

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 287 of 2017

STATE

v.

NEMANI MUSUDOLE

Counsel: Ms. U. Tamanikaiyaroi and Ms. L. Bogitini for State
Mr. F. Vosarogo for Respondent

Date of Summing Up: 28th February 2018

Date of Judgment: 01st March 2018

Date of Sentence: 02nd March 2018

SENTENCE

1. The name of the Complainant is suppressed.
2. The Accused is found guilty and convicted for one count of Rape, contrary to Section 207 (1), (2) (b) of the Crimes Act, which carries a maximum sentence of life imprisonment, and one count of Sexual Assault, contrary to Section 210 (1) (a), which carries a maximum sentence of ten years imprisonment.
3. It was proved at the conclusion of the hearing that you took the Complainant, who is your half-sister, to the toilet, when her mother went to the shop to buy diapers for your father. You and the Complainant were alone at home with your sick father. Having taken the Complainant into the toilet, you have licked her vagina with your tongue and penetrated into her anus with your finger. The Complainant was five years old at that time.

4. This is a case of sexually exploitation of a very young child by a family member within her own family. Young children are the most vulnerable victims of sexual assault of this nature. Such sexual exploitation of children by the family member has become a social menace in this country, which requires a more constructive and affective intervention of the law enforcement authorities, including the Court of Law in order to protect the children from this monsters phenomenon. Therefore, I find this offending is a very serious crime.
5. In view of the seriousness of this offence, it is my opinion that such offenders must be dealt with severe and harsh punishment. Hence, the purpose of this sentence is founded on the principle of deterrence and protection of community. Moreover, the court must demonstrate in sentencing that the offenders of this nature are socially abhorrent.
6. Hon. Chief Justice Gates in Anand Abhav Raj [2014] FJSC 12; CAV0003.2014 (20 August 2014) held that the tariff for rape of a child is between 10 -16 years' imprisonment period.
7. Justice Madigan in State v Epeli Ratabacaca Laca - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012) has expounded the tariff for the offence of Sexual Assault as between 2 years to 8 years' imprisonment, where his Lordship held that:

"The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.

A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines 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

- i) *Contact between the naked genitalia of the offender and another part of the victim's body;*
- ii) *Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
- iii) *Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender 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 the genitalia)"

8. The victim was five years old at that time. It is certain that a crime of this nature adversely affects a child of this age, both physiologically and socially. Hence, I find the level of harm is substantially high in this crime.
9. You have executed this shameful crime on the Complainant when she was alone at home. You found that the mother went to the shop and the sickly father was sitting in the room. You then took the Complainant to the toilet and unleashed this heinous crime on the five years old little child, knowing there was no one available to rescue or protect her from this crime. Hence, it is clear, that you found an opportunity, where the complainant was vulnerable without any prospects of getting any help, in order to satisfy your sexual gratification. I accordingly find the degree of culpability in this offending is substantially high.
10. In view of the seriousness of this crime, and the level of harm and culpability, I select twelve (12) years as the starting point for the offence of Rape and two (2) years for the offence of Sexual Assault.

11. You have blatantly breached the trust reposed in you by the Complainant as her brother. The age difference between you and the Complainant was substantially high at the time of this crime took place. By committing this crime, you have denied the Complainant the natural growth in her life. I consider these factors as aggravating circumstances of this crime.
12. You are not a first offender. However, your last conviction dated in 2005. Taking into consideration that you had maintained a crime free life since 2005, it is my opinion that you are entitled for a substantive discount for your previous character pursuant to Sections 4 (2) and 5 of the Sentencing and Penalties Act. Beside of your previous good character, I do not find any mitigating factor in your favour.
13. In view of the above discussed aggravating circumstances, I increased three (3) years to reach interim imprisonment of fifteen (15) years for rape and five (5) years for the Sexual Assault. I reduce one (1) year for your previous good character. Your final sentence for the rape has now reached to fourteen (14) years of imprisonment. The final sentence for the sexual assault has reached to four (4) years of imprisonment.
14. Having considered the seriousness of this crime, the purpose of this sentence, your age and opportunities for rehabilitation, I find twelve (12) years of non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for a period of twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

15. Accordingly, I sentence you for a **period of fourteen (14) years imprisonment** for the offence of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act and for a **period of four (4) years imprisonment** for the offence of Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act. Both sentence to be served concurrently. Further, I order that you are not eligible for any parole for a period of **twelve (12) years** pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of The Sentence

16. You have been in remand custody for this case for a period of five (5) months and thirteen (13) days as you were not granted bail by the court. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of five (5) months as a period of imprisonment that have already been served by you.
17. Accordingly, the actual sentencing period is **thirteen (13) years and seven (7) months** imprisonment with non-parole period of **eleven (11) years and seven (7) months**.
18. Since this incident involves with domestic violence, I am satisfied that there are sufficient grounds to consider making an order under the Domestic Violence Act. I accordingly make a permanent domestic violence restraining order against you with standard non-molestation conditions and no contact conditions pursuant to section 24 and 28 of the Domestic Violence Act. The above domestic violence restraining order will be in force until this court or any other competence court is varied or suspended it. Furthermore, if you breached this restraining order, you will be charged and prosecuted for an offence pursuant of section 77 of the Domestic Violence Act.
19. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to read 'R.D.R.T. Rajasinghe'.

R.D.R.T. Rajasinghe
Judge

At Suva
02nd March 2018

Solicitors
Office of the Director of Public Prosecutions for the State
Mamlakha lawyers for Defence