

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 194 of 2020

STATE

V

MOHAMMED HAROON RASHEED

Counsel : Ms. L. Latu for the State.
: Ms. J. Raman for the Accused.

Date of Submissions : 14 January, 2021
Date of Sentence : 22 January, 2021

SENTENCE

(The name of the victim is suppressed she will be referred to as "Z.S.N")

BACKGROUND INFORMATION

1. The accused was initially charged with two counts of rape and two alternative counts of incest by males under the Penal Code Cap. 17 at the Ba Magistrate's Court.
2. After numerous adjournments in the Magistrate's Court on 12th August, 2020 the prosecution filed an amended charge as follows:

FIRST COUNT
(Representative count)
Statement of Offence

RAPE: Contrary to section 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

MOHAMMED HAROON RASHEED between the months of December 2005 and January 2006 at Tavua in the Western Division, had unlawful carnal knowledge of Z. S. N, without her consent.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

MOHAMMED HAROON RASHEED on the 29th day of November, 2006 at Tavua in the Western Division, had unlawful carnal knowledge of Z. S. N. without her consent.

3. Since the accused was charged under the Penal Code the Magistrate's Court proceeded to hear the matter. On 13th August, 2020 the accused in the presence of his counsel pleaded not guilty to both the above counts.
4. At trial the prosecution called three witnesses whereas the accused exercised his right to remain silent. On 27th November, 2020 the learned Magistrate found the accused guilty of both counts and he was convicted as charged. On this date this file was sent to this court for sentencing pursuant to section 190 (1) of the Criminal Procedure Act.
5. The brief facts were as follows:

The victim is the biological daughter of the accused. In the year 2005 the victim was 11 years of age and a class 6 student. On one occasion during the school holidays in December, 2005 the victim was alone at home with her father. At around midday the accused was watching a blue movie and he forced the victim to watch as well. The victim tried to run away but the accused caught her and forcefully took her into the bedroom.

6. In the bedroom the accused removed the victim's clothes and his clothes and he pushed the victim onto the bed and started kissing her.
7. Thereafter the accused inserted his penis into the victim's vagina and had forceful sexual intercourse the victim felt pain, after the accused had finished he warned the victim not to tell her mother about what he had done to her.
8. The next day during night time the accused took the victim from her mother's bedroom to her grandmother's bedroom where he forcefully had sexual intercourse with the victim. The victim tried to escape but could not because the door of the room was locked by the accused.
9. On 29th November, 2006 the victim was sleeping when she was awoken by the accused and forcefully taken to his bedroom. In the bedroom the accused had forceful sexual intercourse with the victim.
10. On all occasions the victim did not consent to what the accused was doing to her according to the victim her father was not supposed to be doing all these things to her. During a school counselling program the victim told one of her friend's about what the accused had done to her. The victim's school teacher was informed and the matter was

reported to the police. The accused was arrested, caution interviewed and charged.

11. Both counsel filed their sentence submissions and mitigation for which this court is grateful.
12. The following personal details and mitigation have been submitted by the counsel for the accused:
 - a) The accused is a first offender;
 - b) He is 59 years of age;
 - c) Married with two sons living with him;
 - d) Being a farmer who earns about \$100.00 per week;
 - e) **Co-operated with the police during investigations.**
13. 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 person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

14. The following aggravating factors are obvious:

- (a) Breach of Trust

The victim is the biological daughter of the accused. The accused grossly breached the trust of his daughter by his actions and also abused the sanctity of the relationship that existed between the two. The Supreme Court in *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (02 November, 2018)* at paragraph 62 of the judgment endorsed the comments of the trial judge as follows:

"...Parents are the only trusted and dependable persons that a child has in her growing tender years. Turning that trusted dependable person into a monstrous demon who penetrated in to the innocent childhood of the child and destroy it with his own lustful sexual satisfaction, would undoubtedly jeopardise the child's entire future life. Therefore, incest is a rape by extortion, in which a child's very childhood becomes a weapon used to control her".

(b) Planning

The accused had planned what he did, he knew the victim was naive, innocent and vulnerable and he continued with his unlawful conduct.

(c) Age Difference

At the time of the first incident the victim was 11 years of age whereas the accused was 45 years of age. The age difference is substantial.

(d) Exposing a child to sexual abuse

The accused had exposed the victim to sexual activity at a very young age he basically robbed her of her innocence by exposing her to unexpected sexual encounters.

15. 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.
16. 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.

17. 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.

18. 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."

19. Madigan J in *State v Mario Tavoli* 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."

20. 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 present;*
- (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


21. Although the accused is charged with one representative count of rape the evidence before the court was that there were two incidents of rape.
22. The accused cannot be punished for the other occasion of rape but for one occasion only as charged (*see Senilokula v State, Criminal Petition no. CAV 0017 of 2017 (26 April, 2018)*).
23. The two counts of 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.
24. After assessing the objective seriousness of the offences committed I take 11 years imprisonment (lower end of the scale) as the starting point of the sentence. I add 6 years for the aggravating factors, bringing an interim total of 17 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 16 years imprisonment.
25. I note from the court file that the accused was remanded for 7 months and 17 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 8 months as a period of imprisonment already served. The final sentence is 15 years 4 months imprisonment.

26. Mr. Rasheed you have committed serious offences against your daughter who you were supposed to protect and care. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to her.
27. 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 which cannot be measured or repaired by anyone. You have scarred the life of your daughter forever. There is no doubt that a positive and happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
28. 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 daughter aged 11 and 12 years respectively 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.
29. 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.
30. Considering the above, I impose 13 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.

31. In summary, I pass an aggregate sentence of 15 years 4 months with a non-parole period of 13 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.

32. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

22 January, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.