

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 148 of 2016

STATE

V

P.K.

Counsel : Ms. L. Bogitini for the State.
: Ms. P. Reddy and Ms. N. Sharma for the Accused.

Dates of Hearing : 17, 18 February, 2020
Closing Speeches : 19 February, 2020
Date of Summing Up : 20 February, 2020
Date of Judgment : 21 February, 2020
Date of Sentence : 28 February, 2020

SENTENCE

(The name of the victim is suppressed, she will be referred to as "LT". The name of the accused is also suppressed, he will be referred to as "P.K").

1. In a judgment delivered on 21st February, 2020 this court found the accused guilty and convicted him for two counts of indecent assault and five counts of rape as per the following information:

COUNT ONE
REPRESENTATIVE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154 (1) of the Penal Code.

Particulars of Offence

P.K between the 1st of January, 2006 to the 31st day of December, 2008 at Nausori, in the Eastern Division unlawfully and indecently assaulted "**LT**" by touching the vagina of the said "**LT**".

COUNT TWO
REPRESENTATIVE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 154 (1) of the Penal Code.

Particulars of Offence

P.K between the 1st day of January, 2009 to the 31st day of December, 2009 at Nakasi, in the Central Division unlawfully and indecently assaulted "**LT**" by touching the vagina of the said "**LT**".

COUNT THREE

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code.

Particulars of offence

P.K between the 1st day of January 2009 to the 31st day of January 2009 at Nakasi in the Central Division penetrated the vagina of "**LT**" with his penis, without the consent of the said "**LT**".

COUNT FOUR
REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K between the 1st day of January 2010 to the 31st day of December, 2011 at Nakasi in the Central Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT FIVE
REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K between the 1st day of January 2012 to the 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT SIX

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K on the 2nd day of July 2016 at Nadi in the Western Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT SEVEN

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K on an occasion other than that referred to in Count 6, on the 2nd day of July, 2016 at Nadi in the Western Division had penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

2. The brief facts were as follows:

In the year 2006 the victim was 6 years of age and a class 2 student who lived with her father, the accused and her mother at Dilkusha, Nausori. During the year, the accused touched her body where he was not supposed to touch in particular her vagina. This happened when the victim was alone with the accused in their house since her mother was at work. The accused used to call the victim into the bedroom remove her clothes and then touch her vagina for about 10 minutes. After doing this, the accused would tell the victim not to tell anyone about what he had done.

3. The accused continued doing the above from the year 2006 to 2008 on numerous occasions. In 2009, the victim and her family shifted to Nakasi, at this time she was 10 years of age. On one occasion the victim was at home with her two brothers in the living room, the accused came and took the victim into the bedroom. In the bedroom after asking the victim to remove her clothes the accused touched the victim’s vagina and forcefully inserted his penis into her vagina. The victim cried and asked the accused to stop but he did not.
4. Between the year 2010 and 2011 the victim and the family had moved houses in Nakasi. The accused would ask the victim to remove her clothes

and then had forceful sexual intercourse on numerous occasions with the victim for about 10 to 15 minutes.

5. Between 2012 and 2015 the accused would continue to have sexual intercourse with her. On one occasion he took her into the bedroom by pulling her hair. In the bedroom the accused forcefully removed the victim's clothes and then forcefully had sexual intercourse with her.
6. The accused also threatened the victim not to make any noise since houses were close to each other and he had also slapped her. The sexual intercourse lasted for about 10 to 20 minutes. During this time the victim cried but the accused did not stop or did not care. The victim did not tell anyone because she was threatened by the accused not to tell anyone.
7. On 2nd July, 2016 the family had already moved to Navo, Nadi by this time she was 17 years of age. In the afternoon the victim's mother left the house for a church event, the victim and her 2 brothers were with the accused.
8. After her brothers had slept the accused came and pulled the victim's hand and forcefully took her into the bedroom. In the bedroom, he forcefully removed the victim's clothes and forcefully had sexual intercourse with her.
9. The accused threatened the victim that if she told anyone, there will be no breadwinner in the family. After some time during the night the victim's mother came to pick something from the house and left. After the victim's mother had left the accused came again and forcefully pulled the victim into the bedroom and again had forceful sexual intercourse. The victim was crying and begging the accused to stop but he did not.
10. The victim was scared of the accused that is why she did what the accused had asked her to do, he was also violent on her. The victim never wanted to have sexual intercourse with the accused. He would force her on the bed,

hold her hands in a way so that she wouldn't move although she would try to push him away.

