

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 21 of 2017

STATE

V

S. T.

Counsel : Mr. T. Tuenuku for the State.
: Ms. A. Bilivalu for the Accused.

Dates of Hearing : 09 and 10 June, 2020
Closing Speeches : 11 June, 2020
Date of Summing Up : 12 June, 2020
Date of Judgment : 15 June, 2020
Date of Sentence : 26 June, 2020

SENTENCE

(The name of the victim is suppressed she will be referred to as "LT" the name of the accused is also suppressed and he will be referred to as "ST")

1. In a judgment delivered on 15 June, 2020 this court found the accused guilty and convicted him for one representative count of rape and one representative count of attempt to commit rape.

2. The brief facts were as follows:

The victim was 12 years of age in 2012, in the night of 2nd October, whilst sleeping the victim felt her panty was wet, when she woke up she saw the accused removing her panty and licking her vagina. When the victim asked the accused what he was doing, he blocked her mouth with one hand and with the other he took out his penis and forcefully penetrated her vagina.

3. The victim was scared when the accused was doing this to her. The accused had forceful sexual intercourse with the victim on five different occasions in October, 2012.

4. Thereafter during night time in March, 2013 the victim whilst sleeping felt her panty was being removed when she woke up she saw the accused. The victim told the accused not to do anything to her but the accused did not stop. The accused tried to insert his penis into the vagina of the victim but could not. The accused did this to the victim on two different occasions in March, 2013. The victim is the niece of the accused.

5. Later the victim told her teacher about what the accused was doing to her she did not tell anyone at home since she was afraid of them. The matter was reported to the police.

7. Both counsel filed their sentence submissions including the victim impact statement and mitigation for which this court is grateful.

8. The following personal details and mitigation have been submitted by the counsel for the accused.

- a) The accused is a first offender;
- b) He was 68 years of age at the time of the first offending;
- c) Is unemployed and is a grandfather;
- d) A senior citizen.

9. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

10. The aggravating factors are:

a) Breach of Trust

The victim is the niece of the accused. The accused was a respected member of the victim's family in the absence of the victim's father the accused was considered as the head of the house. The accused was trusted to the extent that he was sleeping in the same bedroom with the victim and her younger sister. The accused grossly breached the trust of the victim by his actions. The victim was vulnerable and unsuspecting, the accused took advantage of this.

b) Age difference

The victim was 12 years when the offending began and the accused was 68 years. The age difference is substantial.

c) Planning

There is some degree of planning involved the accused committed the offences during the night time when everyone would be sleeping. He also knew the victim was innocent and vulnerable yet he continued with his unlawful conduct.

d) Exposing a child to sexual abuse

The accused had exposed the victim to sexual activities at a very young age which is unacceptable.

e) Victim Impact Statement

In the victim impact statement the victim has stated that her life has changed after the incidents, she has become fearful. After the incidents she was unable to sleep well due to flashbacks, her school work was affected resulting in poor academic performance. The victim was blamed by her family and chased out of the family house.

10. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs. The State*, (*supra*) has confirmed the new tariff for the rape of a juvenile to be a sentence between 11 years to 20 years imprisonment.
11. There has been an increase in sexual offences involving offenders who are known to the victim and are mature adults. It is shocking to note the manner in which the accused had committed these offences on the victim.
12. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely. Children are entitled to live their lives free from any form of physical or emotional abuse. When family members sexually abuse children, violating the Domestic Violence Act, they should not expect any mercy from this court. The punishment ought to be such that it takes into account the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.

13. The Supreme Court in *Mohammed Alfaaz v State* [2018] FJSC 17; CAV0009.2018 (30 August 2018) has stated the above in the following words at paragraph 54 that:
- “It is useful to refer to the observation expressed by the Fiji Court of Appeal in *Matasavui v State*; Crim. App. No. AAU 0036 of 2013: 30 September [2016] FJCA 118 wherein court said that “No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilised entity.”*”
14. Madigan J in *State v Mario Tauvoli* HAC 027 of 2011 (18 April, 2011) said:
- “Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and courts are imposing those penalties in order to reflect society’s abhorrence for such crimes. Our nation’s children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound.”*
15. The Supreme Court in *Felix Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015) mentioned a long list of factors that should be considered in punishing the offenders of child rape cases. Those factors would include:
- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
 - (b) *whether there had been a breach of trust;*
 - (c) *whether committed alone;*
 - (d) *whether alcohol or drugs had been used to condition the victim;*
 - (e) *whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*

- (f) *whether the impact on the victim had been severe, traumatic, or continuing;*
- (g) *whether actual violence had been inflicted;*
- (h) *whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
- (i) *whether the method of penetration was dangerous or especially abhorrent;*
- (j) *whether there had been a forced entry to a residence where the victim was pre sent;*
- (k) *whether the incident was sustained over a long period such as several hours;*
- (l) *whether the incident had been especially degrading or humiliating;*
- (m) *If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
- (n) *Time spent in custody on remand.*
- (o) *Extent of remorse and an evaluation of its genuineness;*
- (p) *If other counts or if serving another sentence, totality of appropriate sentence.*

REPRESENTATIVE COUNTS

16. Although the accused is convicted of one representative count of rape and one representative count of attempt to commit rape the evidence was that there was more than one incident of rape and attempt to commit rape.
17. The accused cannot be punished for all the other occasions of sexual assault but for one occasion only in respect of each count (*see Senilokula v State, Criminal Petition no. CAV 0017 of 2017 (26 April, 2018)*).

18. The two counts of rape and attempt to commit rape for which this accused has been convicted are offences founded on the same facts and are of similar character, I therefore prefer to impose an aggregate sentence for the two offences in accordance with section 17 of the Sentencing and Penalties Act.
19. After assessing the objective seriousness of the offences committed I take 13 years imprisonment (lower range of the scale) as the starting point of the sentence. I add 6 years for the aggravating factors, bringing an interim total of 19 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. However, I note that the accused has no previous convictions he comes to court as a person of good character. For mitigation and good character the sentence is reduced by 1 year. The aggregate sentence is now 18 years imprisonment.
20. I note from the court file that the accused was remanded for 3 months and 5 days, in accordance with section 24 of the Sentencing and Penalties Act the sentence is reduced by 3 months and 5 days as a period of imprisonment already served. The final sentence is 17 years 8 months and 25 days imprisonment.
21. Mr. Tiko you have committed serious offences against your niece with whose family you were living and who you were supposed to protect and care. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to the victim. You were a person who was kept in high regard and was a role model to the family you had no mercy for the victim, you never gave a second thought about what you were doing to this innocent child. As a mature adult you took advantage of this child's vulnerability and kept on committing the offences, you were undeterred in achieving your lust for sexual gratification.

22. The victim has also been psychologically and emotionally affected, rape is not only a physical act, it destroys the very soul of the victim, and also brings about a sense of hopelessness and anxiety. You have scarred the life of your niece forever. There is no doubt that a positive and a happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
23. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was the accused's niece aged 12 years compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
25. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
26. Considering the above, I impose 15 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case.
27. In summary, I pass an aggregate sentence of 17 years 8 months and 25 days imprisonment with a non-parole period of 15 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation and non-

contact orders are issued to protect the victim under the Domestic Violence Act.

28. 30 days to appeal to the Court of Appeal.



A handwritten signature in black ink, appearing to read "Sunil Sharma".

**Sunil Sharma
Judge**

At Lautoka

26 June, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.