

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 145 of 2017

STATE

V

ALFRED AJAY PALANI

Counsel	:	Ms. L. Latu for the State.
	:	Ms. A. Bilivalu for the Accused.
Dates of Hearing	:	27, 28 and 29 July, 2020
Closing Speeches	:	30 July, 2020
Date of Summing Up	:	31 July, 2020
Date of Judgment	:	04 August, 2020
Date of Sentence	:	18 August, 2020

SENTENCE

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

1. In a judgment delivered on 4th August, 2020 this court found the accused guilty of one count of rape and one count of indecent assault.

2. The brief facts were as follows:

In 2015 the victim was 14 years of age and a class 8 student the accused is the paternal uncle of the victim, after the death of the victim's mother the victim lived with the accused, her grandmother and her brother.

3. In late 2014 the victim had gone with the accused to wash clothes. After the victim finished washing and bathing in the river the accused touched her breasts from on top of her clothes the victim did not consent to this.

4. Thereafter on the 31st of March, 2015 in the afternoon when the victim was in the house the accused sent the brother of the victim to the shop to buy some panadol and also told the victim to have her shower.

5. When the victim came out of the bathroom she was wearing a long towel the accused gave her a small towel to change. The victim was scared of the accused so she changed into a small towel at this time the accused was also wearing a towel. When the victim went into her bedroom the accused came from behind and held her tightly and dragged her to his bedroom.

6. After threatening the victim he made her lie down on his bed and started kissing her neck then her breast and then her vagina. The accused then forcefully penetrated his penis into the vagina of the victim. The victim was frightened and scared she did not consent to have sexual intercourse with the accused. After the matter was reported to the police the accused was arrested and charged.

7. Both counsel filed sentence and mitigation submissions together with the victim impact statement for which this court is grateful.

8. Counsel for the accused presented the following mitigation and personal details about the accused:

- a) The accused is a first offender;
- b) He is now 43 years of age;

- c) Never Married;
- d) Unemployed;
- e) Had cooperated with the police;
- f) Promises not to reoffend.

9. 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.

AGGRAVATING FACTORS

10. The aggravating factors are:

a) Breach of Trust

The victim is the niece of the accused who was staying with the accused after her mother had passed on. The accused was like a father who breached the trust of the victim by his actions.

b) Vulnerable victim

The victim was alone, vulnerable and helpless the accused took advantage of this.

c) Planning

The accused had carefully planned what he wanted to do. Firstly, he knew his mother was not at home but attending a funeral, he then sent the victim's brother Edward to the shop so that he was left with the victim.

d) Age Difference

The victim was 14 years of age at the time of the offending whereas the accused was 39 years. The age difference of 25 years is substantial.

e) Victim impact statement

According to the victim impact statement the victim's life changed after the incidents she lost interest in her school work. The victim gets memories or flash backs of the incidents. She became suicidal at one stage of her life because she was blamed for the incidents by her own family and was moving from one place to the other.

f) 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.

11. 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.

12. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The tariff for this offence is from 1 year to 4 years imprisonment.

13. 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."

14. 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.
15. 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.
16. 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.
17. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults. It is appalling to note the manner in which the accused had committed both the offences on this victim.
18. 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”

19. 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.”

20. 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.*

21. 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. However, the accused good character has substantive mitigating value which will receive a reduction for good character. In this regard, I reduce the sentence by 1 year for good character and mitigation. The sentence now is 18 years imprisonment.
22. 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 17 years 10 months imprisonment.
23. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of rape, and one count of indecent assault is 17 years and 10 months.

24. I am satisfied that the term of 17 years and 10 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.
25. Mr. Palani, you have committed serious offences against an unsuspecting and vulnerable child who was your niece. It was your responsibility to protect, care and love this child who deserved fatherly love since her father was away. You cannot be forgiven for what you have done to this victim. Exposing a child at such a young age to sexual activities has a negative impact upon the child's development. The accused conduct is unthinkable and deplorable you are sick in mind, for your sexual gratification you have scarred the life of a child forever.
26. 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.
27. Under section 18 (1) of the Sentencing and Penalties Act, I impose 15 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.
28. In summary I pass an aggregate sentence of 17 years and 10 months imprisonment with a non-parole period of 15 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.

29. 30 days to appeal to the Court of Appeal.



**Sunil Sharma
Judge**

At Lautoka

18 August, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.