. He is a member of a large family with 7 siblings.
8. He is said to be remorseful (although the Court saw no evidence of such) and he asks for forgiveness. He has sought forgiveness from Donna's family.
9. He is a practicing Christian and wishes to be free to bring his faith to others.

10. He is young and wishes to pursue a technical education at the Technical College in Labasa.
11. He has spent 4 months in remand awaiting trial and he has one previous conviction for indecent assault.

The Tariff

12. The maximum penalty for rape is life imprisonment and the sentencing range for rape of an adult is well settled to be between 7 to 15 years. (**Marawa** [2004] FJHC 338 per Gates J. (as he then was) and **Kasim** C.App 14 of 1993 C.A. (unreported).
13. Rapes of children attract sentences of between 10 to 16 years (**Raj** CAV003 of 2014 (Supreme Court)).

This Sentence

14. This rape was the rape of a 27 year old who because of mental impairment acted and thought as a 10 year old would. That being so, it greatly aggravates the offence or alternatively removes the case from the adult range and places it into the child range. Rapes of children are regarded by the Courts as far more serious than rapes of adults in that children are not yet mature enough to cope emotionally with sexual violation, and if subject to such abuse their own progress to sexual maturity can well be jeopardized.
15. To rape a mental defective can have the same disastrous consequences and it for this reason that sentences should be

passed in the range *pari passu* with the mental age of the victim.

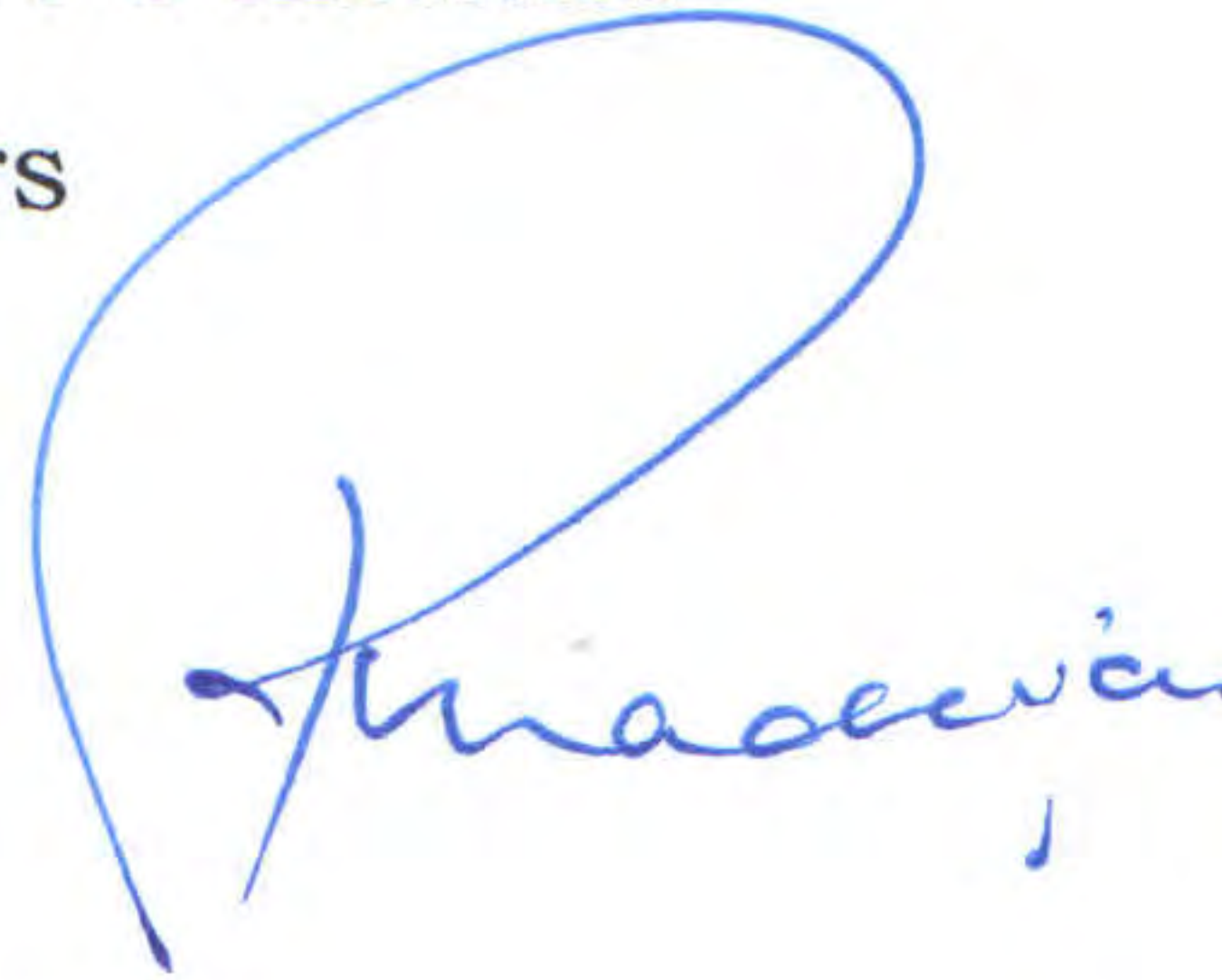
16. This crime therefore must be sentenced within the range of rapes of children; that is a sentence of between 10 to 16 years.
17. I take a starting point of 10 years. It is grossly aggravating that the accused should have breached the trust placed in him by his aunt to care for Donna whilst she was away. For that aggravation I add three years to the sentence. It is also an aggravating factor that the victim of the rape was mentally impaired, but as discussed earlier this aggravation is subsumed in sentencing the accused within the higher "child tariff".
18. The accused although young does not have the advantage of a clear record, he already having been convicted of a minor, but sexual offence in 2016.
19. The court is not impressed with his mitigation of remorse and desire for forgiveness but his major mitigatory advantage is found in his very young age. He was 19 when committing the offence and 20 years of age at present. The courts have always been at pains to treat young offenders with mercy and to keep them from the baneful and corrupting influences of an adult prison community. Such good intentions however must be balanced with the seriousness of the offence he (or she) is convicted of.
20. This offence is very serious indeed and the youth of the accused must be overshadowed by the gravity of his crime.
21. The only mitigating features that can assist this accused are his time spent in remand and his very young age. I deduct a

generous 6 months to reflect the remand period served and so the sentence that the accused shall serve will be one of 12 years and 6 months.

22. I order that he serve a minimum term of 9 years before being eligible for parole. This lenient minimum term is not intended to distort the tariff for rapes of children but is a concession to this young and impetuous youth.
23. I make a domestic violence restraining order against the accused as perpetrator and the victim as the protected person, an order to be in effect until further order of the Court.

Summary

24. Final sentence: 12 years 6 months
Minimum term: 9 years



P. K. Madigan
Judge

At Labasa
21 April 2017