

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 138 of 2020**

**STATE**

**V**

**APIMELEKI NAVATOGA**

**Counsel** : Ms. S. Swastika for the State.  
: Mr. S. Heritage for the Accused.

**Dates of Hearing** : 03, 04, 05 and 06 October, 2023  
**Closing Speeches** : 11 October, 2023  
**Date of Judgment** : 11 October, 2023  
**Date of Sentence** : 26 October, 2023

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**SENTENCE**

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*(The name of the victim is suppressed he will be referred to as "M.N")*

1. In a judgment delivered on 11<sup>th</sup> October, 2023 this court found the accused guilty of one count of rape and convicted him accordingly.
2. The brief facts were as follows:

- a) The victim and the accused are cousin brothers and were staying in the same village. In the year 2019 the victim was 14 years of age and attending Special School.
- b) On 21<sup>st</sup> March, 2019 at about 10am the victim after dropping his mother at the village bus stop was going home when he was called by the accused to come inside his house.
- c) When the victim was sitting on the settee inside the accused house, the accused closed both the doors went to the victim blocked his mouth from behind and pushed him on the floor. The victim was scared he lay facing the floor the accused started removing the victim's pants. The accused put his hand on the victim's mouth blocking it and with the other hand the accused pulled down his pants whilst kneeling over the victim. The victim was struggling by turning and twisting because he did not want the accused to remove his pants.
- d) The accused was able to pull down the victim's pants and was able to insert his penis into the anus of the victim by moving his penis in and out repeatedly for a few minutes. The victim told the accused that it was painful but the accused did not stop he told the victim not to do anything otherwise he will punch the victim.
- e) The victim did not consent to what the accused had done to him. After a week the victim started having back pain and had difficulty in passing his stool since his anus was painful. One evening the victim's parents noticed the victim's situation his father brought a torch and told him to remove his pants and bend over. The victim told his parents everything the accused had done to him. The matter

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

3. The state counsel filed written sentence submissions and the defence counsel filed mitigation for which this court is grateful.
4. The following personal details and mitigation was submitted by the counsel for the accused:
  - a) The accused is 32 years old;
  - b) First offender; (character references attached)
  - c) Is married and has 3 young children;
  - d) Is a Farmer;
  - e) Is an active member of the community;
  - f) Cooperated with police;
  - g) Charge hanging over his head for four years before being completed.
5. 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**

6. The following aggravating factors are obvious in this case:

a) Breach of Trust

The victim and the accused knew each other they were cousins living in the same village. The accused grossly breached the trust of the victim by his actions. The accused owed a duty of care and responsibility towards the victim but he did not live up to this responsibility by his action.

b) Victim was vulnerable

The victim was vulnerable, alone and unsuspecting the accused called the victim into his house and took advantage of the situation and sexually abused the victim in his house. The accused overpowered the helpless victim.

c) Age difference

The victim was 14 years whereas the accused was 28 years. The accused was a mature adult who should have known better. The age difference is substantial.

d) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victims by mature adults known to the victim. The accused being the mature of the two did not give a second thought about what he was doing to the victim.

e) Exposing children to sexual abuse

The accused had exposed the victim to sexual abuse he basically robbed him of his innocence and exposed him to an unexpected experience.

**TARIFF**

7. 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.
8. Bearing in mind the objective seriousness of the offence committed I take 11 years imprisonment (lower range of the scale) as the starting point of the sentence. The sentence is increased for the aggravating factors, for mitigation it is noted that the accused is a first offender hence a person of good character (all the character references have been taken into account).
9. 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 reduced to reflect good character and other mitigation.
10. I note from the court file the accused was remanded for 1 month and 14 days. In exercise of my discretion I reduce the sentence by 1 month and 20 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence for one count of rape is 13 years, 10 months and 10 days imprisonment.

11. 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 for the offence of rape as the maximum penalty.
12. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults.
13. 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 offender sexually abuses a child, he or she should expect condign punishment to mark the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
14. 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.”*”

15. 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."*

16. 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.*
17. Mr. Navatoga, you have committed a serious offence against your cousin and villager who was unsuspecting, alone and vulnerable by forcefully penetrating his anus with your penis. You cannot be forgiven for what you have done to this victim.
18. Exposing a child to sexual abuse 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.
19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim your cousin brother of 14 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.
20. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 11 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 all the circumstances of this case.

21. In summary I pass a sentence of 13 years, 10 months and 10 days imprisonment with a non-parole period of 11 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.
22. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

26 October, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Iqbal Khan & Associates for the Accused.**