

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 350 of 2019

STATE

vs.

ID

Counsel: Ms. U. Tamanikaiyaroi with Mr. U. Lal for the State
Ms. J. Korotini for Accused

Date of Hearing: 24th November 2020 to 25th November 2020

Date of Closing Submission: 26th November 2020

Date of Summing Up: 27th November 2020

Date of Judgment: 01st December 2020

Date of Sentence: 10th December 2020

SENTENCE

1. The name of the Complainant and the Accused are suppressed. Hereinafter the Complainant will be referred to as **TM** and the Accused will be referred to as **ID**.
2. The Court found you guilty of one count of Rape contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act. Both offences carry a maximum punishment of life imprisonment. The particulars of the offences are that:

COUNT 1

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.*

Particulars of Offence

ID between the 1st day of January 2018 - 31st August 2018 at Navua, in the Eastern Division, had carnal knowledge of TM, a child under the age 13 years.

COUNT 2

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

ID between the 1st day of May 2019- 31st August 2019 at Navua, in the Eastern Division, had carnal knowledge of TM, without her consent.

3. It was proved that you had penetrated the vagina of the complainant on two occasions during the period between the 1st of January 2018 and 31st of August 2018. Furthermore, the prosecution proved beyond a reasonable doubt that you had again penetrated the vagina of the Complainant in the same manner on two occasions during the period between the 1st of May 2019 and 31st of August 2019.

4. This is a case of an incestuous father, using his daughter for surrogate sexual gratification. A father, using his daughter as a surrogated sexual partner is not only against the acceptable social norms and values but also the acceptable human behaviours. The social enigma of abusing children for sexual gratification by their parent needs to address promptly and effectively. Parents are the only trusted and dependable persons that a child has in her growing years. Turning that trusted, dependable person into a monstrous demon who penetrated the innocent childhood of the child and destroyed it with his own lustful sexual

satisfaction, would undoubtedly jeopardize the child entire future life. Therefore, incest is a rape by extortion, in which a child's very childhood becomes a weapon used to control her. Accordingly, I find this is a grave crime.

Purpose of the Sentence

5. In view of the severe nature of the crimes of this nature, the primary purpose of this sentence is founded on the principle of deterrence. It is a responsibility of the Court to deter offenders or other persons from committing offences of the same or similar nature and protect the community from offenders of this nature. A harsh and long custodial sentence is inevitable for the offences of this nature to demonstrate the gravity of the offence and reflect that civilized society denounces such crimes without any reservation.
6. These two counts of Rape are founded on the same series of offending of same and similar characters. Therefore, I find it is appropriate to impose an aggregate sentence pursuant to Section 17 of the Sentencing and Penalties Act.
7. Gates CJ in **Aitcheson v State ([2018] FJSC 29; CAV0012.2018 (2 November 2018)** held that the tariff for the Rape of a child is between 11 - 20 years' imprisonment period.
8. Rape is a physical invasion of a sexual nature committed on the victim under a coercive circumstance. (*vide The Prosecutor V Jean-Paul Akayesu Case No ICTR-96-4-T*). Hence, it is an offence against personal liberty and rights to have a private life. Therefore, the degree of invasion of the bodily integrity and sexual autonomy of the victim is an indispensable factor in determining the gravity and impact of the crime on the victim. The victimization of bodily integrity should be ascertained based on the level of harm and the level of culpability.
9. The victim impact report states that this crime has adversely affected the complainant emotionally and psychologically. Her lifestyle, both personal and social, has changed adversely after this incident. Her education has been affected by this crime. According to

the Victim Impact Report, this crime has shattered her self-confidence, thus making her withdrawn, and isolated person. Therefore, I find that the level of harm in this offence is significantly high.

10. You had meticulously planned and executed this crime when she was not in a position to escape or seek assistance from others. The Complainant is the quieter child in the family. You have plotted this crime by using your position in the family as a single parent. The Complainant had no option, but to surrender to your monstrous act and suffer silently. You have threatened her that you would kill her if she informs anyone about this crime. I accordingly find that the level of culpability is significantly high in this crime.
11. Having considered the seriousness of the crime, the purpose of the sentence, the level of culpability and harm, it is my opinion that this is a suitable case where the Court should select the starting point at the mid-range of the tariff. Hence, I select fifteen (15) years as the starting point.
12. The Complainant is your biological daughter. She explained in her evidence that she felt safe and secured around her father, but no longer she feels the same after this crime. You were the fatherly figure and the only parent she had after her mother left them. You had abused that trust and confidence she had in you as her father. By doing this crime, you have destroyed the safest place she had in her young life with her siblings. You had started this crime when she was on the verge of becoming a teenager. That is the age; a child looks up for the parent for guidance and directions in order to venture into the young adolescence. Instead of providing such guidance and directions with love and care, you used her teenagehood as a weapon to satisfy your reprehensible lust of sexual gratification. The age difference between you and the Complainant is significant. I consider these reasons as aggravating factors of this offence.
13. The learned Counsel for the Defence in his mitigation submissions submitted your personal and family background, which has no mitigatory value.

14. The learned Counsel for the Defence submitted that you are a first offender; hence, you are entitled to a substantive discount. I find that your previous good character, especially the fact that you have not been tainted with any previous conviction for an offence of sexual nature, would have allowed you to freely move around in the community without any suspicion of risk. The community has perceived you as a man of good character and not as a child pedophile and allowed you to be feely with your female offsprings as a single male parent. Moreover, there is no suggestion that you have significantly contributed to the community or have any reputation in the community as per Section 5 of the Sentencing and Penalties Act. Therefore, I do not find your previous good character has any significant mitigatory value. Hence, you are only entitled to a meager discount for your previous good character.
15. In view of the reasons discussed above, I increase four (04) years for the aggravating factors to reach an interim period of nineteen (19) years. Because of your previous good character, I give you one (1) year discount and reach eighteen (18) years imprisonment as your final sentence.
16. Having considered the seriousness of this crime, the purpose of this sentence, and opportunities for rehabilitation, I find sixteen (16) years of the non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for sixteen (16) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

17. Accordingly, I sentence you for eighteen (18) years imprisonment as an aggregate sentence for these two counts of Rape as charged in the information. Moreover, you are not entitled to any parole for sixteen (16) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.


Actual Period of the Sentence

18. You have been in remand custody for this case for nearly one (1) year, one (1) month and fourteen (14) days before the sentence as the Court did not grant you bail. In pursuant to Section 24 of the Sentencing and Penalties Act, I consider one (1) year and two (2) months as a period of imprisonment that you have already served.
19. Accordingly, the actual sentencing period is **sixteen (16) years and ten (10) months** imprisonment with a non-parole period of **fourteen (14) years and ten (10) months**.
20. Since this incident involves domestic violence, I am satisfied that there are sufficient grounds to consider making an order under the Domestic Violence Act. I accordingly make a permanent Domestic Violence Restraining Order against you with standard non-molestation conditions and no contact conditions pursuant to Section 24 and 28 of the Domestic Violence Act. The above Domestic Violence Restraining Order will be in force until this Court or any other competence Court is varied or suspended it. Furthermore, if you breached this restraining order, you will be charged and prosecuted for an offence pursuant of section 77 of the Domestic Violence Act.
21. Thirty (30) days to appeal to the Fiji Court of Appeal.



At Suva

10th December 2020


.....
Hon. Mr. Justice R.D.R.T. Rajasinghe

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.