

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 13 of 2018
[Magistrates Court Case No. 264 of 2009)

BETWEEN : STATE

AND : KAMINIELI NIVOI

Before : Hon. Mr Justice Daniel Goundar

Counsel : Ms A Vavadakua for the State
Mr V Tuicolo for the Accused

Date of Hearing : 16 March 2018

Date of Sentence : 03 April 2018

SENTENCE

[1] Kaminieli Nivoi, you were convicted of two counts of rape contrary to sections 149 and 150 of the Penal Code after trial in the Magistrates' Court. Your case was transferred to the High Court for sentencing. You were accorded an opportunity to mitigate when you appeared in the High Court for sentence. I now pronounce your sentence.

[2] The victim is your niece. She was 17 years old when you raped her twice in 2008. Originally, the victim is from Bua. In 2008, she came to Labasa for education. She resided with you and your family at Naseakula Village and attended high school.

- [3] On 30 August 2008, you told the victim to accompany you to your cassava plantation. You took a cane knife with you. While you were in the plantation, you threatened the victim with a stick that you had sharpened using the knife. You had sexual intercourse and ejaculated inside her. The victim cried and told you to stop as you were her uncle. She felt very weak after the incident and you threatened her not to complain to anyone after you returned home.
- [4] The second incident occurred on 30 October 2008 when the victim was left alone at home. You forced the victim to have sexual intercourse with you. When she resisted and tried to raise alarm you covered her mouth with your hand. She did not complain to anyone due to your presence around her at all times.
- [5] In December 2008, when the victim returned to her home, she did not want to come back to your home. When you learnt that the victim was not going to come back to your home, you went to her home and threatened to commit suicide. You gave a letter to the victim's mother in which you expressed your feelings about the victim. At trial, you did not dispute the physical element of sexual intercourse. Your defence was that the victim had consented to sex on both occasions.
- [6] In assessing the seriousness of your crime, the court must have regard to the maximum penalty prescribed for rape. It is life imprisonment. It is now established that rape of a juvenile girl will attract a sentence in the range of 10 to 16 years' imprisonment (*Raj v State* [2014] FJSC 12; CAV0003.2014 (20 August 2014)).
- [7] Your counsel in mitigation has informed the court that you are now 57 years old and a widower. You are remorseful and have apologized to the victim's family. There is no confirmation of the apology from the victim's family, but even if you had apologized, the apology was late for the victim. By not pleading guilty, you made the victim go through a trial and relive those painful vile moments when you raped her. But I do take

into account that you have made an attempt to reform your behaviour. You are now an elder in your local church and have attended counselling. The most compelling mitigating factor, however, is your previous good character.

- [8] The most serious aggravating factor is that you breached the trust of the victim and her parents. She was vulnerable due to her age (17 years). You became her guardian when she came to live with you to attend school. You commanded authority over her as her guardian and uncle. You used your authority to sexually abuse the victim and to prevent her from complaining. The rape was repeated within two months. When you realised that the victim may not return to your home, you became obsessed and threatened to commit suicide. The suicide threat was made to prevent the victim from reporting the sexual abuse. The victim was exposed to the risk of pregnancy and sexually transmitted diseases when you ejaculated inside her. These are additional aggravating factors.
- [9] In these circumstances, a sentence of 14 years' imprisonment would have reflected the criminality involved. However, there is a factor that needs further consideration.
- [10] You were charged with the offences on 27 July 2009 and released on bail on the same day. You elected to be tried in the Magistrates' Court. The trial commenced on 8 February 2014 after twenty six adjournments. The judgment of conviction was pronounced on 17 October 2017. On 13 February 2018, the case was transferred to the High Court for sentencing. The post-charge delay is almost nine years. The delay is systematic. The parties are not at fault.
- [11] The case was poorly managed by the court having no concern for the accused charged with rape or the victim of rape. By the time the victim gave evidence, she was married and had children of her own.

- [12] Systematic delay violates an accused person's right to a fair trial without unreasonable delay. As the Supreme Court said in *Nalawa v State* [2010] FJSC 2: CAV0002.2009 (13 August 2010) at [20]:

Most common law jurisdictions recognize the right of an accused person to a fair trial without unreasonable delay. That right is set out in Article 8 of the Universal Declaration of Human Rights to which Fiji is a party and in the International Covenant on Civil Political Rights, Article 9(3). Fiji has not ratified this Covenant but the provisions of it have been incorporated in successive Constitutions in Fiji since 1970.

- [13] Section 14 (2) (g) of the Constitution expressly provides for a right to have the trial begin and conclude without unreasonable delay. When there is breach of that right the remedy must reflect in the sentence imposed. As the Court of Appeal in *Sahim v. The State MISC Action No. 17 of 2007* (25 March 2008) said:

The second question is if there has been a breach what is the remedy? In determining the appropriate remedy, absence of prejudice becomes relevant. Where an accused person is able to be tried fairly without any impairment in the conduct of the defence, the prosecution should not be stayed. Where the issue is raised on appeal, and the appellant was fairly tried despite the delay, his or her remedy lies in the proportionate reduction of sentence or in the imposition of a non-custodial sentence. (underlining mine).

- [14] Similarly, in *AG's Reference* (No. 2 of 2001) [2004] 2 AC 72 Lord Bingham said at [24]:

If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant.

- [15] Your right to be tried within a reasonable time was breached when the trial court took almost nine years to convict you. For that breach, I compensate you by reducing your sentence by 4 years. I have further decided not to fix a non-parole period due to the unreasonable delay in concluding the case.

Order of the Court:

On each count of rape, you are sentenced to 10 years' imprisonment, to be served concurrently. Your total effective sentence is 10 years' imprisonment.



A handwritten signature in blue ink, appearing to be "D. Goundar", written over a dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused