

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 143 of 2013

STATE

V

JOSEPH SHYAM NARAYAN

Counsel : Ms. D. Kumar with Mr. S. Shah for the State
Mr. S. Kumar for the Accused

Dates of Hearing : 12th July – 15th July 2016

Date of Summing Up: 15th July 2016

Date of Judgment : 18th July 2016

Date of Sentence : 25th July 2016

(Name of the complainant is suppressed. Accordingly, the complainant will be referred to as SS)

SENTENCE

1. Joseph Shyam Narayan, after trial, you stand convicted of the following offences;

FIRST COUNT

Statement of offence

Sexual Assault: Contrary to section 210 (1)(a) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

JOSEPH SHYAM NARAYAN between the 1st and 28th day of February 2013 at Nasinu in the Central Division unlawfully and indecently assaulted SS.

SECOND COUNT

Statement of offence

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

Particulars of offence

JOSEPH SHYAM NARAYAN on the 13th day of March 2013 at Nasinu in the Central Division penetrated the vagina of SS with his tongue without her consent.

2. The assessors unanimously opined that you are guilty of both the above counts.
3. Briefly, the facts of the case are as follows. At the time of the incidents in question, the complainant was a 17 year old school girl. Complainant's parents got separated when she was 10 years old as her mother left the house. She was living with her father and the stepmother for some time. Then she came to live in your house with her mother in 2011 because she had problems with her step mother after her father left for New Zealand. You were the complainant's mother's *de facto* husband. From the time the complainant started living in your house, you used to pass unacceptable comments to her. One day, you caught the complainant smoking inside the bathroom. You discovered this when you forcefully opened the bathroom door while the complainant was naked inside the bathroom, about to have a bath. You then touched the complainant's vagina and told the complainant that you will keep her secret if she keeps your secret. On a subsequent day, you penetrated the complainant's vagina with your tongue. You expected the complainant to keep quiet as you were holding her secret. But the complainant decided to complain to her form teacher after you told her one morning when you dropped her at school, not to come back home until she make up her mind to have sex with you.
4. This matter involves sexually exploiting a helpless child who was already suffering due to the conduct of her own parents. Victim's father was looking after her since her mother left. But he was living with another woman. When the father left the country, the victim had problems with this stepmother and a decision had to be taken where she should be placed. She preferred to go to a boarding school but her mother who was living with you, decided to provide her shelter at your house. You however did not see the victim as a daughter. You were looking for an opportunity to take advantage of her

and then you caught her smoking. Without taking steps to correct her, you kept this as a secret and encouraged her to continue smoking because you wanted to use this secret to stop her from complaining against you. You took advantage of the complainant's naivety and helplessness.

5. You are convicted of the offences of sexual assault and rape. The offence of sexual assault under section 210(1) of the Crimes Decree carries a maximum sentence of 10 years imprisonment. Following the case of *State v Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012), this court has been applying an imprisonment term between 2 to 8 years as the tariff for sexual assault.
6. Pursuant to section 207(1) of the Crimes Decree 2009 the maximum punishment for rape is life imprisonment. It is settled that the sentencing tariff for rape of a child victim is a term of imprisonment between 10 to 16 years (*Anand Abhay Raj v State* [2014] FJSC 12).
7. The two offences you are convicted of are offences of similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree"), I consider it appropriate to impose an aggregate sentence of imprisonment for the first and the second counts. Section 17 of the Sentencing and Penalties Decree reads thus;

"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."

8. I take 10 years as the starting point of your aggregate sentence.
9. I consider the following as aggravating factors;
 - a) you were victim's stepfather. There was a breach of trust;
 - b) age gap between you and the victim is 20 years; and
 - c) you took advantage of the victims naivety and vulnerability.

10. Your counsel submits the following as your mitigating circumstances;
 - a) you are 41 years old;
 - b) you are the sole breadwinner of your family; and
 - c) you support your parents who are having medical conditions.

11. Your counsel also says you are 'remorseful of being found guilty'. The fact that you were compelled to regret your actions because you were found guilty, is not true remorse that can be considered as a mitigating factor.

12. Considering the aforementioned aggravating factors, I add 5 years to the starting point. Now your sentence is 15 years imprisonment.

13. I deduct 4 years of your sentence considering the above mitigating factors.

14. For the first and the second counts, I hereby sentence you for an aggregate sentence of 11 years imprisonment. I order that you are not eligible to be released on parole until you serve 09 years of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Decree 2009.

15. Section 24 of the Sentencing and the Penalties Decree reads thus;

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

16. I note that you have spent 1 month and 02 days in custody before you were granted bail and you spent 10 days in remand pending your sentence. The period you were in custody shall be regarded as a period of imprisonment already served by you pertaining to the sentence imposed on you in this case. I hold that the period to be considered as served should be 1 month and 12 days.

17. In the result, you are sentenced to 11 years imprisonment with a non-parole period of 09 years. Considering the time spent in remand, the time remaining to be served is as follows;

Head Sentence – 10 years, 10 months and 18 days

Non-parole period – 08 years, 10 months and 18 days

18. 30 days to appeal to the Court of Appeal.



Vinsent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Sunil Kumar Esq, Nausori.