

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 205 of 2016

STATE

V

JONE KALE

Counsel : Ms. L. Latu for the State.
: Ms. K. Vulimainadave [LAC] for the Accused.

Dates of Hearing : 11 and 12 March, 2019
Closing Speeches : 13 March, 2019
Date of Summing Up : 14 March, 2019
Date of Judgment : 15 March, 2019
Date of Sentence : 26 March, 2019

SENTENCE

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

1. In a judgment delivered on 15 March, 2019 this court found the accused guilty and convicted him for eight (8) counts of rape as per the following information:

COUNT 1

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of January, 2015 and the 18th day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

COUNT 2

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 19th day of January, 2015 and the 24th day of January, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, a child under the age of 13 years.

COUNT 3

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of May, 2015 and the 31st day of May, 2015 at Toge, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 31st day of December, 2015 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, sometime between the 1st day of August, 2016 and the 31st day of August, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 6

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 3rd day of September, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 7

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 5th day of September, 2016 at Babriban, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

COUNT 8

Statement of Offence

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

Particulars of Offence

JONE KALE also known as **SIRELI BATIRATU**, on the 3rd day of October, 2016 at Balevuto, Ba in the Western Division had carnal knowledge (penile sex) of **RM**, without the said **RM's** consent.

2. The brief facts were as follows:

In January, 2015 the victim was 12 years and 8 months. Between 1st January, 2015 to 18th January, 2015 she had returned from the river to change her wet clothes. She wanted to change her clothes in the bathroom but the accused insisted that she did so in the house which did not have any rooms.

3. There was no one else in the house other than the victim and the accused. After sometime the accused pulled the hand of the victim and made her lie on the bed. The victim was still wearing her towel.
4. The accused then forced his penis into the vagina of the victim when she shouted he blocked her mouth with a pillow. After this, the accused threatened the victim with a knife and warned her if she told anyone about what he had done to her he would kill her
5. When the victim's mother came home she did not tell her anything about what the accused had done because of the threat made to her by the accused.
6. The second incident also happened in January, 2015 after returning home from school the victim was changing her clothes, the accused was in the house.
7. While changing her clothes the accused came and pulled her hand and held it tightly. The accused warned her not to shout since he had a knife ready. The accused made her lie down and forcefully inserted his penis into her vagina. The victim was crying and tried to call for help but the accused was blocking her mouth.
8. The accused thereafter threatened the victim not to tell anyone about what he had done otherwise he will kill her. The victim's mother was

not at home at the time, when her mother came home she did not tell her mother about what the accused had done to her because the accused had threatened her with a knife not to tell anyone.

9. The third time was in May, 2015 at around 11.00pm the accused and the victim went on horseback to a village in Toge, when they were returning the accused forcefully had sexual intercourse with her. The accused had a cane knife with him, he told the victim to remove her clothes or else he will do something to her.
10. When the victim refused he forcefully removed her clothes, made her lie down in the bush and forcefully inserted his penis into her vagina. The victim wanted to shout but did not since it was night time and they were far away from the village. The accused thereafter warned the victim not to tell her mother or anyone about what he had done to her. The victim did not tell anyone about the incident.
11. The fourth incident happened on New Year's Eve on 31st December, 2015 in the night there was a church service on the other side of the village.
12. When the church service was about to end the victim was sent home by her mother to bring the torch. When the victim reached home the accused opened the door and asked the victim whether the church service had finished.
13. The victim told the accused it had not upon hearing this the accused pulled her into the house and closed the door. The accused made the victim lie on the bed removed her clothes and forcefully inserted his penis into her vagina. The accused also blocked the victim's mouth. He threatened the victim with a knife and warned her not to tell anyone about what he had done.

