

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

CRIMINAL CASE NO. HAC 02 of 2017

BETWEEN : **STATE**

AND : **ADI MULLAM NAICKER**

Counsel : Mr. T. Tuenuku for the State
Ms. J. Singh for the Accused

Hearing on : 21st of May 2019 – 23rd of May 2019

Summing up on : 23rd of May 2019

Judgment on : 24th of May 2019

Sentence on : 24th of May 2019

SENTENCE

1. Adi Mullam Naicker, you are found guilty and stand convicted of the following offence for which you were charged:

Statement of Offence

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

Particulars of Offence

Adi Mullam Naicker, on the 05th day of November 2016 Tuvu, Ba, in the Western Division, penetrated the mouth of N, a child under the age of 13 years, with his penis.

2. You pleaded not guilty to the charge and the ensuing trial lasted for 3 days. The complainant, his brother and his parents, gave evidence for the prosecution and while you remained silent, a grandchild of yours, gave evidence on your behalf.
3. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found you guilty of the alleged count.
4. This court by its judgment dated 24th of May 2019, having reviewed the evidence, decided to accept the opinion of the Assessors, found you guilty and convicted you of the said Count.
5. In addition to the Sentencing submissions the State has submitted the Victim Impact Assessment Report, and it reveals that these incidents have affected the victim, mentally. The learned Counsel for the defence has submitted the submissions in mitigation. I have carefully considered the said submissions and the report.
6. Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
7. The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 carries a maximum penalty of imprisonment for life. The rape of children is always a serious matter. The Supreme Court of Fiji had set the tariff of 11 to 20 years imprisonment for the offence of rape of children: see **Gordon Aitcheson v The State**, Criminal Appeal No. CAV 0012 of 2018, 2nd November, 2018. Of course the final Sentence will depend on the aggravating and mitigating factors.
8. 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”.

9. The accepted tariff for the offence of Rape of a child is between 11 to 20 years of imprisonment.
10. 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.”

11. In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 11 years imprisonment for the count of Rape.
12. The aggravating factors are as follows:

(i) Breach of trust:

You were the grandfather of the victim. He called you Nana. Your duty was to protect him. The victim and his parents looked to you as a trusted person. You breached that trust.

(ii) The psychological and emotional harm and the age difference:

As apparent from the victim impact report as well as observed by the court when testified, the victims had suffered a considerable amount of psychological and emotional harm. Further, you were 60 years old and the victim was only 8 years old at the time of the offence.

(iii) The pre meditated act and the use of force:

Initially, when the child refused to accompany you forced him to come with you. Thereafter you forced the child to suck your penis, when he refused to. It shows that your act is pre-meditated.

13. Considering the aforementioned aggravating factors, I increase your sentences by further 4 years. Now your sentence is 15 years.
14. State has admitted that you have no previous convictions or pending cases. Therefore, you are a first time offender.
15. In considering that you are a first time offender and the rest of the mitigating factors submitted on your behalf I deduct three years from the sentence above.
16. Accordingly, I sentence you to a term of imprisonment of 12 years for the Count of Rape.
17. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 10 years of that sentence.
18. 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.”
19. You have been in remand custody for this case from 16th of December 2016 for approximately a period of three (3) months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.


20. In the result, you are sentenced to a term of imprisonment of 12 years with a non-parole period of 10 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 11 years and 09 months.

Non-parole period - 09 years and 09 months.

21. You have 30 days to appeal to the Court of Appeal if you so desire.




Chamath S. Morais
JUDGE

At Lautoka
24th of May, 2019

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