

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

CRIMINAL CASE NO. HAC 300 OF 2018

BETWEEN :

STATE

AND :

UMESH CHAND

Counsel for the State :

Ms. S. Sharma, Ms. J.Fatiaki and Ms. S. Alagendra

Counsel for the Accused :

Mr. J. Reddy and Ms. B. Qioniwasa

Hearing on :

21st of January - 24th of January 2019

Summing up on :

25th of January 2019

Judgment on :

29th of January 2019

Sentence :

12th of February 2019

(The name of the juvenile is suppressed and she will be referred to as LNB or as PW1.)

SENTENCE

1. Umesh Chand, you have been found guilty and convicted of the following offences for which you were charged:

COUNT 1

Statement of Offence

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

Particulars of Offence

Umesh Chand, between the 1st day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

COUNT 2

Statement of Offence

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

Particulars of Offence

Umesh Chand, between the 1st day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, on an occasion other than the one mentioned in the count 1, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

COUNT 3

Statement of Offence

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

Particulars of Offence

Umesh Chand, between the 1st day of January 2018, and 12th day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his tongue.

COUNT 4

Statement of Offence

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

Particulars of Offence

Umesh Chand, On the 13th day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

2. You pleaded not guilty to the charges and the ensuing trial lasted for 4 days. The juvenile, her mother and the doctor who examined the juvenile, gave evidence for the prosecution while accused, his sister, and two of his neighbors gave evidence for the defense.
3. At the conclusion of the evidence and after the directions given in the summing up, the three assessors;
 Unanimously found you guilty to the 3rd Count,
 By majority found you guilty of the 1st and 4th Counts, and
 By majority found you not guilty for the 2nd Count.
4. This court by its judgment dated 29th of January 2019, having reviewed the evidence, decided to accept the opinion of the Assessors, in regards to Counts 1,3 and 4, and overruling the assessors opinion in respect of Count 2, found you guilty and convicted you of all the said Counts from 1 to 4.
5. The State has submitted the Victim Impact Assessment Report, and it reveals that these incidents have had lasting effects on the juvenile.

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.
8. The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of **Mohammed Kasim v. The State** [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

“...It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage.”
9. In the case of **State v. Marawa** [2004] FJHC 338; HAC 16T of 2003S (23 April 2004); His Lordship Justice Anthony Gates stated:

“Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences”.
10. In the **State v LasaroTuragabeci and Others** (supra) Pain J had said:

“The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences.”
11. 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”.
12. The accepted tariff for the offence of Rape of a child is between 11 to 20 years of imprisonment. (**Aitcheson v State** [2018] FJSC29; CAV0012.2018(2 November 2018))

13. 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.”*
14. In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 12 years imprisonment for the count of Rape.
15. The aggravating factors are as follows:
- (i) Breach of trust:
You were a step father of LNB and an adult. The victim looked to you as a trusted person. You breached that trust.
 - (ii) The psychological and emotional harm:
As apparent from the victim impact report as well as observed by the court when child testified, the victims had suffered a considerable amount of psychological and emotional harm.
 - (iii) Age disparity;
The age difference between the accused and the child victim is 39 years.
 - (iv) Accused exposed an innocent mind of a child to sexuality at such a tender age;
As stated in **State v Navunivesi** [2018] FJHC 954; HAC318.2015 (05 October 2018) and few other cases, exposing the mind of a child to sexual activity prematurely is an aggravating factor.
16. Considering the aforementioned aggravating factors, I increase your sentences by a further 5 years. Now your sentence is 17 years.
17. State has admitted that you have no previous convictions or pending cases. Therefore, you are a first time offender.
18. In considering that you are a first time offender and the rest of the mitigating factors submitted on your behalf I deduct one year from the sentence above.
19. Accordingly, I sentence you to a term of imprisonment;
- i) 16 years for each of the four (4) Counts of Rape.
 - ii) These terms should operate concurrently.

20. 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 14 years of that sentence.
21. 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."
23. You have been in remand custody for this case from 20th of July 2018 to this date for a period of nearly 7 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 7 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.
24. In the result, you are sentenced to a term of imprisonment of 16 years with a non-parole period of 14 years. Considering the time you have spent in remand, the time remaining to be served is as follows:
- | | | |
|-------------------|---|----------------------|
| Head Sentence | - | 15 years, 05 months. |
| Non-parole period | - | 13 years, 05 months. |
25. You have 30 days to appeal to the Court of Appeal if you so desire.


Chamath S. Morais
JUDGE



At Suva
12th of February 2019

Solicitor for the Prosecution : **Office of the Director of Public Prosecution, Suva**
Solicitor for the Accused : **Jiten Reddy Lawyers**