

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 203 of 2018

STATE

V

EPELI BALEIWASAWASA

Counsel : Ms. L. Latu for the State.
: Mr. L. Qetaki for the Accused.

Dates of Hearing : 12, 13, 14 April, 2021
Closing Speeches : 15 April, 2021
Date of Judgment : 15 April, 2021
Date of Sentence : 07 October, 2021

SENTENCE

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

1. In a judgment delivered on 15th April, 2021, this court found the accused guilty and convicted him for one count of sexual assault and one count of rape as charged.
2. The brief facts were as follows:

On 11th November 2018, the 11 year old victim was sleeping at her home with her younger sister. At about 5am, Jone a family friend of the victim's parents and the accused went into the house of the victim to sleep since

both had to go to work the same day. The victim's parents were at work at the time.

3. In the house the accused went and sat in the sofa in front of the bedroom where the victim and her sister were sleeping. Jone called the accused to sleep with him in the sitting room but the accused did not listen.
4. After Jone went to sleep in the sitting room the accused went into the bedroom where the victim was sleeping. He removed her blanket, and then put his hands inside the pants of the victim and started massaging her vagina. While doing this, the accused poked his two fingers inside the victim's vagina, when she screamed the accused ran out of the house.
5. The matter was reported to the police the same day and the victim was medically examined at the Nadi hospital. The medical report of the victim showed injuries to the vaginal opening, the accused was arrested and charged.
6. Both counsel filed their sentence submissions including the victim impact statement and mitigation for which this court is grateful, since the accused is in custody, bearing in mind the current Covid-19 restrictions this sentence is delivered virtually.
7. The counsel for the accused submitted the following personal details and mitigation on behalf of the accused:
 - (a) The accused is a first offender;
 - (b) He was 29 years of age at the time of the offending;
 - (c) He is married with 2 daughters aged 8 and 10 years respectively;
 - (d) Sole bread winner of the family;
 - (e) Eldest of the three siblings;
 - (f) Takes care of his elderly parents.

8. 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 has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

9. The aggravating factors are:

a) Breach of Trust

The accused was a visitor in the house of the victim, he was trusted to sleep over and go to work the same morning. The accused grossly breached the trust of the victim by his actions. The victim was vulnerable and unsuspecting and the accused took advantage of this.

b) Planning

There is some degree of planning involved the accused waited for Jone to sleep and he knew the parents of the victim were not at home. The accused was bold and undeterred in what he did.

c) Exposing a child to abuse

The accused had exposed the victim to sexual abuse at a very young age. The victim was supposed to be safe and secure in her house, but this was not to be.

e) Victim Impact Statement

In the victim impact statement the victim has stated that her life changed after the incidents, she has become short tempered, gets flash backs of what the accused had done to her and is not able to lead a normal life.

10. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs. The State* [2018] FJSC; CAV0012.2018 (2 November 2018) has confirmed the new tariff for the rape of a juvenile to be a sentence between 11 years to 20 years imprisonment.
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. Offenders for such offences 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 a situation.
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:

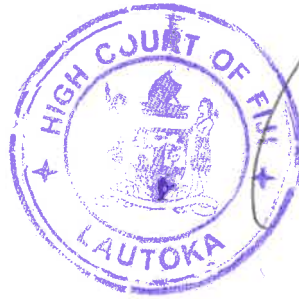
- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, 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. 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."
16. I am satisfied that the two 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 both the offences.
17. After assessing the objective seriousness of the offences committed I take 11 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 17 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. However, I note that the accused has no previous convictions he comes to court as a person of good character. For mitigation and good character the sentence is reduced by 1 year. The sentence is now 16 years imprisonment.
18. I note from the court file that the accused was remanded for 8 months and 22 days, in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is reduced by 9 months as a period of imprisonment already served. The final aggregate sentence is 15 years and 3 months imprisonment.

19. Mr. Baleiwasawasa you have committed serious offences against the victim who was unsuspecting and vulnerable, you cannot be forgiven for what you have done to her. You never gave a second thought about what you were doing to this innocent child who was sleeping in the comfort of her home.
20. The victim has also been psychologically and emotionally affected, rape is not only a physical act, it destroys the very soul of the victim, and also brings about a sense of hopelessness and anxiety. There is no doubt that positive and happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
21. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 11 years at the time 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.
22. Under section 18 (1) of the Sentencing and Penalties Act, 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.
23. Considering the above, I impose 13 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.

24. I am satisfied that the term of 15 years and 3 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. In summary, I pass an aggregate sentence of 15 years and 3 months imprisonment for one count of sexual assault and one count of rape with a non-parole period of 13 years to be served before the accused is eligible for parole.
26. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

07 October, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Cornerstone Lawyers, Suva for the Accused.