

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 137 of 2015

BETWEEN : STATE

AND : DAYA PRASAD

Counsel : Ms Naibe for the State
Ms S. Khan and Mr Z. Khan for the Accused

Dates of Hearing : 25 and 26 March 2019

Closing Speeches : 26 March 2019

Date of Summing up: 28 March 2019

Date of Judgment : 08 April 2019

Date of Sentence : 18 April 2019

SENTENCE

1. You, Daya Prasad are convicted for two counts of indecent assault contrary to section 212(1) of the Crimes Act and three counts of rape contrary to section 207(1) and (2)(a) of the Crimes Act.

2. You were 39 years old at the time of the commission of the offences and the victim was 16 years. You are related to the victim and she referred to you as her uncle.
3. The brief facts relating to each count are as follows;

Count 1 - Indecent assault

In August 2014 during the second term school holidays the victim was learning to drive from you. When she was learning to drive you started touching her thighs over her cloths while driving. You squeezed her breasts. The victim didn't like it, but you told her not to tell anyone about it. The victim reported the incident to her mother. But her mother did not believe her saying that you were part of the family.

Count 2 - Rape

On 27 September 2014 the victim was told by her mother to deliver some food to your place. The victim didn't want to go, but her mother forced her to go. When the victim brought the food, you asked her to come inside the house. You locked the grill door and forced her to your room. You forcefully took off her clothes. You pushed her on the bed and got on top of her. You tried to kiss her, but the victim started moving her head. The victim kept on shouting, but no one could hear her as there was loud music played at your house. You separated her legs with your legs while holding her hands tightly. You inserted your penis into her vagina. The victim didn't like it. She called for help by shouting, but no one could hear her. She was shocked, and she didn't know for how long you did it. The victim said that she did not expect that from her uncle.

Count 3 - Rape

On 10 October 2014 the victim went to your place with her mother to make some sweets. Her mother had to go back home leaving the victim at your place as her mother needed something. You then locked the grill and grabbed her to the sitting room. You played a sex movie and told her to watch it. You

held her tight and forced her to watch the movie. You then grabbed her to your room. You took off her clothes and your clothes. You then placed your mouth on her vagina. You were holding her hands and she shouted for help. No one could hear her as the music was loud. You then inserted your penis into her vagina. The victim didn't like it. It was painful for her. She tried to push you and she bit your arm. You threatened her not to tell the incident to anyone.

Count 4 - Rape

On 18 October 2014 the victim was asked by her parents to go with you to Sigatoka to deliver some sweets. When you were returning in the night you stopped the vehicle on the way. You took a torch and checked around. You asked her to come to the back of the van. When the victim refused you grabbed her. You tried to kiss her, and she kept on moving her head. She didn't like it. You took off her clothes. You inserted your penis into her vagina. She tried to push you, but you over powered her. You held her tight. The victim tried to shout but there was no one around.

Count 5 - Indecent assault

On 20 November 2014 the victim was told by her mother to go with you and exchange a packet of milk. On your way back, you parked your vehicle for the victim's sister to come and pick her up. While waiting in the vehicle you came and started touching her. You touched her thighs and breasts. You held her hands when she tried to stop you. The victim didn't like it and you continued to touch her thighs and breasts until her sister came.

4. Later the victim informed her sister about these incidents and the matter was reported to the police. You were indicted for the above five counts. You pleaded not guilty and after a full hearing the assessors unanimously found you not guilty. This court did not concur with the opinions of the assessors and you were found guilty and were convicted to all five counts by the judgment delivered on 08 April 2019.

5. You took advantage of your position as the victim's uncle and thereby breached the trust. The age gap between you and the victim is about 23 years. You have threatened her not to report the incident to anyone. The victim had to relocate herself as a result of these incidents. The victim has suffered psychological and emotional trauma as per the Victim Impact Statement. I consider those as aggravating factors.
6. I have considered the submissions filed by your counsel on mitigation. You are now 44 years old and single. You support your sister and her two children. You have no previous convictions. It was submitted that you have co-operated with the police and you have assisted charitable and religious organizations.
7. The maximum punishment for indecent assault is 5 years and the tariff is 12 months to 4 years.
8. The maximum punishment for rape is life imprisonment. The tariff for child rape is now 11 years to 20 years. It was observed in *Aitcheson v State* [2018] FJSC 29; CAV 0012.2018 (2 November 2018);

"The tariff previously set in *Raj v The State* [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms."

9. Section 17 of the Sentencing and Penalties Act states;

"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period

of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

10. I am satisfied that the five counts that you are convicted for in this case form a series of offences of the same or similar character. Therefore, I am of the view that it is appropriate to impose an aggregate sentence in respect of the five counts pursuant to section 17 of the Sentencing and Penalties Act.

11. Sexual offences committed within domestic relationships are considered to be very serious in nature and time and again courts in Fiji stress the need to impose adequate punishments to reflect abhorrence for such offences. Moreover, the courts have always imposed severe punishments for rape of children by mature adults to signify that no civilized society will tolerate such heinous crimes committed against children.

12. Having taken into account the objective seriousness of the offences I pick 13 years as the starting point for the aggregate sentence. For the aggravating factors I add 3 years. Your personal circumstances have less mitigating value, but I deduct 2 years for your clean records and for good character.

13. Accordingly, I impose an aggregate sentence of 14 years imprisonment on you in respect of the five counts that you are convicted for. Having considered the significance of rehabilitation I fix a non-parole period of 10 years.

14. In **Aitcheson V The State** (supra) the Supreme Court has remarked on the preferred sequence in which the final term should be arrived at as follows;

“The Supreme Court has favoured the approach to granting the discount to be that the remand time is to be dealt with last. Once the term and non-parole period is arrived at, then the court will set out a suitable discount.”

15. For this case you had been in remand custody nearly for two weeks. Pursuant to section 24 of the Sentencing and Penalties Act any period of time spent in

custody is regarded as a period of imprisonment already served by the offender. Therefore, I deduct two weeks from your aggregate sentence to reflect the time that you were in remand custody.

16. Accordingly, you should serve a term of 13 years 11 months and 2 weeks imprisonment. The non-parole period is also adjusted to be 9 years 11 months and 2 weeks.

17. Further I decide to issue a fresh domestic violence restraining order against you for non-molestation and for non-contact to ensure the safety of the victim.

You have 30 days to appeal to the Court of Appeal.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Messrs Iqbal Khan & Associates