

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 97 of 2016

STATE

V

MITIELI NABORISI

Counsel : Ms. R. Uce for the State.
: Mr. J. Dinati for the Accused.

Dates of Hearing : 19 and 22 July, 2019
Closing Speeches : 23 July, 2019
Date of Summing Up : 24 July, 2019
Date of Judgment : 25 July, 2019
Date of Sentence : 08 August, 2019

SENTENCE

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

1. In a judgment delivered on 25th July, 2019 this court found the accused guilty of one representative count of sexual assault and one representative count of rape.

The brief facts were as follows:

2. In 2013 up to early 2014 the victim who was nearly 14 years of age was living with her mother and the accused her step father and his five children.
3. The house was a one bedroom house, the victim slept on the bed in the sitting room where as her mother and the accused slept in the bedroom. The children of the accused would sometimes sleep in the sitting room on the floor but most of the time they would sleep at their grandfather's house a few blocks away.
4. When everyone would be asleep nearly every night the accused would come into the sitting room molest, kiss, squeeze the victim's breast and also fondled her vagina initially he would do this from on top of her clothes but as days went by the accused would do this by forcefully removing her clothes.
5. Since the accused cupped her mouth with his hand the victim was not able to scream. The accused also threatened the victim if she screams he will do something to her. The victim was also not able to move because the accused would lock her thighs in between his.
6. One night during the beginning of 2014 while the victim was asleep the accused came and woke her she was shocked when she saw the accused standing. On this night the victim had come back from a "soli" or a fundraising organized at a nearby school. According to the victim it was probably past midnight when the accused and her mother came back home.
7. The accused started to kiss, molest, squeeze the victim's breasts and then went on to fondle her vagina at this time he removed her pants. The victim tried to stop him, but could not, the victim saw the accused put some coconut oil on his penis. She felt very scared and started to cry the accused

came on top of her spread her legs apart and then penetrated his penis into her vagina.

8. When the victim told the accused to stop he cupped his hand on her mouth and threatened her that he will do something to her or to her mother. She tried to push him away, but could not since she was feeling weak.
9. The accused penetrated his penis into the vagina of the victim three times that night after the accused ejaculated she forcefully turned over since she felt pain from what was being done to her. The accused had penetrated her vagina on three other occasions she did not tell anyone until she went to her grandmother's house to stay.
10. Since the victim loved to write she wrote about what the accused had done to her and had saved the document on a laptop. The victim's grandmother read what was written by the victim when she was using the laptop. This prompted her grandmother to ask the victim about what she had written, at this moment she told her grandmother everything the accused had done to her.
11. After the matter was reported to the police the accused was arrested and charged.
12. Both counsel filed sentence and mitigation submissions together with the victim impact statement for which this court is grateful.
13. Counsel for the accused presented the following mitigation and personal details about the accused:
 - a) The accused is 44 years of age;
 - b) First offender;
 - c) Married with 4 children;

- d) Sole bread winner of the family also looks after his elderly father;
 - e) Acknowledges his wrong doing and repents what he had done;
 - f) Apologies to the court;
 - g) Has learnt his lesson whilst in remand;
14. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v the State, CAV 003 of 2014* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.
15. The aggravating factors are:
- a) Breach of Trust
The victim is the step daughter of the accused who was staying in his house she trusted the accused and in him she had seen her father since her biological father was not living with her. He breached this trust by his actions. The victim was vulnerable and helpless and the accused took advantage of this over a period of time. This is a case of gross breach of trust by the accused.
 - b) Planning
The accused had carefully planned what he wanted to do. After everyone was asleep particularly his wife the accused would make his way into the sitting room after midnight and commit the offences on the victim.
 - c) Age Difference
The victim was 14 years whereas the accused was 40 years at the time of the commission of the offence. The age difference of 26 years is substantial.

d) Victim Impact Statement

According to the victim impact statement the victim's life changed after the incidents she lost concentration in school, keeps away from everyone, blames herself for what had happened. The victim gets memories or flash backs she missed school for one whole year. She became suicidal and had attempted to commit suicide 13 times and at one stage she had ended up at the Hub Center for treatment. The victim impact statement was served on the defence, the accused in his mitigation did not raise any issues in respect of the contents of the victim impact statement.

16. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victim. However the contents of the victim impact statement cannot be ignored in light of the evidence given by the complainant, it summarizes the harm caused to the victim which was a direct result of what the accused had done to her (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*). The contents of the victim impact statement are credible and reliable and this court has no hesitation in relying on the victim impact statement filed.

REPRESENTATIVE COUNT

17. This court is mindful that the accused faces one representative count of rape and one representative count of sexual assault. The evidence before the court was of more than one occasion both the offences were committed on the victim. The accused cannot be punished for the other occasions of rape and sexual assault under the representative counts but for one occasion only (*see Senilokula vs. State, Criminal Petition No. CAV 0017 of 2017, (26 April, 2018)*).
18. The maximum penalty for the offence of rape is life imprisonment 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.

19. The maximum penalty for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epeli Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012)*).
20. 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.”
21. 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 two offences.
22. 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.
23. Children are entitled to live their lives free from any form of physical or emotional abuse. When children are sexually abused, the offenders should expect condign punishment to mark the society’s outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.

24. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults. It is shocking to note the manner in which the accused had committed both the offences on this child victim.
25. 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”

26. 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.”

27. 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.*


28. 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 an active unrelated previous conviction for assault dated 21st March, 2017 hence the accused will not receive any discount for good character. In this regard I reduce the sentence by 6 months for his mitigation. The sentence now is 18 ½ years imprisonment.
29. I note from court file that the accused was remanded for one month and 16 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 18 years 4 months imprisonment.
30. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one representative count of rape, and one representative count of sexual assault is 18 years and 4 months.
31. I am satisfied that the term of 18 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.
32. Mr. Naborisi, you have committed serious offences against an unsuspecting and vulnerable child who was your step daughter the victim used to call you dad. It was your responsibility to protect, care and love this child who deserved fatherly love since she was away from her biological father. Your

actions against the victim were cowardly even animals are protective of their young ones. You cannot be forgiven for what you have done to this victim. Exposing a child of such a tender age to sexual activities has a negative impact upon a child's development. The accused conduct is unthinkable and deplorable you are sick in mind for your sexual gratification you have scarred a child forever.

33. As a result of the accused person's actions the victim lost all hope to live which saw her attempting suicide 13 times this shows the impact of the offending on the victim who was affected emotionally and psychologically.
34. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 14 years of age 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.
35. 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 which is just in the circumstances of this case.
36. In summary I pass an aggregate sentence of 18 years and 4 months 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.

37. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
08 August, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.
Messrs. Vananalagi and Associates, for the Accused.