

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 30 of 2020

STATE

V

ISIKELI KUNAGUDRU

Counsel : Mr. T. Tuenuku for the State.
: Ms. E. Radrole for the Accused.

Dates of Hearing : 26, 27, 28 July, 2022

Closing Speeches : 01 August, 2022

Date of Judgment : 03 August, 2022

Date of Sentence : 17 August, 2022

SENTENCE

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

1. In a judgment delivered on 3rd August, 2022 this court found the accused guilty and convicted him for three counts of rape, (counts one, two and three) and two counts of indecent assault being lesser offences in counts four and six. The accused was acquitted for the offences of rape (counts four, five and six).
2. The brief facts were as follows:

The victim in 2019 was 16 years of age, she is the niece of the accused who is also a church elder. Both were living at Keiyasi Village on 27th August, 2019 at about 9 am the victim after completing her household chores went to lie down on the mattress in her house to take a nap. After a while, the accused came into the house laid beside the victim and started touching her from her breast downwards. The victim told him not to do it but he did not stop.

3. The accused got hold of some clothes and blocked her mouth. The victim was scared she wanted to sit but the accused pushed her down removed her pants, blocked her mouth and with his other hand pulled down her pants, at this time the victim was lying face up. The accused forcefully penetrated her vagina with his penis and had sexual intercourse for about 5 minutes.
4. Thereafter in the morning of 12th September, 2019 the victim was sleeping in her house. The accused came and forcefully turned her to face up since she was lying on her side. The accused put his pants down, went on top of the victim and removed her pants.
5. The victim tried to turn and sit but could not since the accused was on top of her. The accused told her to lie still and not do anything. The victim was crying since she was afraid of what the accused was doing to her. The accused forcefully inserted his finger into the victim's vagina and after this had forceful sexual intercourse with her for about 4 minutes.
6. On 23rd September 2019 at around 9 am the victim was at home. After doing the house chores the victim was playing with her phone whilst lying on the mattress. The victim had a swollen leg she could not walk the accused came and lay beside her and forcefully started touching her from her breast downwards. The victim told the accused to go away and also

told him that everyone at home was aware of what he has been doing to her. After a while the accused left.

7. On 4th October 2019 at 9 am the victim was alone at home she went to lie down in the living room. The accused came and sat beside her and said for them to go to the sleeping area. The victim told the accused to go away but he did not go so she stood up and sat by the door and looked outside to see if someone was around but there was no one.
8. After the accused left the victim went to sleep. When she woke up she found the accused lying beside her and his hand was under her dress. The victim pushed the accused hand stood up and went outside. The accused told her not to tell anything to anyone. The victim ran to a neighbour's house and locked herself.
10. The victim did not consent to what the accused had done to her. On all occasions the victim was alone since all her family members had left for the farm. The matter was reported to the police, the accused was arrested, caution interviewed and charged.
11. The state counsel filed written submissions and victim impact statement whereas the defence counsel filed mitigation for which this court is grateful.
12. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused is 48 years old;
 - b) Married with four children;
 - c) Three young children attending school;

- d) Farmer earning \$50.00 per week;
- e) Sole breadwinner of the family.

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 in this case:

a) Breach of Trust

The accused is the uncle of the victim and her church elder. The victim had trusted the accused he grossly breached the trust of the victim by his actions.

b) Victim was vulnerable

The victim was vulnerable and unsuspecting the accused took advantage of this and sexually abused the victim over a period of time. The accused overpowered the helpless victim. The victim was 16 years whereas the accused was 45 years and a mature adult who should have known better. The age difference is substantial.

c) Planning

There is some degree of planning by the accused he would go to the victim's house when the villagers and her family members were in the farm knowing very well that the victim would be alone at home.

d) Victim Impact Statement

In the victim impact statement the victim states that after the incidents her life changed she feels bad about what her uncle had done to her. She did not like it.

e) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victim by mature relatives and individuals known to the victim. The accused was bold and undeterred in what he did to the victim over a period of time.

TARIFF

15. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in the judgment of *Gordon Aitcheson vs. the State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now a sentence between 11 years to 20 years imprisonment.
16. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (*Rokota vs. The State, criminal appeal no. HAA 0068 of 2002*).
17. 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.”

18. I am satisfied that the five offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the five offences.
19. Bearing in mind the objective seriousness of the offences committed I take 11 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors. For mitigation it is noted that the accused has one previous conviction in the year 2014 for the offence of theft. In exercise of my discretion I disregard this unrelated previous conviction and consider him as a first offender.
20. The personal circumstances and family background of the accused has little mitigatory value, however, his good character being a first offender has substantive mitigating value. The sentence is further reduced to reflect good character and other mitigation.
21. I note from the court file the accused was remanded for 11 months and 26 days. In exercise of my discretion I reduce the sentence by 12 months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final aggregate sentence is 15 years and 8 months imprisonment.
22. It is the duty of the court to protect children from sexual abuse or exploitation of any kind that is the reason why the law has imposed life imprisonment as the maximum penalty.

23. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults.
24. 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 an accused sexually abuses a child, they should expect condign punishment to mark the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
25. 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 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."

26. 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."

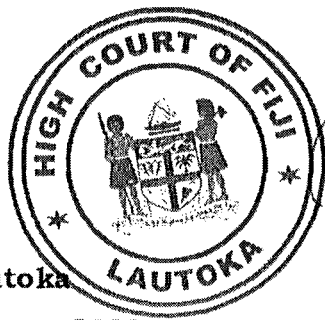
27. The Supreme Court in *Felix Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015) mentioned a long list of factors that should be considered in punishing the offenders of child rape cases. Those factors would include:


- (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.*

28. This court is satisfied that the term of 15 years and 8 months imprisonment 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 offence.
29. Mr. Kunagudru, you have committed serious offences against your niece who was alone, unsuspecting and vulnerable in her house. You were also a church elder who was a respected individual but this was not to be due to your lust and sexual gratification. You cannot be forgiven for what you have done to this victim.
30. Exposing children to sexual activities at a time when they are in transition to maturity has a negative impact upon a child's development. Your conduct on the victim is unthinkable and deplorable a long term imprisonment is the only answer. Being a matured adult you should have known better. Furthermore, you committed these offences without any fear or second thoughts. You have scarred the life of the victim.
31. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on your niece of 16 years of age compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.

32. Under section 18 (1) of the Sentencing and Penalties Act, I impose 13 years imprisonment 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 to meet community expectations which is just in the circumstances of this case.
33. In summary I pass an aggregate sentence of 15 years and 8 months imprisonment for three counts of rape and two counts of indecent assault 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.
34. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
17 August, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.