

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

Criminal Case No. HAC 104 of 2017

BETWEEN : STATE

AND : PENI VUKICI

Counsel : Ms S Alagendra, Ms L Bogitini & Ms J Fatiaki for the State
Ms L Ratidara for the Accused

Date of Hearing : 17-20, 29 September & 13 November 2018

Date of Sentence : 14 December 2018

SENTENCE

[1] Peni Vukici, you stand convicted of seven counts of rape and two counts of indecent assault on your own guilty pleas. All except count seven are representative charges. I now pronounce your sentence.

Facts

[2] I base your sentence on the following facts. There are two victims in this case. They are your biological daughters. The second victim is also your granddaughter. She is the daughter of the first victim and was born as a result of rape. The facts disclose a systematic sexual abuse of the victims over a prolonged period of time. You were an authority figure and had total control over your family when the incidents occurred.

[3] Counts one to seven relate to the first victim. Her date of birth is 6 June 1972. She is the eldest of all the siblings. She is now 44 years old and has her own family. The sexual abuse started in 1982 when she was only 10 years old. You were 38 years old

and residing at Rakiraki at that time. On the night of the first incident the victim was left alone with her siblings under your care and protection. Your wife had gone to Rewa to attend a function. When you returned home in the early hours of the morning after drinking kava, you told the victim to massage your stomach. You then made her touch your genitals while you fondled her breasts. You told her that you were going to penetrate her and you did in fact have sexual intercourse with her. She did not consent to sexual intercourse and you did not care whether she consented or not. In her victim impact statement she has stated that she experienced severe pain and lost her virginity when you had sexual intercourse with her.

- [4] Thereafter, you engaged in a campaign of unstoppable rape and sexual abuse of the victim either inside your home or in the cane fields beside your home. In October 1986, you impregnated the victim when she was only 14 years old. You were 42 years old at the time. In 1990, the first victim left her home after she got married. Eventually she settled at Nasinu in Suva with her new family.
- [5] But the sexual abuse did not stop. In 1992 you raped the victim in her own home while her husband and your wife were attending an event in Rewa. She was in an advanced stage of pregnancy when this incident occurred.
- [6] Counts 8 and 9 relate to the second victim. Her date of birth is 17 July 1987. The incidents concerning her occurred between 1997 and 2013 for a period of 16 years when she was under your care and protection. You started sexually abusing the victim when she was only 10 years old. She had accompanied you to the swamps near your home at Tacirua in Suva to collect crabs when you touched her vagina in the pretext of washing it. When you returned home from the swamps you convinced her to sleep in your bedroom by telling her that her own bedroom was going to be used by the visitors on that particular night. While she was asleep in your bedroom, she woke up abruptly to find you performing oral sex on her. You instructed her not to resist. She complied as you were the authority figure in the family. Similar episodes of sexual abuse were repeated between 1997 and 2003.

- [7] The last incident occurred in 2013. The second victim was 26 years old at the time. You were 69 years of age. After the victim had come out of the shower, you called her in your bedroom and raped her. You threatened her with the stick used to prop up the bedroom window to make her subdue to your sexual gratification. You also covered her mouth in the process. You threatened her with further rape until the time she wished to marry. The next morning the victim escaped to her mother's home (the first victim) on the pretext of going to church.
- [8] You were arrested and interviewed under caution in February 2017. You were charged in March 2017 and produced in court. By the time you were charged you were 73 years old. You remained in custody until 30 May 2017 when you were released on bail. On this date your plea was also taken for the first time. You entered a plea of not guilty to the charges. On 11 September 2017, your plea was retaken after the Information was amended. You entered not guilty pleas.
- [9] The trial commenced on 17 September 2018 with a *voir dire* to determine the admissibility of your confession made to police under caution. You challenged the admissibility of your confession on the ground that it was unfairly obtained. After the conclusion of the *voir dire*, your confession was ruled inadmissible. On 19 September 2018, the Information was further amended without any objection from your counsel. The substantive trial commenced before three assessors. When the charges were put to you in the presence of the assessors, you pleaded guilty to all but two counts. The case was adjourned to the following morning. When the court reconvened the next day you pleaded guilty to the remaining two counts. By the time you changed your pleas to guilty the prosecution witnesses were summoned and were present outside the courtroom to give evidence.
- [10] Your counsel has urged this Court to consider a number of factors as mitigating factors. A mitigating factor in sentencing is a fact regarding the accused or circumstance of the crime that might result in a reduced sentence.

