

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 12 OF 2019

THE STATE

V

MOHAMMED RIZWAN ALI

Counsel : Ms. S. Naibe with Ms. Prakash for State
Ms. K. Boseiwaqa with Mr. A. Swamy for Defence

Date of Judgment: 10 February 2023

Date of Sentence: 13 February 2023

SENTENCE

1. Mr. Rizwan Ali, you stand convicted after trial of one of Sexual Assault contrary to Section 210 (1)(a) of the Crimes Act 2009, and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. You now come before this Court for sentence.
2. Your victim was 13 years old at the time of the offence. She was playing in the compound with her four brothers when you entered her house asking for a glass of water. Her parents were away at work at that time. She trusted you as a neighbor. She gave you a glass of water and went to the kitchen to wash dishes. You followed her to the kitchen and touched her breast and her vagina on top of her clothes. She felt bad. She tried to push you and ran away. You opened the gate she had closed and came back inside the house. You carried her to the bedroom and put her on the bed. You took off his clothes and touched her breast and vagina.

You got hold of her tightly and put your hand on her mouth to silence her. Then you kissed her vagina and put your penis forcefully in her vagina. After that you took out your penis and ejaculated on the rug.

3. The maximum penalty prescribed for the offence of Sexual Assault is 10 years' imprisonment. The sentencing tariff ranges from 2 to 8 years' imprisonment, the top end being reserved for serious sexual assaults [*State v Epeli Ratabacaca Laca*, HAC 252 of 2011]. In *Laca*, depending on gravity, three (3) categories of sexual assaults were identified:

Category 1

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim's body;

(ii) Contact with the genitalia of the victim by the offender using part of his body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

4. The acts of touching the necked breast and kissing lips and vagina of the victim fall into category 2 above.
5. The maximum sentence for Rape is life imprisonment. The sentencing tariff for juvenile rape ranges from 11 years to 20 years' imprisonment. [*Aitcheson v [2018] FJSC 29; CAV0012.2018 (2 November 2018)*].

6. In selecting a sentence that is best suited to you, I must have regard to the proportionality principle enshrined in the Constitution and the Sentencing and Penalties Act 2009 (SPA). I would also have regard to the maximum penalty prescribed for the offences, the current sentencing practice and the applicable guidelines issued by the courts. Having due regard to the seriousness of the offence and harm caused to the victim, I would select the appropriate starting point. The final sentence would be determined after making due adjustments for the aggravating and the mitigating circumstances.
7. The courts in the Republic of Fiji, at all levels, have repeatedly pronounced that rape of a child is the most serious form of sexual violence. The United Nations Convention on Rights of the Child to which Fiji is a party and our own Constitution require the courts to protect the children who are vulnerable members of our society. The children are entitled to live their lives free from any form of physical or emotional abuse.
8. Sexual offences involving children are on the rise in Fiji. The courts have emphasised that the increasing prevalence of this offence in our community calls for deterrent sentences. The duty of this Court is to see that the sentences are such as to operate as a powerful deterrent factor to prevent the commission of such offences. The offenders must receive condign punishment to mark the society's outrage and denunciation against sexual abuse of children. The main purpose of your punishment is to condemn your action and to protect the public from the commission of such crimes by making it clear to you and to others with similar impulses that, if anyone yield to these crimes will meet with severe punishments.
9. Both offences took place in a single transaction and are based on the same facts. According to Section 17 of the Sentencing and Penalties Act 2009, if an offender is convicted of more than one offence founded on the same facts, the court has a discretion to impose an aggregate sentence of imprisonment in respect of those offences. This is a fit case to impose an aggregate sentence under Section 17 of the Sentencing and Penalties Act for both offences.
10. Having taken into consideration the seriousness of the offences and the harm caused to the victim, I select a starting point of 11 years for both offences from the bottom range of the tariff.

11. I have identified the following aggravating and mitigation factors with the help of the submissions filed by the Counsel, the Victim Impact Statement and the medical reports:

Aggravating factors:

- (a). The victim trusted you as a neighbor and adult when she gave you a glass of water. You breached that trust.
- (b). There is a considerable age gap between you and the victim. You were 34 years old at the time of the offending when your victim was only 13 years old.
- (c). You exploited the vulnerability of a child when her parents were away.
- (d). The trauma caused to the child victim scarred her rest of her life. The psychological impact on the victim is enormous and your offence made her life miserable.

Mitigating Factors:

- (a). You are now 38 years of age. You are a labourer by profession. Your Counsel has informed me that you are a asthma patient. The Medical Report attached shows that you have been treated at the Sigatoka Hospital for Ischemic Heart Disease, Diabetes Mellitus2, Hypertension, Bronchial VS Cardiac Asthma and Hyperlipidaemia. However, the doctor has stated that you are currently stable on medication. There is no evidence that you are in an urgent need of a heart surgery overseas as indicated by your counsel. The personal circumstances are of little mitigatory value.
- (b). You have maintained a clear record over the past 38 years of your life. You do not have any previous convictions.

12. I add 3 years and 4 months to the starting point of 11 years for the above mentioned list of aggravating factors to arrive at an interim sentence of 14 years and 4 months' imprisonment. I reduce 1 year for mitigating factors to arrive at a sentence of 13 years and 4 months' imprisonment.

13. You had been in remand for approximately 4 months. I deduct 4 months for the remand period to arrive at a final aggregate sentence of 13 years' imprisonment.

14. Taking into consideration your age, health condition, potential for rehabilitation and the gravity and the impact of the offence on the society, I impose a non-parole period of 10 years.
15. Summary.
Mr. Rizwan Mohammed Ali, you are sentenced to an imprisonment term of 13 years with a non-parole period of 10 years.
16. You have 30 days to appeal to the Court of Appeal.



Aruna Aluthge
Judge

13 February 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence