

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2017

STATE

V

UMENDRA KUMAR

Counsel : Ms. Mehzabeen Khan with Ms. Sadaf Shameem for the State
Ms. Lavinia David with Mr. Krisheel Chang for the Accused

Dates of Trial : 26, 29-30 January and 1-2, 12-16, 19-21 February 2018

Summing Up : 23 February 2018

Judgment : 26 February 2018

Sentence : 21 March 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "RRD".

SENTENCE

- [1] Umendra Kumar you have been found guilty and convicted of the following offences for which you were charged:

COUNT 1

Statement of Offence (a)

ABDUCTION OF YOUNG PERSONS: Contrary to Section 285 of the Crimes Act 2009.

Particulars of Offence (b)

UMENDRA KUMAR on the 10th day of January 2014, at Nasinu, in the Central Division, unlawfully took **RRD**, a young person being under the age of 18 years, out of the possession and against the will of her mother **RANITA DEVI**.

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR between the 11th day of January 2014 and the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR on the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

COUNT 4

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR on the 13th day of January 2014, at Rakiraki, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

- [2] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 13 days. The prosecution relied on the evidence of the complainant, her mother, Ranita Devi, Dr. Brian Guevara and Viman Sonia Chand to prove its case. You gave evidence on your own behalf.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a majority decision, the three Assessors found you guilty of the charge of Abduction and three counts of Rape. Having reviewed the evidence, this Court decided to accept the majority opinion of the Assessors and found you guilty and convicted you of the said charges.
- [4] It was proved during the trial that, on the 10 January 2014, at Nasinu, you abducted the complainant, a young person being under the age of 18 years, by unlawfully taking her out of the possession and against the will of her mother Ranita Devi.
- [5] It was also proved that, between 11 January 2014 and 12 January 2014, at Nadi, you raped the complainant by penetrating her vagina with your penis, without her consent.
- [6] It was further proved that, on 12 January 2014, at Nadi, you raped the complainant by penetrating her vagina with your penis, without her consent.
- [7] And lastly it was proved that, on 13 January 2014, at Rakiraki, you raped the complainant by penetrating her vagina with your penis, without her consent.
- [8] The complainant was 14 years of age at the time you committed the above offences on her (her date of birth being 28 May 1999), and as such, she was a juvenile.
- [9] The complainant testified in Court as to how you abducted her on the night of 10 January 2014 from Nasinu and thereafter forcibly took her to the West and the horrifying ordeal she underwent. You had kept the complainant in virtual captivity for 5 days, until 15 January 2014, when she was rescued by the Police.

[10] In sentencing you, I will first deal with the three counts of Rape.

[11] The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 (“Crimes Act”) carries a maximum penalty of imprisonment for life.

[12] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of **Mohammed Kasim v. The State** [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

“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.”

[13] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice Gates stated:

“Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences”.

*“A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public’s disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly the sentence is set in order to protect women from such crimes: **Roberts and Roberts** (1982) 4 Cr. App R(S) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S.”*

[14] In **The State v Lasaro Turagabeci and Others** (supra) Pain J had said:

“The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences.”

[15] His Lordship Justice Daniel Goundar, in the case of **State v. AV** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

"...Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults on children. Children are our future. The Courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences".

[16] In the case of **State v. Tauvoli** [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

"Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has 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."

[17] In the case of **Anand Abhay Raj v. The State** [2014] FJSC 12; CAV 03 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

[18] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa Koroivuki v. State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[19] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years for the second count of Rape (Count 2).

[20] The aggravating factors are as follows:

- (i) There was a large disparity in age between you and the complainant. The complainant was 14 years of age and you were 33 years of age, at the time of this incident.
- (ii) The use of a weapon during the time of the offending. The complainant testified that at the time of the abduction, you held a knife against her neck. She further testified, that throughout the journey from Suva to Lautoka, and thereafter to Nadi, that you had the said knife in your possession.
- (iii) The complainant had suffered injuries as a result of these incidents. Dr. Brian Guevara had testified that a small superficial ulcer (about 0.5 cms long) was noted in the posterior fourchette of the complainant's vagina. Although, there was no bleeding, the injury was still tender and there was redness around the injury. Furthermore, he had noted a swollen lower lip-which was tender to touch.
- (iv) You were employed as a taxi driver at the time of the incident. You have abused your authority as a driver of a public service vehicle and thereby caused a breach of trust by abducting the complainant, taking her to the West and raping her on three occasions.
- (v) The victim has suffered serious emotional and psychological trauma as a result of this incident. During the course of her evidence the complainant testified to the emotional and psychological effects this incident had on her. The Victim Impact Statement submitted to Court by the Prosecution further confirms this position.
- (vi) You took advantage of the complainant's vulnerability and helplessness.

