

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 155 OF 2013

BETWEEN : STATE

AND : VISHAL KRISHNA

Counsel : Ms. J. Fatiaki for State
Ms. Volau for the Accused

Date of Hearing : 16th - 17th of August 2016

Date of Closing Submissions : 17th of August 2016

Date of Summing Up : 23rd of August 2016

Date of Judgment : 24th of August 2016

Date of Sentence : 25th of August 2016

SENTENCE

1. The name of the victim is suppressed.
2. Mr. Vishal Krishna, you are found guilty and convicted accordingly by this court for one count of Indecent Assault contrary to Section 212(1) of the Crimes Decree, which carries a maximum penalty of five years imprisonment, one count of Rape contrary to Section 207 (1) (2) (a) of the Crimes Decree which carries a maximum penalty of life imprisonment, one count of Sexual Assault contrary to Section 210

(1) (a) of the Crimes Decree, which carries a maximum penalty of ten years imprisonment and one count of Rape Contrary to Section 207 (1) and (2) (b) of the Crimes decree which carries a maximum penalty of life imprisonment.

3. It was proved at the conclusion of the hearing, that you have committed these four offences between 1st day of April 2012 and 1st day of May 2013. The victim is your niece and was staying at your house. In respect of the first count, it was proved that you came and touched the breast of the victim while she was revising her notes in her bed room. In respect of the second and third count, it was proved that you came behind the victim while she was cleaning the bed room of her aunty and pushed her on to the bed. You then unbuttoned her top and lifted her skirt. Having done that, you indecently rubbed your penis on her vagina. You then inserted your penis into the vagina of the victim without her consent. In respect of the fourth count, it was proved that you came to the victim while she was sleeping in her bedroom in the night and inserted you finger into her vagina.
4. This is a case of sexually exploitation of a child by a known relative within her own domestic environment. She is your niece and the daughter of your elder brother. She came to live with your family as she was ill treated by her step mother. The victim has considered you and your wife as the persons who provided her needs. She has considered your house and the family as her own. The family environment is the most protective and appropriate environment for a child to grow up with confidence and safety. Close family members and relatives are the most trusted and dependable people surrounded during the developmental stages of a child. Therefore, sexually assaulting a child within her

own family environment by a known relative is one of the outrageous forms of sexual crime.

5. In view of the seriousness of these offences, it is my opinion that such offenders must be dealt with severe and harsh punishment. Hence, the purpose of this sentence is founded on the principle of deterrence and protection of community. Moreover, the court must demonstrate in sentencing that the offenders of this nature are socially abhorrent.
6. Hon. Chief Justice Gates in Anand Abhay Raj [2014] FJSC 12; CAV0003.2014 (20 August 2014) held that the tariff for rape of a child is between 10 -16 years' imprisonment period.
7. Justice Shameem in Rokota v The State [2002] FJHC 168; HAA0068].2002S (23 August 2002) held that the acceptable tariff for the offence of Indecent Assault under Section 154 (1) of the repealed Penal Code ranges from 12 months of imprisonment to 4 years of imprisonment. Her Ladyship has further discussed the applicable approach in sentencing of offender of this nature, where her ladyship found that;

"From these cases a number of principles emerge. Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest

attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence”.

8. The offence of Indecent Assault under Section 154 (1) of the Penal Code was only applicable to women and girls, where it states that;

“Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment”

9. The offence of Indecent Assault under the regime of Crimes Decree has expanded the scope of definition, covering any person. However, the main elements and the punishment prescribed under the old regime of Penal Code and the new regime of Crimes Decree for the offence of Indecent Assault remain the same.

10. Justice Fernando in **State v Nukumate [2011] FJHC 109; HAC184.2010 (4 February 2011)** in sentencing for the offence of Indecent Assault under the Crimes Decree, has adopted the tariff limits expounded by Justice Shameem in **Rokota (supra)**, where his lordship held that;

“Maximum sentence for the offence of Indecent Assault is 5 years imprisonment. Sentences for Indecent Assault range from 12 months imprisonment to 4 years (Rokota v State [2002] FJHC168; HAA 0068]. 2002S [23 August 2002])”

11. Justice Madigan in **State v Epeli Ratabaceca Laca - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012)** has expounded the tariff for the offence of Sexual Assault as between 2 years to 8 years’ imprisonment. Having considered

the sentencing guidelines adopted in United Kingdom, His Lordship has further discussed the applicable sentencing approach for the offence of Sexual Assault, where his lordship held that;

“The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.

A very helpful guide to sentencing for sexual assault can be found in the United Kingdom’s Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

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 or her 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 part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)"

12. In consequence of these crimes, the victim had to relocate her place of residence with her aunty from Cuvu to Drasa. With that she had to change her school too. Her mother has passed away and her father is now married to another person. Her step mother had treated her badly, forcing her to live with the family of the accused. Since then she had been living under your authority. Hence, it appears that she was a vulnerable child due to her personal circumstances. In view of these factors, I find the level of harm caused by you on the victim is very high.

