

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 146 OF 2012S

STATE

VS

SIVANIOLO NAVUNIDAKUA

Counsels : **Ms. M. Fong for the State**
Mr. S. Waqainabete for Accused
Hearings : **4th and 14th February, 2013**
Sentence : **5th April, 2013**

SENTENCE

1. On 4th February, 2013, in the presence of your counsel, you pleaded guilty to the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SIVANIOLO NAVUNIDAKUA between the 1st day of June, 2007 and 31st day of August, 2007 at Naviteitei Village,

Bureta in the Eastern Division, attempted to have unlawful carnal knowledge of I. S without her consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 154(1) of the Penal Code, Cap. 17.

Particulars of Offence

SIVANIOLO NAVUNIDAKUA between the 1st day of June, 2007 and 31st day of August, 2007 at Naviteitei Village, Bureta in the Eastern Division, unlawfully and indecently assaulted I. S.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

SIVANIOLO NAVUNIDAKUA between the 1st day of March, 2009 and 31st day of April, 2009 at Naviteitei Village, Bureta in the Eastern Division, had unlawful carnal knowledge of I. S without her consent.

FOURTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

SIVANIOLO NAVUNIDAKUA on the 28th day of March, 2009
at Naviteitei Village, Bureta in the Eastern Division, unlawfully
and indecently assaulted **I. S.**

2. The matter was adjourned to 14th February, 2013, to enable the prosecution to prepare and present the summary of facts. The summary of facts was presented on 14th February, 2013 by the prosecutor.
3. The summary of facts were as follows. The female complainant was born on 17th July, 1995. So, when the offence against her were allegedly committed, she was a child because she was under 14 years old. On count no. 1, it was alleged that the accused, who was 40 years old at the time, attempted to rape the complainant between the 1st June to 31st August, 2007. Early one morning, the accused came to the complainant, while she was half asleep, and attempted to thrust his erected penis into her vagina, without her consent. She was 12 years old at the time. The complainant resisted the accused, who later stood up and left.
4. On count no. 2, again between the 1st June to 31st August 2007, the complainant awoke early one morning to find herself naked, with the accused's erected penis between her buttocks, and he was moving the same to and fro. He was also fondling her breast from behind. The complainant never consented to the same. She was 12 years old at the time.
5. On count no. 3, between 1st March and 30th April, 2009, the accused took the complainant to the bush to look for some wild yams. She was 13 years 8 months old, at the time. While they were alone in the bush, the accused forcefully took off the complainant's clothes, sucked her breast and vagina, and then forcefully inserted his penis into her vagina. The complainant tried to resist but to no avail. She did not consent, and the accused well knew she was not consenting to sex, at the time.
6. On count no. 4, on 28th March, 2009, the accused again took the complainant to the bush to look for wild yams. When they were alone, the accused forcefully undressed the complainant, and put

her on the ground. He then sucked the complainant's breast, and licked her vagina. The complainant cried and resisted. The accused then stoop up, and they returned to the village.

7. The court checked with defence counsel to see that the accused had admitted all the elements of the offences in counts nos. 1, 2, 3 and 4. Counsel for the defence, on behalf of his client, admitted all the elements of the offences in counts no. 1, 2, 3 and 4. They admitted that the accused attempted to rape the complainant in count no. 1, and indecently assaulted her twice as mentioned in counts no. 2 and 4, and also raped her, as mentioned in count no. 3. They admitted the complainant was not consenting, at the time, and they knew she was not consenting to the accused's actions, at the time. On the basis of the above, the court found the accused guilty as charged on all counts, and convicted him accordingly.
8. I will start with count no. 3, as it involved the more serious offence of "rape". As has often been said before, rape is always a serious offence. It carries a maximum sentence of life imprisonment. For the rape of an adult, the tariff is a sentence between 7 to 15 years imprisonment. This case involved the rape of a child, and the tariff is a sentence between 10 to 15 years imprisonment: see **Mohammed Kasim v The State**, Criminal Appeal No. 21 of 1993, Fiji Court of Appeal; **Mark Lawrence Mutch v State**, Criminal Appeal No. AAU 0060 of 1990, Fiji Court of Appeal; **The State v N. K.** Criminal Case No. HAC 155 of 2010, High Court, Suva; **State v Simione Talenasila**, Criminal Case No. HAC 11 of 2010, High Court, Lautoka. The actual sentence will depend on the mitigating and aggravating factors.
9. As for "attempted rape" in count no. 1, the maximum sentence was 10 years imprisonment. The tariff for this offence is a sentence between 1 to 5 years imprisonment: see Her Ladyship Madam Justice Shameem's decision in **Aunima v State** [2001] 1 FLR 213.
10. As for "indecent assault" in counts nos. 2 and 4, the maximum sentence is 5 years imprisonment. The tariff for "indecent assault" is a sentence between 1 to 4 years imprisonment. The more serious the indecent assault is, the higher the sentence will be: see **Ratu Penioni Rakota v The State**, Criminal Appeal No. HAA 0068 of 2002S, High Court, Suva; **Sikeli Nayate v The State**, Criminal Appeal No. HAA 46 of 2008, High Court, Suva.

