

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 102 OF 2012

STATE

-v-

SUBRAMANI

Counsels : Mr. F. Lacanivalu for the State

Mr. R. Kumar for the accused

Date of Sentence : 5th December 2013

(Name of the victim is suppressed she is referred to as MR)

SENTENCE

1. You are charged as follows:

First Count
Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Subramani between the 1st day of May 2012 and the 31st day of May 2012 at Yalava, Sigatoka in the Western Division, penetrated the vagina of a girl namely **MR** aged 11 years old with his finger.

Second Count
Statement of Offence

Rape: Contrary to Section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Subramani between the 1st day of May 2012 and the 31st day of May 2012 at Yalava, Sigatoka in the Western Division, penetrated the vagina of a girl namely **MR** aged 11 years old with his penis.

2. You pleaded not guilty to these charges on 19th September 2012. When the case was taken up for trial on 29.11.2013 and charges were read over to you before the assessors, you again pleaded not guilty.
3. However after the evidence of the victim was recorded, you wanted to change the plea and pleaded guilty to both charges. You admitted summary of facts on 3rd December 2013.
4. The Summary of Facts submitted by the State Counsel states as follows:

The Complainant stays with her grandfather, uncle (her father's brother), aunt, cousin sisters' and brothers'. She attends Nalagi Public School and is in class 7. The Complainant is the Accused's grand-niece as he and her grandfather are brothers.

Between the 1st of May 2012 and the 31st of May 2012, the Accused was staying at the Complainant's home after he came to attend her grandmother's funeral.

Sometimes between the 1st of May and the 31st of May 2012, on a Saturday during the day, the Complainant was in one of the three bedrooms of their home while her cousins were watching movies in the living room. At that time, the Complainant was 11 years old and was in Class 6. The Accused was in another room when he called the Complainant's name. While setting her bed, the Complainant heard the Accused called her name. She then went to him in his room and asked him what happened. She was wearing a blue and white top, white vest, skirt, black tights and red panty. As soon as she got to him, the Accused pushed her on to the bed in the room and her skirt went up. He then came on top of her and forcefully removed her black tights and her panty while leaving her top on. He then used his hands to forcefully penetrate the Complainant's vagina. Afterwards, he then forcefully inserted his penis into her vagina. She felt it was painful and also felt blood coming from her vagina. After about 10 seconds, the Complainant pushed the Accused away onto the bed before grabbing her clothes and running away to her room.

5. After carefully considering the Plea of you to be unequivocal, this Court found you guilty for two counts of Rape and accordingly you are convicted for two counts under Section 207 (1) and (2) (c) and (3) of the Crimes Decree.

6. Accused **Subramani**, you stand convicted for two counts of Rape.
7. The tariff for rape is well settled since the Judgment of Hon. Mr. Justice A.H.C.T. Gates in **State v Marawa**[2004] FJHC 338; HAC 0016T.2003S (23 April 2004). The starting point of a rape of an adult is 7 years. The tariff is 7 years to 15 years.
8. In **Mohamed Kasim v The State** (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993; 27 May 1994, the Court of Appeal observed:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

9. The tariff for the rape of children differs from that of adults and takes the tariff of 10 to 15 years.
10. In **State v Mario Tauvoli** [2011] FJHC 216, HAC 027.2011 Hon. Mr. Justice Paul Madigan held that:

“Rape of children is a very serious offence in deed and it seems to be very prevalent in Fiji at the time. The legislation had dictated harsh penalties and the 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.”

In this case 42 year step father was sentenced for 13 years with non parole period of 10 years for digital rape of 14 year old step daughter.

11. In **State v Anthony** [2012] FJHC 1013; HAC 151.2010 Hon. Mr. Justice Priynatha Nawana held that:

“The accused’s engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl of

MB's standing is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and assess even by psychologists and sociologists. The depravity of the accused in committing the offence should be denounced to save little children for their own future; and, the men of the accused's caliber should not be allowed to deny the children of their legitimate place in the community. In passing down the sentence in case of this nature, deterrence is therefore, of paramount importance."

12. It was held further by Hon. Mr. Justice Priynatha Nawana that:

"The accused had not shown any remorse or repentance. On the contrary, he relentlessly castigated the witnesses saying that they were making up a false allegation at the expense of the little girl to avenge an unsubstantiated previous incident of refusing a loan to MB's mother. This added, in my view, insult to the injury. While court recognizes that the accused was entitled to advance any proposition in support of his case, court equally recognizes that it should show its displeasure by showing no mercy in the matter of sentence when such allegations are found to be totally ill-founded as in this case."

13. Considering the above, I commence your sentence at 12 years imprisonment for each charge of Rape.

14. Aggravating factors;

- (a) The victim was of a younger and tender age,
- (b) You completely breached the trust shared between you and the victim,
- (c) Victim was subjected to more than one sexual act,
- (d) You had made the victim sexually active at a young age,
- (e) You had traumatized the life of the victim,

Considering all, I increase your sentence by 3 years now the sentence is 15 years imprisonment.

15. Mitigating circumstances:

- (a) You are first offender at the age of 65 years,
- (b) You are asthmatic and suffer from gastritis.

Considering above, I reduce 1 year from your sentence now your sentence is 14 years imprisonment.

16. In **Sakiusa Basa v The State** Criminal Appeal No AAU 0024 of 2005 the Court of Appeal held that:

“The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.”

17. For the guilty plea, I deduct 1 year and now your sentence is 13 years.

18. You were in remand for a period of 1 year and 3 months. I deduct that period from above sentence. Now your sentence is 11 years and 9 months.

19. Considering Section 18 (1) of the Sentencing and Penalties Decree, I impose 10 years as non parole period.

20. Your sentences are as follows:

- | | | | |
|------|-------------------------------|---|-------------------|
| (i) | 1 st count of Rape | - | 11 years 9 months |
| (ii) | 2 nd count of Rape | - | 11 years 9 months |

21. The Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013) cited with approval the following citation of D.A. Thomas, Principles of Sentencing (2nd edition, 1979) p. 56-57 which was cited in High Court of Australia judgment **Mill v The Queen** [1988] HCA 70:

“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at

the total just to see whether it looks wrong'; "when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences."

22. Considering the totality principle, I order the sentences for both charges to run concurrently.

Summary

23. You are sentenced to 11 years and 9 months imprisonment. You will not be eligible for parole until you complete serving 10 years of imprisonment.

24. 30 days to appeal to Court of Appeal.

Sudharshana De Silva

JUDGE

**At Lautoka
05th December 2013**

**Solicitors for the State : Office of the Director of Public Prosecutions for Prosecution
Solicitors for the Accused: Office of the Legal Aid Commission**