11. On all the incidents of rape the victim did not consent to have sexual intercourse with the accused. Furthermore, after every incident of rape the accused would sit down with the victim and pray with her seeking her forgiveness and also ask God to forgive him for what he had done and also each time he would assure the victim that he would never do it again but he always did.
12. As a result of what the accused was doing to the victim she could not cope with her studies so one day instead of going to school about a week after the second incident on 2nd July, the victim went to her aunt's house and told her aunt what the accused was doing to her. The victim's mother was called and the victim told her mother everything the accused was doing to her.
13. The victim went with her mother and reported the matter to the police. The accused was arrested, caution interviewed and charged.
14. Both counsel filed their submissions including the victim impact statement and mitigation submissions. At this point, this court wishes to acknowledge the well-researched and detailed submissions of the state counsel.
15. The following personal details and mitigation have been presented by the counsel for the accused:
 - a) The accused is 46 years of age;
 - b) First offender;
 - c) Married with 2 sons and 1 daughter;
 - d) Is a church caretaker.

16. 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 FEATURES

17. The aggravating features are:

a) Breach of Trust

The victim is the biological daughter of the accused, she trusted the accused who grossly breached this trust by his actions. The victim was vulnerable, alone and helpless and the accused took advantage of this for 10 years. The accused exposed the victim to sexual activity at the age of 10 which continued until the victim reported the matter to the police at the age of 17. The accused also abused the sanctity of the relationship between a father and a daughter. By engaging the victim in sexual activity at a young age the accused had robbed the victim of her childhood and innocence. The accused continued abusing the victim from the tender age of 6 years till she became an adolescent without any regard to her health, pain and sufferings.

b) Planning

The evidence shows premeditation, careful and systematic planning by the accused he knew when the victim's mother was not at home and he took full advantage of this on different occasions. The accused also manipulated and instilled fear in the victim by threatening her so that she surrenders to him for his lust and sexual gratification.

c) Age difference

The victim was 6 years when the abuse started and the accused was 34 years. The age difference is substantial.

e) Victim Impact Statement

In the victim impact statement the victim mentioned that as a result of what the accused had done to her she was not able to complete her education. She had to endure the pain of living with the perpetrator in the same house as the abuse continued which reminded her of what she had been through. Mentally the victim was affected to the extent that she could not focus on anything since she kept on getting flash backs about what her father was doing to her. The victim does not trust anyone now especially men. At one stage in life the victim had attempted suicide since she had lost all hope to live.

18. 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 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.

REPRESENTATIVE COUNTS

19. This court is mindful of the fact that the accused faces two representative counts of indecent assault and two representative counts of rape. The evidence before the court was of more than one occasion the accused had indecently assaulted and raped the victim under the representative counts. The accused cannot be punished for all the other occasions of indecent assault and rape mentioned by the victim under the representative counts but for one occasion only (*see Senilokula v State, Criminal Petition No. CAV 0017 of 2017 (26 April 2018)*).

20. 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.
21. 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 abused and breached the trust of this victim.
22. 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.”
23. I am satisfied that the seven 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 all the seven offences.
24. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely. 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 expect condign punishment to mark the society’s outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.

