

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 98 of 2018

[CRIMINAL JURISDICTION]

STATE

V

RAJESH CHAND

Counsel : Mr. I. Rakaria for the State
Mr. A. K. Singh with Mr. P. R. Sharma for the Accused
Hearing on : 20 - 23 May 2019
Summing up on : 23 May 2019
Judgment on : 24 May 2019
Sentenced on : 31 May 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SK". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SENTENCE

1. Rajesh Chand, you stand convicted of the offence of defilement contrary to section 215(1) of the Crimes Act 2009 ("Crimes Act").
2. You were charged with two counts of rape. After trial the assessors unanimously found you guilty of the said two counts. However, for the reasons stated in my judgment, I declined to conform to the opinion of the assessors and you were found

not guilty of both counts but guilty of the alternative offence of defilement in relation to the first count.

3. The victim in this case was about 13 years and 09 months old at the time you sexually exploited him. At the time you committed the offence, you were working in a DVD shop. You were 46 years old then. The victim came with you to the said shop during daytime on a Sunday where the shop was closed for business. You penetrated the victim's anus with your penis inside that shop. The evidence suggested that the incident may have taken place with the victim's consent. The position you took during the trial was that, you did attempt to penetrate the victim's anus because the victim requested you to do so, but you were not successful as you are unable to have erections due to an accident you had more than 10 years ago.
4. Pursuant to section 215(1) of the Crimes Act 2009 read with section 3(4) of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), the maximum punishment for defilement is an imprisonment for 10 years.
5. Persuaded by the decision of the Supreme Court in the case of *Aitcheson v State* [[2018] FJSC 29; CAV0012.2018 (2 November 2018)] where the tariff for child rape was increased to an imprisonment term between 11 years to 20 years, I have decided that the appropriate range of sentence for the offence of defilement should be 02 years to 08 years imprisonment. [See *State v Mawi* [2019] FJHC 324; HAC17.2017 (12 April 2019)]
6. In *Mawi* (supra), the accused (Mawi) was 30 years old and the victim's age was 13 years and 02 months. The age gap therefore was 17 years. The victim in the said case was a girl and the accused had unprotected sexual intercourse with her where he penetrated the victim's vagina with his penis. Vaginal intercourse with a female

child has the inherent danger that it could lead to the child being impregnated. It follows that, defilement of a female child where the accused penetrates her vagina with his penis should be considered more serious compared to the offence of defilement committed by penetrating the anus of a child with the penis.

7. Moreover, in *Mawi* (supra), the accused approached the victim and it was during nighttime. In this case, according to the evidence, the victim came to the video shop where you were employed. The explanation given by the victim in his evidence as the reason for him to go to that video shop with you during daytime on a Sunday when it was closed for business was not that convincing and the evidence in its entirety does not suggest that you instigated the event. Therefore, I am mindful of the clear distinction between the facts and circumstances in *Mawi* (supra) and the instant case.
8. Your counsel has filed extensive submissions in your mitigation. Your counsel argued that your personal characteristics should be taken into account in determining your sentence. It is submitted that your father passed away when you were young; that you have suffered injuries due to an accident in the year 2000 and you have lost your eardrum due to that accident. However, in this case, there was no evidence that your personal characteristics had anything to do with the offence you have committed.
9. In your mitigation, your counsel tried to convince this court that you did not contest that you committed the offence of defilement and you have admitted committing defilement when you were interviewed by the police. The argument is that, had you been charged for defilement, you would have pleaded guilty at the inception. This position however, was not reflected in your evidence or from the questions put to the victim during cross-examination. You clearly denied penetration during the

trial. As stated before, your evidence was that you are unable to have erections after your accident 10 years ago. Further, there was no indication before the trial that you are willing to plead guilty for defilement. However the admissions made by you during the trial did in fact assist me to reach my conclusion with regard to your guilt for the offence of defilement. Therefore, I do agree that the said conduct during the trial where you made crucial admissions should earn you a discount in your sentence.

10. I select 02 years imprisonment as the starting point of your sentence.
11. I consider the following as the aggravating factors in this case;
 - a) The victim was 13 years and 09 months old at the time of offence;
 - b) The age difference between you and the victim is 33 years; and
 - c) You took advantage of the victim's vulnerability and naivety.
12. Considering the nature of offending and the above aggravating factors, I would add 03 years to the starting point. Now your sentence is an imprisonment term of 05 years.
13. I consider the following as mitigating factors;
 - a) You are a first offender; and
 - b) Your conduct during the trial as I have explained above.
14. I would deduct 02 years of your sentence in view of the above. Now your sentence is an imprisonment term of 03 years. 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 01 year of that sentence. In fixing your non-parole term, I have considered your personal circumstances and the fact that you are a first offender.


15. There should be a clear message that this court denounces sexual exploitation of young children. Therefore, it is not appropriate to suspend your sentence.
16. I note that you have been in custody in view of this case from 06/02/18 to 14/02/18 and then from the date of the judgment which is 23/05/19 to date. Accordingly, you have spent 16 days in custody in relation to this matter. In view of the provisions of section 24 of the sentencing and Penalties Act, the period you have been in custody for this case shall be regarded as time already served by you.
17. In the result, you are sentenced to 03 years imprisonment with a non-parole period of 01 year. Considering the period spent in custody, the time remaining to be served is;

Head Sentence - 02 years; 11 months; and 14 days

Non-parole period - 11 months and 14 days

18. Thirty (30) days to appeal to the Court of Appeal.




Vinsent S. Perera
JUDGE

Solicitors;

Office of the Director of Public Prosecutions for the State.
A. K. Singh Lawyers, Suva for the Accused.