Previous Character

[11] Your counsel submits that you are a first time offender deserving a reduced sentence. Sentencing courts are required to consider the previous character of the offender pursuant to section 4(2) (i) of the Sentencing and Penalties Act. Section 5 of the Sentencing and Penalties Act states that in determining the character of an offender the court may consider (amongst other matters)-

- (a) The number, seriousness, date, relevance and nature of any previous findings of guilt or convictions recorded against the offender,
- (b) The general reputation of the offender,
- (c) Any significant contributions made by the offender to the community, or any part of it.

[12] You have two previous convictions recorded against you. Your first conviction was in 1977 for drunk and disorderly and your second conviction was in 1982 for counselling to set fire to crop. For drunk and disorderly you were fined and for counselling to set fire to crop you received a 4-month suspended sentence. Thereafter there is no conviction recorded against you. There is no suggestion that you have a good reputation in the community or that you have significantly contributed to the community. Instead your counsel has relied upon the submission that you are a first time offender deserving leniency in sentence.

[13] Although your convictions are spent and irrelevant, I am not satisfied that you deserve leniency in sentence because of your character. In cases of repeated sexual abuse of children, previous good character of the offender is of less significance (*R v Kennedy* [2000] NSWCCA 527 at [21] and *R v ABS* [2005] NSWCCA 255 at [25]). You embarked on a campaign of sexual violence against your own biological daughter for a period of 10 years (1982-1992). The deviant sexual behaviour did not stop in 1992.

[14] Your next victim was your granddaughter. You are also her biological father. You sexually abused her for a period of 16 years between 1997 and 2013. Both victims were minors when the campaign of sexual abuse started and it went on for 31 years,

undetected. For these reasons, I give no weight to your previous character as a mitigating factor.

Advanced Age

[15] Your counsel submits that your advanced age mitigates your sentence. You were born on 13 July 1944. You are now 74 years old. There is a principle in sentencing that a sentence should normally be shortened so as to avoid the possibility that an elderly offender will not live to be released from prison (*Rokota v The State* [2002] FJHC 168; HAA0068J.2002S (23 August 2002)).

[16] However, it must be stressed that old age is not a mitigating factor especially in cases of sexual offence. Old age is definitely not a licence to commit a crime. I accept that you are elderly with medical issues associated with old age, but I do not think your age is so exceptional to grant you mercy in sentence. You engaged in the worst form of sexual violence against your children for a period of 31 years. The last alleged incident occurred in October 2013. At that time you were 69 years old. Old age was not a barrier for you when you raped the second victim. According to your recent medical reports, you suffer from hypertension or poor vision due to old age, but these are conditions that the prison can adequately monitor and manage. For these reasons, I am not satisfied that your advanced age mitigates your sentence.

Physical Disability

[17] Apart from your advanced age, you are also relying upon your physical disability as a mitigating factor. The court has been informed that you are now wheelchair bound and being cared by relatives. According to your medical report you are suffering from chronic right hip deformity and left arm paralysis. Both conditions are due to old injuries. You will require special care if incarcerated.

