

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 216 of 2019

STATE

V

NARSIMLU

Counsel : Ms. L. Latu for the State.
: Mr. V. Chandra for the Accused.

Date of Sentence Hearing : 30 January, 2020
Date of Sentence : 31 January, 2020

SENTENCE

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

1. The accused is charged with the offence of rape contrary to section 149 and 150 of the Penal Code, Cap. 17 as per the following charge filed in the Magistrate's Court at Ba:

Statement of Offence

RAPE: Contrary to Section 149 & 150 of the Penal Code Cap 17.

Particulars of Offence

NARISMLU s/o PERMAL between 16th day of May 2006 and 31st day of August 2006 at Vaqia, Ba in the Western Division had unlawful carnal knowledge of "PP" without her consent.

2. The accused had elected to be tried by the Magistrate's Court when the charge was read and explained he pleaded not guilty. After numerous adjournments on 26th August, 2019 the matter proceeded to trial the prosecution called eight witnesses, whereas the accused gave evidence for the defence.
3. On 15th November, 2019 the accused was found guilty and convicted for one count of rape as charged. On this date and in accordance with section 190 (1) of the Criminal Procedure Act the file was sent to this court for sentencing.
4. The brief facts are as follows:
 - a) The victim in the year 2006 was 10 years of age and a class 5 student living with the accused her father and her mother.
 - b) On 30th August, 2006 at about 8.30pm the victim was sleeping with her mother but when she woke up she noticed that she was sleeping in the room of the accused. By this time the accused had removed her pants and panty, the accused then removed his pants took out his penis and inserted it into her vagina. The victim wanted to shout but the accused held her mouth and threatened her with a kitchen knife that if she told her mother, he will kill her. The victim got scared, it was painful when the accused inserted his penis into her vagina. The victim did not consent to what the accused had done to her.
 - c) Next day the victim's mother saw stains on the victim's panty upon questioning the victim told her mother about what the accused had done to her. The matter was reported to the police, the victim was medically examined upon investigation the accused was arrested caution interviewed and charged.

5. Both counsel filed sentence and mitigation submissions and also made oral submissions during the sentence hearing for which this court is grateful.

6. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:
 - (a) The accused is a first offender and a person of good character;
 - (b) The accused was 47 years of age at the time of the offending but now he is retired aged 60;
 - (c) Attained primary school education;
 - (d) Was looked after and maintained by his nephew in Navua.

7. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj -vs.- 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 FACTORS

8. The aggravating factors are:
 - (a) Breach of Trust

The victim is the daughter of the accused. The accused grossly breached the trust of his daughter by his actions and also abused the sanctity of the relationship between a father and daughter. The accused also used a kitchen knife to threaten the victim.
 - (b) Planning

The accused had planned what he did, he knew the victim was naive, innocent and vulnerable yet he continued with his unlawful conduct.

(c) Age Difference

The victim was 10 years of age whereas the accused was 47 years of age. The age difference was substantial.

(d) Exposing a child to sexual abuse

The accused had exposed the victim to sexual activity at a very young age he basically robbed her of her innocence by exposing her to an unexpected sexual encounter.

9. 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 *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.
10. There has been an increase in sexual offences involving offenders who are known to the victim and are mature adults. It is shocking to note the manner in which the accused had committed this offence on the victim.
11. 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 not expect any mercy from this court. The punishment ought to be such that it takes into account the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
12. 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.”

13. 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.”

14. 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:

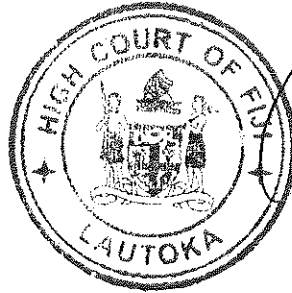
- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, 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;*

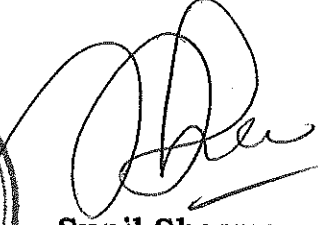
- (h) *whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
 - (i) *whether the method of penetration was dangerous or especially abhorrent;*
 - (j) *whether there had been a forced entry to a residence where the victim was pre sent;*
 - (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.*
15. After assessing the objective seriousness of the offence committed I take 13 years imprisonment (lower range of the scale) as the starting point of the 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. However, I note that the accused has no previous conviction he comes to court as a person of good character. I also note that this matter has been hanging over the accused for the past 13 years from 2006 due to no fault of his. For this reason the sentence is reduced by 2 years for the accused good character, mitigation and the substantial delay in having this matter determined earlier. The sentence is now 17 years imprisonment.
16. I note from the court file that the accused was remanded for 2 months and 19 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 3 months as a

period of imprisonment already served. The final sentence is 16 years 9 months imprisonment.

17. Mr. Narsimlu you have committed a serious offence against your daughter who you were supposed to protect and care. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to the victim.
18. I am certain as a result of your actions the victim would have been psychologically and emotionally affected for some time. Rape is not only a physical act, it not only destroys the very soul of the victim, but also brings about a sense of hopelessness and anxiety which cannot be measured or repaired by anyone.
19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was the accused's daughter aged 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.
20. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
21. Considering the above, I impose 14 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 and also meet the expectations of the community which is just in the circumstances of this case.

22. In summary I pass a sentence of 16 years and 9 months imprisonment with a non-parole period of 14 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.
23. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

31 January, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Millbrook Hills Law Partners for the Accused.