(vii) You are convicted of multiple offending.

- [21] It was submitted on your behalf that you are now 37 years of age. You have been in a defacto relationship with Vineeta Devi for 19 years. Together, the two of you have a 17 year old son who is a college student. You are said to be the sole breadwinner of your family. You are said to be coming from a very disadvantaged family, where your parents had divorced when you were only 12 years of age. Thereafter, you have been raised by your mother and your stepfather. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [22] In the Previous Convictions Report submitted by the State, two previous convictions have been recorded against you over the past 10 years. Therefore, this Court cannot consider you as a first offender. However, it is noted that the previous convictions do not relate to similar offending.
- [23] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 15 years. As I have stated above, there are no mitigating circumstances in your favour so as to grant you any concession or deduction in your sentence. Therefore, your sentence remains at 15 years for Count 2.
- [24] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years for the third count of Rape (Count 3).
- [25] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 15 years. As I have stated above, there are no mitigating circumstances in your favour so as to grant you any concession or deduction in your sentence. Therefore, your sentence remains at 15 years for Count 3.
- [26] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 10 years for the fourth count of Rape (Count 4).
- [27] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 15 years.

As I have stated above, there are no mitigating circumstances in your favour so as to grant you any concession or deduction in your sentence. Therefore, your sentence remains at 15 years for Count 4.

[28] The offence of Abduction of Young Persons, contrary to Section 285 of the Crimes Act carries a maximum penalty of 5 years imprisonment.

[29] In *State v. Vakacegu* [2014] FJHC 136; HAC 034 of 2013 (11 March 2014), it was held:

"There has been no tariff set for the offence of Abduction. In the case of State v. Sausau-Sentence [2012] FJHC 1301; HAC 111.2009(28 August 2012) Justice Madigan discussed the sentencing for the offence of Abduction under English Court of Appeal case Spence and Thomas 5 Cr. App. R(5)413:

".....that the top end of sentencing is reserved for cases where the victim is taken hostage or ransom has demanded, and at the maximum if undue violence or fire arms used. The bottom end of the tariff can be appropriate in cases of family disputes or lovers tiffs."

[30] In *State v. Sausau* (Supra), His Lordship Justice Madigan held that *"As the maximum penalty for this offence is 7 years both under the Penal Code....., an appropriate tariff would be between 18 months to 4 years, depending on violence, length of detention, use of weapons etc."*

[31] Since the offence of Abduction contrary to Section 285 of the Crimes Act, carries a maximum penalty of 5 years imprisonment, I am of the opinion that the appropriate tariff for this offence should be between 12 months to 3 years imprisonment, depending on violence, length of detention, use of weapons etc.

[32] In the light of the guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 months for the first count of Abduction (Count 1).

[33] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 2 years. Now your sentence is 3 years. As I have stated above, there are no mitigating circumstances in your favour so as to

grant you any concession or deduction in your sentence. Therefore, your sentence remains at 3 years for Count 1.

[34] In the circumstances, your sentences are as follows:

Count 1- Abduction of Young Persons contrary to Section 285 of the Crimes Act – 3 years imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years imprisonment.

Count 3- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 15 years imprisonment.

Count 4- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act - 15 years imprisonment.

I order that all four sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 15 years.

[35] Accordingly, I sentence you to a term of 15 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act), I order that you are not eligible to be released on parole until you serve 12 years of that sentence.

[36] Section 24 of the Sentencing and Penalties Act 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.”

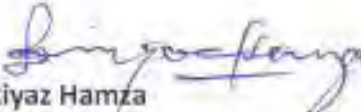
[37] You have been in remand custody for this case from 16 January 2014 to 18 March 2014. Accordingly, you had been in custody for a period of 2 months. Further, you were again remanded in custody after you were found guilty and convicted for these offences, which was on 26 February 2018 (a period of nearly one month). The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[38] In the result, you are sentenced to a term of imprisonment of 15 years with a non-parole period of 12 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 14 years and 9 months.

Non-parole period - 11 years and 9 months.

[39] You have 30 days to appeal to the Court of Appeal if you so wish.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.