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 *Anand Abhay Raj v State* (*supra*) found the following aggravating factors, many of which appear in the present case, at paragraph 63 as follows:

- (i) *The Petitioner was the victim's stepfather who should have protected her. Instead he breached the trust expected of him, and the breach was gross.*
- (ii) *The rape offences took place continuously over a long period of time. Such an experience "will surely scar her for the rest of her life" [Record p24].*
- (iii) *She was a child of 10 years. It is not clear what factors the learned judge took into account when fixing the starting point on the tariff. The age of the child, if very young, could yet be an aggravating factor. In this case it is more likely and appropriate that it be put into consideration for arriving at the tariff only, and not added on later as an aggravating factor.*
- (iv) *The frequency of the crime against children in Fiji, and therefore the need for deterrence.*
- (v) *She had been subjected to threats to kill her, assaulted and injured by the Petitioner.*
- (vi) *She was observed to be in real fear of the Petitioner. Such threats besides causing fear and anxiety in the victim over a long period, had postponed the exposure of these offences. These aggravating factors made this a particularly bad case of child abuse and for the specific crime charged namely rape."*

28. In *Gordon Aitcheson's* case (supra) the Supreme Court at paragraph 6 has mentioned the following aggravating factors some of which also apply to this case as well:

(i) This was a serious and abhorrent series of crimes.

(ii) There had been prolonged sexual abuse of children, a campaign of unstoppable rape on the vulnerable.

(iii) It was a gross abuse of trust.

(iv) He had tried to get one of the victims to take marijuana at the time of the rape.

(v) Both victims were his biological daughters.

(vi) Actual physical violence was used – punching – and pain was inflicted by these penetrations which did not make him desist.

(vii) There were threats to kill the mother if she interfered. She was borne down by his threats.

(viii) On one occasion he used one of the girls to keep lookout at the bedroom door whilst he raped the other girl in the bedroom.

(ix) The reports indicating the two victims were not doing well and were deeply marked by the traumas they had suffered.


29. 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 10 years for the aggravating factors bringing an interim total of 23 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value, however, the accused good character has substantive value, and in this regard, I reduce the sentence for mitigation and good character by 1 year. The sentence is now 22 years imprisonment.

30. I note from court file that the accused was remanded for two months and twenty four days. In exercise of my discretion I deduct three months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final aggregate sentence is 21 years 9 months imprisonment.
31. This court is mindful of the fact that the sentence is above the current sentencing tariff for the rape of a child, this is so, considering the circumstances of the offending and the culpability of the accused which calls for a sentence above the current tariff for the following reasons:
- a. The accused started indecently assaulting and abusing the victim when she was 6 years of age and he started raping the victim at the age of 10 years. The offending continued for 10 years;
 - b. The accused committed the offences when the victim's mother would not be at home, he was bold and undeterred. The accused was systematically manipulating the victim by seeking forgiveness and assuring her that he will not be repeating what he had done;
 - c. The accused threatened the victim all along instilling fear in her so that she does not tell anyone about what he was doing to her;
 - d. The abuse was profound and continuous without any regard to the health, pain and sufferings of the victim.
32. 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 five counts of rape is 21 years and 9 months.

33. I am satisfied that the term of 21 years and 9 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.
34. Mr. K. you have committed serious offences against your biological daughter who you were supposed to protect, care and love. You are a shame to the society. The victim was helpless, unsuspecting and vulnerable you cannot be forgiven for what you have done to this victim, you have scarred her life forever. I do not have any words to describe you and/or your actions against your own daughter. You cannot be forgiven for what you have done you have brought shame to all the fathers of this country.
35. As a result of your actions, the victim could not complete her education and fulfill her dream of becoming a doctor, she endured pain in silence by living in the same house as you. The campaign of sexual abuse had basically ruined her life to the extent that at one stage she attempted to commit suicide. This court denounces your behaviour in the strongest of terms you do not deserve a place in this society but away from it for a long time.
36. 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 daughter for a period of 10 years compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
37. Under section 18 (1) of the Sentencing and Penalties Act, I impose 20 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 meeting the expectations of the community and also assist in the rehabilitation of the accused which is just in the circumstances of this case.

38. In summary, I pass an aggregate sentence of 21 years and 9 months imprisonment with a non-parole period of 20 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.
39. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

28 February, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.