

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 152 of 2016**

**STATE**

**V**

**SEMI MALAI**

**Counsel** : Ms. S. Navia for the State.  
: Ms. V. Diroiroi with Ms. E. Radrole for the Accused.

**Dates of Hearing** : 21 and 22 May, 2019  
**Closing Speeches** : 23 May, 2019  
**Date of Summing Up** : 23 May, 2019  
**Date of Judgment** : 24 May, 2019  
**Date of Sentence** : 11 June, 2019

---

**SENTENCE**

---

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

1. In a judgment delivered on 24 May, 2019 this court found the accused guilty and convicted him of one count of rape and two counts of indecent assault as per the following information:

### **COUNT ONE**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, inserted his penis into the mouth of “**VH**”.

### **COUNT TWO**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her vagina.

### **COUNT THREE**

#### *Statement of Offence*

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

#### *Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her breasts.

2. The brief facts were as follows:
3. On 23<sup>rd</sup> July, 2016 the victim who was 7 years of age went to the beach near her house to look for her mother who had gone fishing with some women from the village. At this time the accused came and held the hair of the victim and took her into the nearby bush. The accused was the uncle of the victim both lived in the same village.

4. In the bush the accused told the victim to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused and the victim were standing at this time. The accused also touched the victim's body by putting his hand inside her t-shirt from her breast down to her private part. The accused had touched her private part by putting his hand inside her panty.
5. On this day the victim was wearing a t-shirt and a skirt. She wanted to run away, but the accused grabbed her hand and then gave her a \$2 coin and told to go. The victim wanted to call out to her grandmother, but the accused blocked her mouth with his hand. After a while the victim's mother came and the victim told her mother what the accused had done to her.
6. Upon hearing this, the victim's mother started to cry and the matter was reported to the police.
7. Both counsel filed their written sentence and mitigation submissions for which this court is grateful.
8. The following personal details and mitigation have been presented by the counsel for the accused:
  - a) The accused was 26 years of age at the time of the offending;
  - b) He was employed as an Electrician at one of the Resorts;
  - c) Married with a son who is 4 years of age;
  - d) He was earning \$240.00 per week and is the sole bread winner of his family;
  - e) He is educated up to form 3;
  - f) The accused sincerely apologies for his actions to the victim and her family;
  - g) Promises not to reoffend and seeks the forgiveness of the court.

9. 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 FACTORS**

10. The aggravating factors are:

a) Breach of Trust

The accused was the paternal uncle of the victim and both lived in the same village. The accused took advantage of the fact that the victim was alone at the beach he forcefully took the victim to the nearby bush. The accused breached the trust of the victim by his actions. The victim respected the accused calling him "Vava" Semi meaning uncle Semi.

b) Age Difference

The victim was 7 years of age whereas the accused was 26 years of age at the time of the offending. The age difference of 19 years is substantial.

c) Sanctity of Relationship

The accused and the victim's father are brothers, the accused had breached the sanctity of the relationship that existed between the accused and the victim.

d) Vulnerable victim

The victim was vulnerable and alone when the accused pulled her by her hair into the bush. The victim could not do anything, when she tried to call her grandmother for help the accused blocked her mouth.

e) Exposing a child to sexual activity

The accused had exposed a 7 year old child to sexual activity when the child should be playing with her friends and enjoying her life the accused robbed her of her innocence and exposed her to an unexpected and uncalled experience.

f) Victim Impact Statement

As a result of the accused's action the victim has been fearful and scared most of the time and she could not sleep properly waking up suddenly in the middle of the night. Furthermore, the effect of what the accused had done also resulted in the victim not going to school in 2017.

11. 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.
12. 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.
13. There has been an increase in sexual offences involving offenders who are known to the victim and are mature adults. It is shocking, and sickening to note the manner in which the accused had committed the three offences on this child.

14. 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.”*

15. I am satisfied that the 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 three offences.

16. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely and 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 not expect any mercy from this court. The punishment ought to be such that it takes into account the society’s outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.

17. 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.”*

18. 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.”*

19. 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.*

20. 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 6 years for the aggravating factors, bringing an interim total of 19 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. The accused has one previous conviction in 2013 (although not in relation to any sexual offending) hence the accused will not receive any discount for good character. In this regard I reduce the sentence by 6 months for mitigation. The sentence is now 18 years and 6 months imprisonment.

21. I note from court file that the accused was remanded for 1 month and 15 days in accordance with section 24 of the Sentencing and Penalties Act the remand period is deducted as a period of imprisonment already served. The final aggregate sentence is 18 years 4 months and 15 days imprisonment.

22. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for two counts of indecent assault and one count of rape is 18 years 4 months and 15 days imprisonment.



23. This court is satisfied that the term of 18 years and 4 months and 15 days 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. Mr. Malai you have committed serious offences against your niece who you were supposed to protect and care. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to this victim who was 7 years of age at the time.
25. As a result of your actions as per the victim impact statement the victim was affected psychologically and emotionally for some time even to the extent that she refused to go to school. Rape is not only a physical assault, it destroys the very soul of the victim, which cannot be measured or repaired by anyone.
26. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was the accused's niece of 7 years 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.
27. Under section 18 (1) of the Sentencing and Penalties Act, I impose 16 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 and also meet the expectations of the community which is just in the circumstances of this case.
28. In summary I pass an aggregate sentence of 18 years and 4 months and 15 days imprisonment with a non-parole period of 16 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.

29. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**

**Judge**



**At Lautoka**

11 June, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**