11. The aggravating factors, in this case, were as follows:

- (i) You were in a position of trust to the complainant, when you committed these offences. She came to live in your home, to be with your daughter, as they were studying for their exams. The complainant was your daughter's friend and both of them were under 14 years, at the time. You were 40 years old, at the time. In your daughter's bedroom, where the complainant was sleeping next to her friend, you attempted to rape her. She was aged 12 years, at the time. Your criminal action, was a serious breach of trust.
- (ii) Furthermore, while the complainant was in your house, you repeatedly assaulted her indecently. You did these while your children were around, but in other parts of the house. Your actions were despicable, and an utter disregard to the complainant's right to be left alone and not subjected to the above.
- (iii) In count no. 3, you pretended to take the complainant to the bush to look for wild yams. You deliberately set up the complainant to be raped on that day. She was 13 years 8 months old at the time. You knew she would be defenceless in the bush. Then you put your plan into action. You forced yourself on her. You knew her resistance would be futile. Then you raped her. You must accept that your liberty will have to be forfeited to atone for your misdeeds.
- (iv) Your offendings were a serious violation of the child's human rights. After committing the offence, you then threatened her to keep quite or something nasty will be done to her.

12. The mitigating factors are as follows:

- (i) In the last 10 years, you haven't offended, and thus I am treating you as a first offender, at the age of 41 years;

- (ii) You pleaded guilty to the offence 9 months after first call in the High Court. Nevertheless, you saved the court's time, and the need for the complainant to relieve her ordeal in the courtroom;
 - (iii) You have been remanded in custody from 24th July, 2012 to now, that is, approximately 8 months 10 days ago.
13. I will start with the rape offence (count no. 3) first. I start with a sentence of 12 years imprisonment. I add 5 years for the aggravating factors, making a total of 17 years imprisonment. For the mitigating factors, I deduct 4 years, leaving a balance of 13 years imprisonment. On count no. 3, I sentence you accused to 13 years imprisonment.
 14. On count no. 1 (attempted rape), I start with a sentence of 2 years imprisonment. For the aggravating factors, I add 2 years prison, making a total of 4 years imprisonment. For the mitigating factors, I deduct 1 year imprisonment, leaving a balance of 3 years imprisonment.
 15. On count no. 2 (indecent assault), I start with a sentence of 1 year imprisonment. For the aggravating factors, I add 1 year prison, making a total of 2 years imprisonment. For the mitigating factors, I deduct 1 year imprisonment, leaving a balance of 1 year imprisonment.
 16. On count no. 4 (indecent assault), I repeat the process and sentence in count no. 2.
 17. In summary, your sentences are as follows:

(i)	Count No. 1	:	Attempted Rape	:	3 years imprisonment
(ii)	Count No. 2	:	Indecent Assault	:	1 year imprisonment.
(iii)	Count No. 3	:	Rape	:	13 years imprisonment.
(iv)	Count No. 4	:	Indecent Assault	:	1 year imprisonment.

All the above sentences are concurrent to each other, that is, a total sentence of 13 years imprisonment. I sentence you, Sivaniolo Navunidakua, to 13 years imprisonment, with a non-parole period of 12 years imprisonment, effective forthwith.

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JUDGE

Solicitor for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitor for Accused : **Legal Aid Commission, Suva.**