14. After this the accused gave the victim the torch, when she arrived at the church she did not tell anything to her mother because the accused had threatened her with a knife not to tell anyone.
15. The fifth incident happened in August, 2016 at Babriban when the accused and the victim were returning home on horseback. It was night time around 11.00pm the accused after pulling some cassava plants forcefully removed the victim's clothes and forcefully inserted his penis into her vagina. The victim wanted to shout for help but did not since they were in the middle of the bush and no one would hear her. After this the accused warned the victim not to tell her mum or anyone otherwise he would kill her.
16. When the victim reached home she did not tell her mother about what the accused had done to her because of his threats.
17. The sixth incident happened on 3rd September, 2016 when the victim came home from town after about 6.00pm. The accused was at home the victim went and changed her clothes and then had tea.
18. After a while the victim went to lie down on the bed shortly after she saw the accused lying beside her. When the victim told the accused to go and lie down on the floor he blocked her mouth and told her to remove her clothes. After this, he forcefully inserted his penis into her vagina. The victim tried to shout but the accused pushed her down and blocked her mouth. Her mother was not at home at this time.
19. The accused warned the victim not to tell anyone about what he had done to her. The victim's mother returned home in the night but she did not tell her mother what the accused had done to her because the accused had threatened her if she told anyone he would kill her.

20. The seventh incident also happened in Babriban on 5th September, 2016 the victim went with the accused during the night, her mother had allowed her to go with the accused. They had gone to check the fence, on their way back the accused forcefully removed her clothes and forcefully inserted his penis into her vagina.
21. The victim shouted for help but they were far away from the village, after this the accused warned the victim not to tell anyone about what he had done to her. He also threatened her that he will kill her if she told anyone.
22. The eighth incident happened on 3rd October, 2016 at home when she returned from the Ba Riverside Carnival.
23. The victim came home at night her mother was not at home. The accused was at home, the victim went to change her clothes at this time the accused got hold of her and pulled her to the bed. The accused forcefully inserted his penis into her vagina.
24. The victim shouted for help but no one came to rescue her. The accused later showed her the knife and threatened her not to tell anyone.
25. During a counseling session by her School Teachers on an allegation of vandalism against the victim she told her teachers about what the accused was doing to her. The matter was reported to the police by her School Teachers.
26. Both counsel filed their written submissions for which this court is grateful.
27. The following personal details and mitigation have been presented by the counsel for the accused:

- a) The accused is 58 years of age but was 55 years at the time of the offending;
 - b) He is in a defacto relationship;
 - c) He is a Farmer and sole breadwinner of his family;
 - d) He has two children who live with his mother;
 - e) He has been a hardworking church member serving the church and the community.
28. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FEATURES

29. The aggravating features are:

a) Breach of Trust

The victim is the daughter of the accused (although the victim is the step daughter I have decided to use a neutral word to describe the relationship between the victim and the accused). The victim trusted the accused who breached this trust by his actions. The victim was vulnerable, alone and helpless and the accused took advantage of this which continued over a period of time. The accused exposed the victim to sexual activity at a very young age for his sexual gratification is shocking and unforgiveable.

b) Planning

The evidence shows premeditation and careful planning by the accused he knew when the victim's mother was not around or at home and he took full advantage of this by raping the victim on different occasions.

c) Age difference

The victim was 12 years 8 months whereas the accused was 55 years. The age difference is substantial.

30. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in the recent judgment of *Gordon Aitcheson vs the State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now a sentence between 11 years to 20 years imprisonment.
31. It is the duty of the court to protect children from sexual exploitation of any kind that is the reason why the law has imposed life imprisonment as the maximum penalty.
32. There has been an increase in sexual offences involving offenders who are known to the victim and matured adults. It is shocking, sickening and appalling to note the manner in which the accused had breached the trust of this victim.
33. 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.”

34. I am satisfied that the eight offences for which the accused stands convicted are offences founded on the same facts and are of 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 eight offences.
35. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely there is no two ways about it. Children are entitled to live their lives free from any form of physical or emotional abuse. When family members sexually abuse children, violating the Domestic Violence Act, they should expect condign punishment to mark the society’s outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
36. The Supreme Court in *Mohammed Alfaaz v State* [2018] FJSC 17; CAV0009.2018 (30 August 2018) has stated the above in the following words at paragraph 54 that:

*“It is useful to refer to the observation expressed by the Fiji Court of Appeal in *Matasavui v State*; Crim. App. No. AAU 0036 of 2013: 30 September [2016] FJCA 118 wherein court said that “No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilised entity.” The Court of Appeal referred to the same judgment in paragraph 60 of the judgment which is being canvassed before this court having taken into consideration the gravity and cruelty of the case before court*

and observed that highest possible punishment should be given to the prospective offenders of sexual assault on children who are vulnerable to fall prey to the offenders. I agree with the observations expressed by the Court of Appeal in this regard and would not hesitate to add further that the Court of Appeal had been lenient not to enhance the sentences on the petitioner in view of the aggravating factors in this case”

37. Madigan J in *State v Mario Tauvoli* HAC 027 of 2011 (18 April, 2011) said:

“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 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.”