13. You have unleashed these disgraceful sexual exploitations on the victim when she was not in a position to seek any assistance or find a way to escape. At one occasion, she was cleaning the bed room of her aunty. You sent your two children to the sea to catch crabs. Your wife was not at home. You then came and first rubbed your penis on her vagina and then inserted your penis into her vagina and raped her. In respect of the fourth count of rape, it was proved that you came to her and inserted your finger into her vagina while she was sleeping in the room. Hence, it appears that you found an opportunity, where the victim was vulnerable without any prospects of escaping, in order to satisfy your

heinous lustful sexual gratification. Hence, I find the degree of culpability in these offences is substantially high.

14. The victim states in the Victim Impact Report filed by the prosecution that these crimes caused adverse emotional and psychological effects in her life. However, I do not wish to give much weight on this report as it has not been prepared by an expert in this filed upon proper evaluation.
15. In view of the nature and the seriousness of these four offences, I select the second count of rape as the base offence for this sentencing.
16. Having considered the seriousness of the offence, the purpose of the sentencing, the level of harm and the degree of culpability in respect of the offence of rape as charged under count two, it is appropriate to select the starting point from the middle range of the tariff limit. I accordingly select thirteen (13) years as the starting point.
17. You have blatantly breached the trust reposed in you by the victim as her Uncle. By committing this crime on the victim, you denied her childhood and the natural growth of her life. Being the uncle of the victim, it was your duty and responsibility to provide the victim necessary protection and care with love and affection. By committing this crime, you have ignored to fulfill such duties and responsibilities. The age difference between you and the victim was about 23 years at the time of these crimes took place. I consider these factors as aggravating circumstances of this crime.

18. The learned counsel for the defence submitted in mitigation about your family circumstances. You are married and have a child. However, the family background of the offenders of this nature has very minimal mitigatory value.
19. You are a first offender. Therefore, it is appropriate to give you some substantial discount for your good character. You are now forty (40) years old. You have spent fifteen (15) days in remand custody prior to the hearing of this case. Therefore, you are entitled for a discount for the said period in remand custody pursuant to Section 24 of the Sentencing and Penalties Decree. I consider these factors as mitigating factors in your favour.
20. In view of the above discussed aggravating circumstances, I increased three (3) years to reach interim imprisonment of sixteen (16) years. I reduce one (1) years for the mitigating factors discussed above. Your final sentence has now reached to fifteen (15) years of imprisonment.
21. Having considered the seriousness of the offence, the purpose of the sentencing, the level of harm and the degree of culpability in respect of the offence of rape as charged under count four, it is appropriate to select the starting point from the middle range of the tariff limit. I accordingly select thirteen (13) years for the offence of Rape as charged under count four.
22. It was proved at the conclusion of the hearing, that you rubbed the vagina of the victim with your penis. It falls into the first category as stated in **Epeli Ratabacaca Laca (Supra)**. Hence, I select six (6) years imprisonment period for the offence of Sexual Assault.
23. I select 3 years for the offence of Indecent Assault.

24. Having considered your age and your previous good character, it is my opinion that all of these four sentences should be imposed concurrently with a parole period of fourteen (14) years.

25. Accordingly, I sentence you as follows,

i) Three (3) years of imprisonment for the offence of Indecent Assault, contrary to section 212 (1) of the Crimes Decree,

ii) Fifteen (15) years of imprisonment for the offence of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Decree,

iii) Six (6) years of imprisonment for the offence of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Decree,


iv) Thirteen (13) years of imprisonment for the offence of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Decree,

26. All these sentences are to be served concurrently. Accordingly, you have to serve a period of fifteen (15) years of imprisonment. Moreover, you are not eligible for any parole for a period of fourteen (14) years.

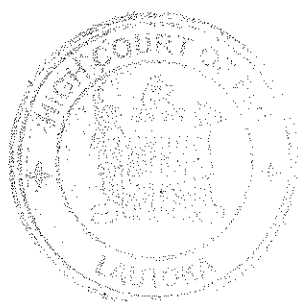
27. Since this incident involves domestic violence, I am satisfied that there are sufficient grounds to consider making an order under the Domestic Violence Decree. I accordingly make a permanent domestic violence restraining order against the accused with standard non molestation conditions and no contact conditions pursuant to section 24 and 28 of the Domestic Violence Decree. The above domestic violence restraining order will be in force until this court or any

other competence court is varied or suspended it. Furthermore, if you breached this restraining order, you will be charged and prosecuted for an offence pursuant of section 77 of the Domestic Violence Decree.

28. Thirty (30) days to appeal to the Fiji Court of Appeal.


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
25th of August 2016



Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission