

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 336 OF 2017S

STATE

VS

SHEIK ZOHAIB SHAH

**Counsels : Ms. L. Bogitini for State
Ms. S. Prakash and Mr. P. Gade for Accused**

Hearings : 3 and 4 May, 2019.

Sentence : 5 June, 2019.

SENTENCE

1. On 3 June 2019, in the presence of his counsels, the accused pleaded guilty to the following counts in the following information:

"FIRST COUNT

Statement of Offence

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

Particulars of Offence

SHEIK ZOHAIB SHAH on the 2nd day of November 2017 at Nasinu in the Central Division had carnal knowledge of A R, a child under the age of 13 years.

SECOND COUNT

Statement of Offence

ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE: Contrary to Section 211(1) of the Crimes Act 2009.

Particulars of Offence

SHEIK ZOHAIB SHAH on the 2nd day of November 2017 at Nasinu in the Central Division abducted A R, a child under 13 years of age with intent to have carnal knowledge with the said A R”.

2. Prior to the information being put to him, the same was read and explained to him in the Hindustani and English languages. He said, he understood the same, and pleaded guilty to both counts in the information. The matter was stood down to after lunch to enable the prosecutor to prepare the summary of facts.
3. After lunch, the prosecution presented the following summary of facts in court:

- “1. The accused is Sheik Zohaib Shah of Lot 24 David Street, Davuilevu housing. He was born on the 3rd of November, 1993. He was 23 years old at the time of the alleged offence.
2. The complainant in this matter is A R of Davuilevu housing. He was born on the 12th of August, 2011. He was 6 years old at the time of the alleged offence.
3. The complainant and the accused are not related. The accused and the complainant reside in the same neighborhood at Davuilevu housing.

Count 2 – Abduction of a young person with intent to have carnal knowledge

4. On the 2nd of November, 2017 at around 8.00 am, the complainant was about to leave for school when he left his home to buy cookies from a nearby shop. The complainant’s parents waited for the complainant at their home when the complainant went to the shop.

5. The accused was at his home when he saw the complainant was returning to his home from the shop. The accused then called out to the complainant to come to his house. The accused then opened the gate of his house and the complainant went inside the house of the accused.
6. The accused brought the complainant into his house intending to have carnal knowledge of the complainant.
7. At the time the accused did this, he did not have the permission of the complainant's parents to take the complainant into his house.

Count 1 - Rape

8. The accused took the complainant to his bedroom and told the complainant to take off his pants which he then did. The accused then made the complainant lie down on his bed. The accused then took a bottle of coconut oil, placed some on his own hands and rubbed it on the anus of the complainant.
9. The accused then took off his pants and inserted his penis into the anus of the complainant while the complainant was lying down with his legs up. The complainant felt it was painful and began to cry when the accused was inserting his penis into his anus.
10. After a few minutes, when the accused was done, the complainant wore his clothes and went home.
11. The complainant then returned to his home around 8.30 am that same day. He then told his mother about what the accused had done. The matter was then reported to the Nakasi Police Station.
12. The complainant was medically examined on the 2nd of November 2017 at the Medical services Pacific clinic by Dr. Elvira Ongbit whereby superficial abrasions were found all over the anal opening. There was also deep abrasions and slight bleeding at the 12 o'clock and 7 o'clock position at the anal opening [medical report not included herein].

13. **The accused was interviewed on the 2nd of November, 2017 by DC 5052 Shalvin Narayan at the Nasinu crime office. He was interviewed in the Hindi language. The accused admitted to calling the complainant to his home and taking him into his bedroom at the alleged time at Question and Answer No. 28 to 30, 37 and 38 of the Record of Interview. The accused also admitted to laying the complainant down in his bedroom, pouring oil on the complainant's backside and inserting his penis into the anus of the complainant at the alleged time at Question and Answer No. 31 to 33 of the Record of Interview. The accused made these admissions out of his own free will, voluntarily and without oppression [caution interview not included herein]."**
4. The court then checked with defence counsel, on whether or not the accused had admitted the prosecution's summary of facts and whether or not he had admitted the elements of the offences in count no. 1 and 2 of the information. Defence counsel, on behalf of her client, said the accused admitted the prosecution's summary of facts, the particulars of the two counts in the information and admitted inserting his penis into the complainant's anus, at the material time. On the basis of the above admissions, the court found the accused guilty as charged, on both counts and convicted him accordingly on those counts. The matter was then adjourned to 4 June 2019 for the sentence hearing.
5. On 4 June 2019, the prosecution said, the accused was a first offender. She submitted the accused antecedent report and the victim's impact report. Defence counsel, on behalf of her client, did not challenge these reports. Defence counsel then presented her client's written plea in mitigation. Later both parties made their sentence submissions to the court. I have carefully considered the above reports, the accused's written plea in mitigation, and the parties' sentence submissions. I had listened very carefully to their verbal submissions.
6. The rape of children in our community is always a serious matter. It is basically an attack on a nuclear family, the basic unit in our society. It undermines the safety and welfare of the family. It puts untold pressures and heart aches in the parents and the members of the family. Consequently the lawmakers of this country had prescribed the maximum penalty