38. The Supreme Court in *Felix Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015) mentioned a long list of factors that should be considered in punishing the offenders of child rape cases. Those factors would include:

- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*
- (f) *whether the impact on the victim had been severe, traumatic, or continuing;*
- (g) *whether actual violence had been inflicted;*

- (h) *whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
- (i) *whether the method of penetration was dangerous or especially abhorrent;*
- (j) *whether there had been a forced entry to a residence where the victim was present;*
- (k) *whether the incident was sustained over a long period such as several hours;*
- (l) *whether the incident had been especially degrading or humiliating;*
- (m) *If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
- (n) *Time spent in custody on remand.*
- (o) *Extent of remorse and an evaluation of its genuineness;*
- (p) *If other counts or if serving another sentence, totality of appropriate sentence.*

39. The Supreme Court in *Anand Abhay Raj v State (supra)* found the following aggravating factors, many of which appear in the present case, at paragraph 63 as follows:

- (i) *The Petitioner was the victim's stepfather who should have protected her. Instead he breached the trust expected of him, and the breach was gross.*
- (ii) *The rape offences took place continuously over a long period of time. Such an experience "will surely scar her for the rest of her life" [Record p24].*
- (iii) *She was a child of 10 years. It is not clear what factors the learned judge took into account when fixing the starting point on the tariff. The age of the child, if very young, could yet be an aggravating factor. In this case it is more likely and appropriate that it be put into consideration for arriving at the tariff only, and not added on later as an aggravating factor.*
- (iv) *The frequency of the crime against children in Fiji, and therefore the need for deterrence.*

- (v) *She had been subjected to threats to kill her, assaulted and injured by the Petitioner.*
- (vi) *She was observed to be in real fear of the Petitioner. Such threats besides causing fear and anxiety in the victim over a long period, had postponed the exposure of these offences. These aggravating factors made this a particularly bad case of child abuse and for the specific crime charged namely rape.”*

40. After assessing the objective seriousness of the offences committed I take 13 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. I add 8 years for the aggravating factors, bringing an interim total of 21 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. Furthermore it is noted that the accused has previous convictions, although they are not sexual offences. In this regard I reduce the sentence by 6 months. The sentence now is 20 years and six months imprisonment.

41. I note from court file that the accused was remanded for one month and 19 days. In exercise of my discretion I deduct two months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final aggregate sentence is 20 years 4 months imprisonment.

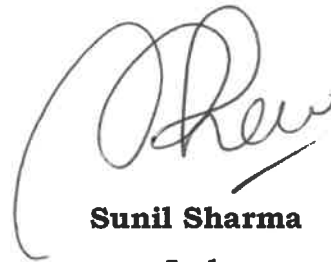
42. This court is mindful of the fact that the sentence is above the current sentencing tariff for the rape of a child, however, this is so considering the circumstances of the offending and the culpability of the accused which calls for a sentence which is above the current tariff for the following reasons:

- a) The accused started raping the child when she was 12 years and 8 months;

- b) He committed the offences when the victim's mother would not be at home or by taking her to an isolated place away from home;
 - c) The offending took place over a period of time with the accused instilling fear on the victim with his threats to kill her.
43. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for eight counts of rape is 20 years and 4 months.
44. I am satisfied that the term of 20 years and 4 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.
45. Mr. Kale you have committed serious offences against your daughter who you were supposed to protect, care and love. You are a shame to the society. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to this victim you have scarred the victim's life forever.
46. As a result of the accused person's actions in the victim impact statement the victim states that she was so much affected by what the accused had done to her that she started having nightmares and could not sleep well.
47. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was his daughter of 12 years and eight months compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.

48. Under section 18 (1) of the Sentencing and Penalties Act, I impose 19 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.
49. In summary I pass an aggregate sentence of 20 years and 4 months imprisonment with a non-parole period of 19 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.
50. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

26 March, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.