[18] I am mindful that prison life will have some impact on you due to your physical disability but I am not convinced your sentence should be reduced because of your disability. Like advanced age, physical disability cannot be an excuse for avoiding a prison sentence (*State v Naulu* [2011] FJHC 113; HAC041.2010 (7 February 2011)). Like any other person with disabilities, your rights are protected in the Constitution

and the International Conventions on the Rights of Persons with Disabilities. Rule 5 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) creates an obligation on the prison administrations to make all reasonable accommodation and adjustments to ensure that prisoners with disabilities have full and effective access to prison life on an equitable basis. The Fiji Corrections Service is obliged by law to provide you with full and effective access to prison life on an equitable basis. You will have other recourse if there is a failure to comply with this obligation. Otherwise, your physical disability is of little relevance in sentencing.

Guilty Pleas

- [19] You further seek mercy on the ground that you are genuinely remorseful. You have based your claim for clemency on the fact that you have pleaded guilty to the charges. Guilty plea is a relevant consideration in sentencing. The weight to be attached to a guilty plea however depends on a number of factors. An early guilty plea may indicate that the offender is genuinely remorseful for his crime. An offender who takes responsibility for his conduct and is genuinely remorseful is more likely to respond to rehabilitation than an offender who takes no such responsibility. An early guilty plea also has a utilitarian value, that is, the plea has saved the State the expense of a contested trial (*Mataunitoga v State* [2015] FJCA 70; AAU125.2013 (28 May 2015)). In sexual offences, a further discount may be given if the victim is relieved from the trauma of giving evidence in court as a result of the guilty plea (*Navuniani Koroi v The State* (unreported Criminal Appeal No. AAU0037 of 2002S; 14 February 2003; *Kelepi Taqa v The State* (unreported Criminal Appeal No. AAU0042 of 2007; 26 June 2009).
- [20] Although there is no specific methodology for discounting guilty plea, it is desirable that the court indicate how much discount is given for the guilty plea. An early guilty plea that reflects genuine remorse will attract far more discount than a late guilty plea.
- [21] Your guilty pleas were made after the trial had commenced but before the prosecution had called any witnesses. Initially, there was some reluctance to plead guilty to all the charges but after the case was adjourned overnight, you pleaded guilty the following

morning in the presence of the assessors. By that time, the victims had been summoned and were waiting outside the courtroom when you changed your pleas to guilty. I further take note of the fact that the confession you made to police under caution was retracted by you. There is very little evidence of genuine remorse except that the victims were relieved from giving evidence. But they were not relieved from the anxiety of coming to court and facing their perpetrator. Even when the victims spoke at the sentencing hearing, you turned your head away from listening to them – again indicating you are not genuinely remorseful. The utilitarian value of your guilty pleas is very less. For all these reasons your guilty pleas carry very little weight as a mitigating factor.

Tariff and Guidelines

- [22] In assessing the objective seriousness of your offending, I am mindful that rape is punishable by life imprisonment and indecent assault is punishable by 5 years imprisonment. Recently, in *Aitchison v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court endorsed a new tariff of 11-20 years' imprisonment for rape of a child. The increased tariff recognizes the prevalence of sexual violence against children in our community and the need for the court to denounce such crimes in the strongest terms. The Supreme Court said at [24]:

The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent. (per Gates CJ)

Serious Harm to the Mental Health of the Victims

- [23] In assessing the objective seriousness of your actual conduct, I take into account you preyed on your biological daughters when they were minors – sexually molesting and raping them for a long period of time. The offences you committed were not isolated incidents of sexual violence. They were systematic infliction of sexual violence on children by a father. Your conduct is unspeakable. Your crimes have caused severe

damage to the victims' mental health. The evidence of the psychological impact that your crimes had on the victims is undisputed. Both victims have been clinically diagnosed to be suffering from Posttraumatic Stress Disorder and Major Depressive Disorder. Both are experiencing feelings of worthlessness and suicidal. The psychotic symptoms have been persistent and severe, affecting their social and family life.

