

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 123 of 2013

STATE

V

WAISAKE WAININIMA

Counsel : Mr. J. Niudamu for the State.
: Mr. W. Rosa for the Accused.

Dates of Hearing : 21, 22, 26 June, 2017
Closing Speeches : 27 June, 2017
Date of Summing Up : 28 June, 2017
Date of Judgment : 29 June, 2017
Date of Sentence : 18 July, 2017

SENTENCE

(The name of the complainant is suppressed she will be referred to as "LD")

[1] In a Judgment delivered on 29 June, 2017 the court found the accused guilty and convicted him for one count of rape as per the following information:-

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and 3 of the Crimes Act of 2009.

Particulars of Offence

WAISAKE WAININIMA between the 1st day of December, 2012 and 30th day of December 2012 at Fiji Sugar Corporation Quarters, Rakiraki in the Western Division penetrated the vagina of “**LD**”, a child under the age of 13 years, with his penis.

[2] The brief facts were as follows:

The complainant who was 11 years of age and a class 5 student resided with her parents and two elder brothers at FSC Compound in Rakiraki. She knew the accused who was a distant cousin.

[3] On a day between 1 December, 2012 and 30 December, 2012 whilst the complainant's parents were in Suva the accused and his friends came to the house of the complainant, together with her two brothers they all went to the river for a swim.

[4] The complainant was alone at home after a while the accused came back at this time the complainant was in her bedroom. In the bedroom the accused started kissing the complainant and then forcefully grabbed her and told her to take off her clothes. The complainant did as she was told since she was not strong enough to resist.

[5] The accused made the complainant lie on the bed took out his penis and inserted it into her vagina. The complainant felt pain so she told the accused to go away which he did.

[6] The complainant was frightened and shocked she did not know what to do. The complainant's aunt one evening saw the accused putting his hands around the buttocks of the complainant. The aunt of the complainant suspected something was happening to the

complainant. The complainant's father was informed and the matter was reported to the police.

[7] Both counsel have filed written sentencing submissions.

[8] Counsel for the accused presented the following personal details and mitigation on behalf of the accused:

- (a) The accused is 25 years of age;
- (b) First offender;
- (c) The accused apologizes to the complainant and her family and stands ready to talk to them to express his remorse;
- (d) The accused was a security guard at Vatukoula Gold Mines Ltd, he is in a de-facto relationship and the couple expects their first child in September this year;
- (e) Whatever has happened is completely out of character;
- (f) The accused seeks the mercy of the court in sentencing;
- (g) The accused cooperated with the Police during the course of investigation.

[9] I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs. The State, CAV 0003 of 2014* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

[10] Furthermore counsel for the accused at paragraph 5.01 of his written mitigation submission stated:

"The Accused humbly submits to the Honorable Court that he had to maintain his not guilty plea during the cause of the trial as he had not committed the offence. He further submits he could not admit to something that he rightfully believe he had not done. It is against his

character, his upbringing and principles. On the other hand, the Accused being the person he is would be the first person to admit the offence if he had indeed committed it.”

[11] It is unfortunate that counsel for the accused has embarked into making such incongruous comments on behalf of the accused knowing very well that the court has already convicted the accused. It is the duty of counsel to file submissions in court that are appropriate in its contents. Whilst the comments made shall not be taken against the accused I will also desist from making a finding whether the paragraph in question amounts to contempt of court.

[12] The aggravating features are:

(a) Breach of trust

The victim is related to the accused as a distant cousin who trusted the accused. The incident happened in the house of the complainant when she was alone. The accused breached the trust of a helpless and vulnerable victim.

(b) Age difference

At the time of the offending the victim was 11 years of age a primary school student and the accused was 20 years of age. The age difference of 9 years is substantial.

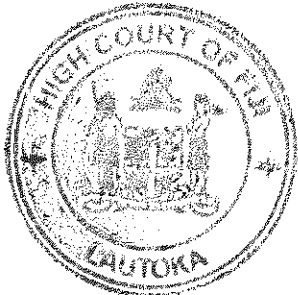
[13] The maximum penalty for the offence of rape is life imprisonment which means this offence falls under the most serious category of offences. The Supreme Court of Fiji in *Anand Abhay Raj (supra)* has confirmed that the tariff for the rape of a juvenile is now a sentence between 10 years to 16 years imprisonment.

- [14] Bearing in mind the seriousness of the offence committed I take 11 years imprisonment as the starting point of the sentence. I add 4 years for the aggravating factors bringing the interim total to 15 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, I find the accused good character has substantive mitigating value. I therefore reduce the sentence by 2 years.
- [15] I note the accused has been in remand for about 129 days which is about 4 months and 9 days in exercise of my discretion I reduce the sentence for the remand period by 4 ½ months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served by the accused. The final sentence is 12 years and 7 ½ months imprisonment.
- [16] Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 11 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 is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
- [17] Under section 18 (1) of the Sentencing and Penalties Act, I impose 9 years 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 which is just in the circumstances of this case.
- [18] Mr. Waininima you have committed a serious offence against a victim who trusted you and was related to you. I am sure the complainant will not easily forget what you had done to her, rather than

protecting her you have scarred her life forever by what you have done to her. No amount of remorse or regret will bring back what the victim had lost. The court has an obligation to protect the vulnerable from any form of sexual abuse and an immediate long term custodial sentence is warranted.

[19] In summary I pass a sentence of 12 years and 7 ½ months imprisonment for one count of rape that the accused has been convicted of with a non-parole period of 9 years to be served before the accused is eligible for parole.

[20] 30 days to appeal to the Court of Appeal.



At Lautoka

18 July, 2017

A handwritten signature in black ink, appearing to read "Sunil Sharma".

Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Zodiac Law, Tavua for the Accused.