

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 186 of 2020

STATE

V

MOHAMMED RIYAZ

Counsel : Ms. L. Latu for the State.
: Mr. S. Heritage for the Accused.

Date of Submissions : 15 January, 2021
Date of Sentence : 25 January, 2021

SENTENCE

(The name of the victim is suppressed she will be referred to as "L.B")

BACKGROUND INFORMATION

1. The accused is charged with one count of rape and one count of attempted rape as follows at the Ba Magistrate's Court:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED RIYAZ on the 16th day of July, 2008 at Koronubu, Ba in the Western Division had unlawful carnal knowledge of "LB" without her consent.

SECOND COUNT

Statement of Offence

ATTEMPTED RAPE: Contrary to section 151 of the Penal Code, Cap 17.

Particulars of Offence

MOHAMMED RIYAZ on the 17th day of July, 2008 at Koronubu, Ba in the Western Division attempted to have unlawful carnal knowledge of "LB".

2. After numerous adjournments for one reason or the other on 27th June, 2019 the matter finally went to trial, the prosecution called 10 witnesses for the voir dire and trial proper whereas for the defence the accused gave evidence.
3. The trial and voir dire hearing was part heard and after numerous adjournments on 22nd September, 2020 the defence closed its case.
4. On 23rd November, 2020 the learned Magistrate found the accused guilty of both counts and convicted him accordingly on this date the file was transferred to the High Court for sentencing.
5. The brief facts are as follows:

The victim and the accused are known to each other, the accused is the victim's paternal uncle. In the year 2008 the victim was 11 years of age and a class 6 student both were living in the same house.

6. On 16th July, 2008 the victim came back from school late, at about 3.45pm she was having tea at home. At this time the victim's grandmother and sisters were in the farm. The victim wanted to join them in the farm, however, the accused called the victim into his bedroom. When the victim went in the room she saw the accused was wearing a towel at this time the accused held the victim tightly, put her on the bed and removed her panty and his towel.
7. The accused threatened the victim if she shouted he would assault her, thereafter the accused had forceful sexual intercourse with the victim.
8. The next day on the 17th the accused called the victim in his room. In the bedroom he laid the victim on his bed lifted her dress, removed his towel and got on top of the victim. The accused threatened the victim not to shout otherwise he will assault her.
9. The accused wanted to have sexual intercourse with the victim but could not so he forcefully rubbed his penis on the victim's vagina and then licked her vagina. Later the matter was reported to the police, the accused was arrested, caution interviewed and charged.
10. Both counsel filed their sentence submissions and mitigation for which this court is grateful.
11. The counsel for the accused submitted the following mitigation on behalf of the accused:
 - a) The accused is a first offender;
 - b) He was 30 years of age at the time of the offending;
 - c) Accused is married and is a sickly person who has a kidney problem (no medical report was provided);
 - d) Sole breadwinner of the family;
 - e) Good and hardworking member of the community;

f) He is remorseful and undertakes not to reoffend.

12. 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

13. The following aggravating factors are obvious:

a) Breach of Trust

The accused is the paternal uncle of the victim he grossly breached the trust of the victim by his actions. The offences were committed in the house of the victim where she was supposed to be safe.

b) Planning

The accused was bold and undeterred that he kept the door of his bedroom open when he was having forceful sexual intercourse and attempting to rape the victim. There is a degree of planning by the accused he knew the other members of the family were busy with their chores. He did what he wanted to do.

c) 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 abuse.

d) Victim was unsuspecting and vulnerable

The victim was innocent, naive, unsuspecting and vulnerable. The accused took advantage of this.

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 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.”

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.*
21. The two counts for which the 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.
22. 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. The accused has provided four character references which have also been taken into consideration.
23. For mitigation and good character the sentence is reduced by 1 year. The aggregate sentence is now 16 years imprisonment. I note from the court file that the accused was remanded for 2 months and 14 days, in accordance with section 24 of the Sentencing and Penalties Act the sentence is reduced as a period of imprisonment already served. The final sentence is 15 years 9 months and 16 days imprisonment.
24. Mr. Riyaz you have committed serious offences against your niece 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.

25. 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 niece 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.
26. 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 11 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.
27. 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.
28. 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.
29. In summary, I pass an aggregate sentence of 15 years 9 months and 16 days imprisonment 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.

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



Sunil Sharma
Judge

At Lautoka

25 January, 2021



Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Iqbal Khan & Associates for the Accused.