Other Aggravating Factors

- [24] Other disturbing features of this case are that you impregnated the first victim at the age of 14. She gave birth to a child when she herself was a child. She lost an opportunity to complete her studies because of you. You preyed on her since she was 10 years old and vulnerable. The first incident of rape was a painful experience for her. Your wife knew about the sexual abuse but she was borne down by your threats. The sexual abuse continued for a decade. Even after she had become an adult and had her own family, you went and raped her in her own home when she was six months pregnant.
- [25] The second victim was also vulnerable when you started sexually molesting her at the age of 10 years. You took her off from school to prevent her from reporting. You preyed on her for 16 years. You got away with your crime for 31 years because of the fear you instilled in the victims from reporting. For these victims the demon was real, in the form of their own father. It has never left them to-date. The demon now appears in their nightmares.

The Punishment

- [26] Counsel for the State submits that the only fitting punishment for you is the maximum penalty prescribed for rape, that is, life imprisonment. In the event you are not sentenced to life imprisonment, the State recommends a head sentence of 41 years imprisonment to reflect your overall criminality.
- [27] As a general principle the statutory maximum sentence is reserved for the worst possible cases of its kind (*Harrison* (1909) 2 Cr App R 94, *R v Amber* Crim LR 266). The Parliament has prescribed life imprisonment for rape. However, life imprisonment has never been imposed for rape in Fiji.

- [28] Counsel for the State has helpfully referred to two cases where life imprisonment was imposed in cases of rape of daughters by their biological fathers. The first is an Irish case where a father pleaded guilty to sample charges of rape and sexual abuse of his four biological daughters that took place over a period of twenty years when they were aged between six and twelve. The trial judge took the view that the only sentence that would fit the criminality involved was life imprisonment. He sentenced the offender to life imprisonment in respect of each count of rape and to 5 years imprisonment for sexual assault, to be served concurrently. On appeal the Irish Court of Appeal upheld the sentence saying 'this must certainly be one of the worst cases of sexual abuse of young children by their father ever to come before the Court' (*DPP v D* [2004] IECCA 8(2) (21 May 2004)).
- [29] The second case is a South African case. In that case the accused pleaded guilty to rape of his 12-year old biological daughter and was sentenced to life imprisonment after the trial judge found no substantial and compelling circumstances existed to justify a sentence other than life imprisonment. On appeal the Supreme Court of Appeal of South Africa upheld the sentence of life imprisonment for rape. While this case demonstrates that a sentence of life imprisonment may be imposed for rape, I am mindful that the sentence was imposed under a different statutory sentencing regime.
- [29] In England, a life imprisonment for rape is justified in cases where the accused's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time (*R v Billam* [1986] 8 Cr App R (S) 48).
- [30] However, I am not persuaded that the dangerous offender principle shackles the exercise of the sentencing discretion in rape cases in Fiji. The maximum sentence of life imprisonment for rape will not be inappropriate if the case is one of the worst cases of sexual abuse of a child by a biological father.
- [31] This case presents a very disturbing criminal behaviour by a father towards his children. You raped your biological daughter when she was ten years old,

impregnated her when she was fourteen years old and continued to rape her when she was married and six-month pregnant with a child from her husband. You moved on to the second victim (your daughter and granddaughter) when she was ten years old and sexually abused her for 16 years with impunity using your authority as the patriarchal head of the family.

[32] The physical and psychological harm that you have caused to the victims is severe, if not permanent. This is one of the worst cases of rape of children by their own biological father to come before the Court. A father who rapes his own child deserves very little mercy. Your crimes are so abhorrent that they must be denounced in the strongest terms with the maximum sentence that the court can impose.

[33] I sentence you to life in prison on each count of rape and to 5 years' imprisonment on each count of indecent assault, to be served concurrently. I decline to fix non-parole period. Your release from prison is in the hands of the Executive now.

[34] I issue a permanent DVRO with standard non-molestation and no-contact conditions for the protection of the victims.



A handwritten signature in blue ink, appearing to read "D. Goundar", is written above a dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Office of Legal Aid Commission for the Accused