

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

High Court Criminal Case No. HAC 174 of 2015

BETWEEN : STATE

AND : ALTHAEUS WILSON TOMASI

Counsel : Mr Niudamu for the State
Ms Vulimainadave for the Accused

Dates of Hearing : 22 July 2019

Closing Speeches : 23 July 2019

Date of Summing up: 23 July 2019

Date of Judgement : 24 July 2019

Date of Sentence : 25 September 2019

(The complainant's name is suppressed and will be referred to as HS)

SENTENCE

1. You, Althaeus Wilson Tomasi stand convicted for one representative count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act. The particulars of the offence are as follows;

“Althaeus Wilson Tomasi between the 1st day of October 2014 and 30th day of November 2014 at Lautoka in the Western Division, penetrated the vagina of HS, aged 10 years with his penis.”

2. The complainant is your stepdaughter. She was 11 years old and you were 27 years old at the time of the offence according to the amended admitted facts. You were living with the complainant’s mother, the complainant and her two younger brothers. Between 01 October 2014 and 30 November 2014, on one Saturday you called the complainant to your room when the complainant’s mother was not at home. You closed the door and made her lie next to you. You removed her clothes and inserted your penis into her vagina. The complainant screamed in pain. The following Saturday you made her lie next to you and covered yourself and the complainant with a blanket. You removed her pants and inserted your penis into her vagina. Once again during the same period, you called her to your room and removed her underwear. You started rubbing your penis on her vagina. The complainant said you did not fully insert your penis into her vagina. You told the complainant not to tell anyone about the incidents after the second and third incidents. The complainant was afraid to complain to her mother. After sometimes when her grandmother started living with them, the complainant informed the grandmother about the incidents. The matter was later reported to the Police.
3. You were indicted for one representative count of rape regarding all three incidents. You pleaded not guilty and after the hearing the assessors returned with a unanimous opinion of not guilty. However, this Court did not accept the opinion of the assessors. On 24 July 2019 I delivered my judgment finding you guilty and you were convicted for the offence of rape.
4. As a stepfather, obviously the complainant’s mother has chosen you to be the protector of her children. You were supposed to provide sustainability, protection and care to the family as their guardian. But you have abused the trust and exploited the relationship to fulfil your lustful desires. The age gap

between you and the complainant is 16 years. You took the advantage of the vulnerability of the complainant by reason of her age. I have observed premeditation in your actions as you chose occasions where the complainant's mother was away from home. Further you have exposed the mind of a young child to sexual activities. You have told the complainant not tell anyone about the incidents and thereby you have taken steps to prevent the complainant from reporting the incident. As a result of this incident the complainant has been deprived of her right to be in the company of her mother and the siblings as she was relocated. The victim impact statement reveals that the complainant is emotionally and psychologically disturbed as a result of what she had gone through. Although you are charged for one count of rape you have had repetitive sexual intercourse with the complainant. I consider those as aggravating factors in this case.

5. In mitigation it was submitted that;
 - i. You are 31 years now and living in a de facto relationship with the complainant's mother.
 - ii. You work as a driver and earns \$200 per week.
 - iii. You are the sole breadwinner.
 - iv. You have cooperated with the Police.

6. However, it is not clear how you have cooperated with the Police. There are no admissions in the caution interview, and your counsel did not explain how you have cooperated. Therefore, I cannot consider it as a mitigating factor.

7. In sexual offences committed in domestic context, personal circumstances of the offender do not bear any significance as far as mitigation is concerned. In *Raj v State* [2014] FJCA 18; AAU0038.2010 (5 March 2014) where a stepfather has raped the 10 year old child, the Court of Appeal observed that;

“Legitimate aspects of mitigation will include a clear record, proven remorse, mental disorder but not family circumstances because the

perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit.”

8. The Supreme court noted about the hardships to the family and the weight that has to be attached to such circumstances in sentencing an offender in *Rokolaba v State* [2018] FJSC 12; CAV0011.2017 (26 April 2018);

“In these serious cases of sexual offending very little mitigation can be derived from being “married with children” and “sole breadwinner”. For a crime as serious as this, imprisonment must necessarily be imposed for a substantial period. Families invariably suffer greatly when the supporting member is to be imprisoned. In the absence of strong social security support, vulnerable relatives of the Accused, elderly or sickly parents, children at school, and overworked wives and mothers have to endure harsh misfortune as a result of the Accused person’s serious offending.”

9. You are not a first offender. You have three previous convictions. As a result, you are not entitled to any discount for previous good behavior.

10. For the reasons discussed above I do not find any mitigatory value in the factors that were submitted on your behalf.

11. You had been in remand custody a little less than two weeks. That period will be subsumed into your sentence in view of section 24 of the Sentencing and Penalties Act as a period of imprisonment already served by you.

12. The maximum punishment for rape is life imprisonment. The tariff for child rape is now 11 years to 20 years. It was observed in *Aitcheson v State* [2018] FJSC 29; CAV 0012.2018 (2 November 2018);

“The tariff previously set in *Raj v The State* [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating

circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.”

13. You have committed a serious domestic violence offence. Having considered the objective seriousness of the offence I pick a starting point of 12 years. For the aggravating circumstances I add 4 years. There are no mitigating circumstances as mentioned above. Thus, I arrive at a sentence of 16 years imprisonment for you.

14. I deduct two weeks from your sentence to reflect the time you were in remand custody.

15. Section 18 of the Sentencing and Penalties Act provides that the Court must fix a period during which the offender is not eligible to be released on parole when the Court sentences an offender for more than two years. However, in the recent Supreme Court decision in *Nacani Timo V State Criminal Petition No: CAV 0022 of 2018* it was decided that;

“It is not mandatory for a Court to award a non-parole period to every convict. However, a decision to award or decline to award a non-parole period must be taken by a court after hearing a convict and the decision must be accompanied by reasons, with an economy of words, as a part of a just, fair and reasonable procedure keeping the interests of the convict and society(including the victim) in mind”.

16. Accordingly, you were heard on the issue of setting a non-parole period. The complainant in this case is already deprived of the comforts of being with her mother and siblings as a result of this case. She is still 14 years old she must have the right and privilege to grow up with her other siblings under the care and love of her mother. Due to the consequences of this case she is relocated, and the victim impact statement reveals that she has been missing love and

bonding with her family. Your early release could potentially imbalance her lifestyle again if she reunites with her mother and the siblings. Chances are high for offenders in domestic violence offences to bring back trauma and violence to the victims upon their early release from prison.

17. Moreover, this is a rape case involving a child in domestic context. I am of the view that this case can be considered as an exceptional case for the purpose of setting a non-parole period for two reasons, namely; this is a domestic violence offence and the sexual offence is committed against a child. The Court has a duty to incarcerate offenders of domestic violence offences for longer periods to signify that the Courts unreservedly denounce any form of domestic violence and to recognize the interests of the victims. For the foregoing reasons, I find it absolutely necessary to set a non-parole period in this case.

18. At the same time, I have borne in mind the significance of promoting rehabilitation when setting a non-parole period.

19. Accordingly, you should serve a term of 15 years 11 months and 2 weeks imprisonment. You are eligible for parole after 11 years.

20. Further I issue a permanent domestic violence restraining order against you for non-molestation and for non-contact for the safety of the complainant.

30 days to appeal to the Court of Appeal.



At Lautoka
On 25 September 2019

Rangajeeva Wimalasena
Acting Judge

Solicitors:

Office of the Director of Public Prosecutions for the Prosecution
Legal Aid Commission for the Accused