

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 24 of 2015

STATE

V

FEROZ KUMAR

Counsel : Mr. A. Datt for the State.
: Ms. J. Singh [LAC] for the Accused.

Dates of Hearing : 24, 25, 30 April, 2018
Closing Speeches : 01 May, 2018
Date of Summing Up : 02 May, 2018
Date of Judgment : 03 May, 2018
Date of Sentence : 11 May, 2018

SENTENCE

(The name of the victim is suppressed she will be referred to as "UN")

1. In a judgment delivered on 3 May, 2018 this court found the accused guilty and convicted him for one count of rape and one count of Indecent Assault as per the following information:

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (b) and 207 (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

FEROZ KUMAR aka **RAKESH KUMAR** aka **PILLU**, on the 24th day of August, 2010, at Naidrodro, Ba in the Western Division, penetrated the vulva of “UN” with his finger and at the relevant time the said “UN” was under the age of 13 years.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

FEROZ KUMAR aka **RAKESH KUMAR** aka **PILLU**, on the 24th day of August, 2010 at Naidrodro, Ba in the Western Division, unlawfully and indecently touched the backside of “UN” without the said “UN”s consent.

2. The brief facts were as follows:

On 24 August, 2010 the complainant who was 7 years of age was at home with her one year old brother. At about 8.30am the complainant was carrying her brother when the accused who was the next door neighbour came into her house got hold of her brother and put him on the floor. After this the accused touched the buttocks of the complainant with his hands.

3. Thereafter the accused lifted the complainant and carried her to the settee in the sitting room where he took off her panty, leaned over her and poked her vagina penetrating her vulva with his middle finger. The poke was hard and painful.
4. The complainant informed her mother about what the accused had done to her the next morning that is on 25 August, 2010. The matter was reported to police and the complainant was medically examined at the Lautoka Hospital. The professional opinion of the Doctor was that the areas of erythema (redness) indicated a recent blunt injury consistent with the use of a finger.
5. Both counsel have filed written sentence submissions for which the court is grateful.
6. Counsel for the accused presented the following mitigation on behalf of the accused.
 - (a) The accused is a first offender and a person of good character;
 - (b) He is now 42 years of age (was 35 years of age at the time of the offending);
 - (c) He is not married, unemployed and resides with his mother;
 - (d) As per his medical report dated 27 October, 2017 the accused is suffering from lower urinary tract symptoms due to urethral stricture. A suprapubic catheter was inserted to temporarily divert urine;
 - (e) Accused seeks mercy of the court.
7. 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.

8. The aggravating features are:

(a) Breach of Trust

The victim knew the accused who was her next door neighbour. The accused breached the trust of the victim by his actions. The victim was helpless, innocent and vulnerable. The accused took advantage of the fact that the complainant was alone with her one year old brother.

(b) Age Difference

The victim was 7 years of age whereas the accused was 35 years years of age. The age difference of 28 years is substantial.

9. 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.

10. According to the victim impact statement, the victim has lost trust in men and she is scared to stay home alone. Rape of any kind not only destroys a woman's soul but also shatters her self-respect and the hope to live a normal life.

11. Section 17 of the Sentencing and Penalties Act states:

“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.”

12. I am satisfied that the two offences for which the accused stands convicted are offences of the same or similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the two offences.
13. After assessing the objective seriousness of the offences committed I take 11 years imprisonment as the starting point of the aggregate sentence. I add 4 years for the aggravating factors, bringing an interim total of 15 years imprisonment, since the personal circumstances and family background of the accused has little mitigatory value I find the accused good character has substantive mitigating value. I therefore reduce the sentence by 2 years.
14. I note that the accused had been remanded for about 41 days. In exercise of my discretion I further reduce the sentence by 1 ½ months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence is 12 years 10 ½ months imprisonment.
15. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for the two offences of rape and indecent assault is 12 years and 10 ½ months.
16. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 7 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 10 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. Kumar you have committed an abhorrent crime on an unsuspecting 7 year old victim, you took advantage of the fact that she was helpless and alone since her brother was only one year old.
19. You have brought anxiety and fear upon this very young child who would have never thought she would be abused by someone who she had faith and trust in.
20. This court has a duty and an obligation to protect the vulnerable from any form of sexual violations accordingly an immediate long term imprisonment is warranted.
21. The accused has advanced his medical conditions as a factor that should be taken into account in showing leniency to him. The seriousness of the offending and the degree of culpability is such that an imprisonment term cannot be avoided.
22. In view of the medical condition of the accused it is recommended that the Commissioner of Correction Services and his officers provide all the necessary assistance and care as may be required from time to time by the accused. It is also in the interest of the accused to brief his facility

officer of his medical requirements including the need to follow up medical treatments.

23. I am satisfied that the term of 12 years and 10 ½ months imprisonment 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 offence.
24. In summary I pass an aggregate sentence of 12 years and 10 ½ months imprisonment with a non-parole period of 10 years to be served before the accused is eligible for parole.
25. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

11 May, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.