of life imprisonment for those found guilty of the rape of a child (see section 207 (1), (2)(a) and (3) of the Crimes Act 2009). The highest court in the land, the Supreme Court, had set a tariff of a sentence between 11 to 20 years imprisonment, for those found guilty of the rape of a child: (see **Gordon Aitcheson v The State**, Criminal Petition CAV 012 of 2018, Supreme Court of Fiji, delivered on 2 November 2018). The final sentence will depend on the aggravating and mitigation factors.

7. “Abduction of a person under 18 years with intent to have carnal knowledge”, contrary to section 211 (1) of the Crimes Act 2009, carried a maximum sentence of 5 years imprisonment.

8. The aggravating factors, in this case, were as follows:
 - (i) **Breach of Neighbourly Trust.** In an increasingly urbanized Fiji, people of various cultures and values live side by side, in living life. Families with children live side by side, in living their life. This close proximity with each other imposes an obligation on everyone to be kind to each other. If you want peace, you are also obliged to give peace to others. This is especially so when people are neighbours. It gives rise to what is commonly known as “neighbourly trust”. The accused was 23 years old at the time of the offence. The complainant was 6 years old. They were neighbours. As an adult, you were supposed to protect this child, given that you were neighbours. But you did the opposite. You will have to be punished, to teach you to love your neighbours.
 - (ii) **Rape of a child.** The courts had been saying in the past, and will say again, that it will not tolerate sexual violence against children. Children are the future of this country. It will keep on passing long prison terms as a warning to others.
 - (iii) By offending against the child complainant, you had shown no regard to his right as a human being, no regard to his right as a child and no regard to his right to live a happy and peaceful life. You have also caused heart ache and sadness to his family.

9. The mitigating factors were as follows:
- (i) At the age of 23 years, this is your first offence;
 - (ii) You have been remanded in custody, awaiting trial, since 6 November 2017, which was approximately 1 year 7 months ago;
 - (iii) You pleaded guilty on the day of your trial, that is, 1 year 6 months 17 days after first call in the High Court. Although you pleaded guilty late, you nevertheless saved some court time.
 - (iv) You co-operated with police by admitting the offence when cautioned interviewed by police on 2 November 2017.
10. On the rape charge (count no. 1), I start with a sentence of 13 years imprisonment. I add 5 years for the aggravating factors, making a total of 18 years imprisonment. I deduct 1 year 7 months for time already served, while remanded in custody, leaving a balance of 16 years 5 months. For pleading guilty late, I deduct 2 months, leaving a balance of 16 years 3 months. Had you pleaded guilty on first call on 17 November 2017, I would have given you a 2 years deduction. But this is a lesson to those who come before the court after you, on similar charges. For co-operation with police, I deduct 3 months, leaving a balance of 16 years imprisonment. A larger deduction would have been given had you pleaded guilty earlier. This again is a lesson to others who follow you in these type of charges. For being a first offender, I deduct 1 year, leaving a balance of 15 years imprisonment. On count no. 1 (rape), I sentence you to 15 years imprisonment.
11. On the abduction charge (count no. 2), I sentence you to 3 years imprisonment.
12. The summary of your sentences are as follows:
- (i) Count No. 1: Rape: 15 years imprisonment.
 - (ii) Count No. 2: Abduction: 3 years imprisonment.

13. Because of the totality principle of sentencing, I direct that the above sentence be made concurrent to each other, making a final total sentence of 15 years imprisonment.
14. Mr. Sheik Zohaib Shah, for abducting and raping the child complainant on 2 November 2017, at Nasinu in the central Division, I sentence you to 15 years imprisonment, with a non-parole period of 14 years imprisonment, effective forthwith.
15. The above sentence is designed to punish you in a manner that is just in all circumstances, to protect the community from people like you, to deter other would-be offenders and to signify that the court and the community denounce what you did to the child complainant on 2 November 2017 at Nasinu in the Central Division.
16. The name of the complainant is permanently suppressed to protect his privacy.
17. You have 30 days to appeal to the Court of Appeal.




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JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**