

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 002 of 2021**

**STATE**

**V**

**JOSAIA RACEVUA**

**Counsel** : Ms. S. Naibe for the State.  
: Ms. S. Ali for the Accused.

**Dates of Hearing** : 29, 30 June, 01 July, 2022  
**Closing Speeches** : 04 July, 2022  
**Date of Judgment** : 05 July, 2022  
**Date of Sentence** : 26 July, 2022

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**SENTENCE**

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*(The name of the victims are suppressed they will be referred to as "M.L" and "R.T" respectively)*

1. In a judgment delivered on 5<sup>th</sup> July, 2022 this court acquitted the accused of one count of rape but found him guilty and convicted him of the lesser offence of sexual assault. For the second count of rape the accused was acquitted but found him guilty and convicted him of the lesser offence of attempt to commit rape. For the third count this court found the accused guilty and convicted him of the offence of rape. For the fourth count the accused was acquitted of the lesser offence of sexual assault.

2. The brief facts were as follows:

In the year 2020 the first victim was 10 years and the second victim was 7 years of age. The accused is the uncle of both the victims and they were living in the same neighbourhood at a settlement in Rakiraki.

3. On 12<sup>th</sup> December, 2020 at about 2pm the victims were at their home when the accused waved at the victims to come to his house. At his house the accused told them to sleep on the mattress which was placed on the floor whilst he laid on his bed.

4. After sometime, the accused went on to the mattress where the victims were sleeping. The first victim felt something heavy on her back she saw the accused was inserting his penis on her backside. He then hugged her and touched her thighs and at the same time he tried to insert his penis into her vagina. The victim's panty had been removed, when she was released by the accused she went outside wore her panty went home and told her father about what the accused had done to her.

5. In respect of the second victim the accused went behind her and poked her vagina with his finger since it was painful the victim started to cry. The accused took out his wallet and gave her 20 cents. The victim went outside wore her panty and went home. At home she told her father about what the accused had done to her.

6. The matter was reported to the police. An investigation was conducted, the accused was arrested, caution interviewed and charged.

7. The state counsel filed sentence submissions and victim impact statements whereas the defence counsel filed mitigation submissions and supplementary submissions for which this court is grateful.

8. The following personal details and mitigation was presented on behalf of the accused:
- a) The accused was 54 years of age at the time of the offending;
  - b) First offender;
  - c) He is a widower; and
  - d) A Farmer.
9. 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 FACTORS**

10. The aggravating factors are:
- a) Breach of Trust  
The accused is the paternal uncle of the victims and also their neighbour. The victims trusted the accused when upon his gesture they went to his house. The accused grossly breached the trust of the victims by what he did to them.
  - b) Age Difference  
The victims were 10 and 7 years of age respectively at the time of the offending the accused was 54 years of age. The age difference is substantial the accused being a matured adult should have exercised care and restraint.
  - c) Vulnerable Victims  
Both victims were vulnerable and unsuspecting they innocently obliged to the accused's invitation to go to his house where he sexually abused them.

d) Exposing children to sexual abuse

The accused had exposed the victims to sexual abuse in different ways. He basically robbed them of their innocence and exposed them to an unexpected experience which they will not be able to forget easily.

Victim Impact Statement

According to the victim impact statement the victims have suffered psychological and emotional harm as follows:

a) First Victim "M.L"

- (i) After the incident has lost normalcy in life;
- (ii) Was teased by friends and school mates;
- (iii) Does not feel like going to school.

b) Second Victim "R.T"

- (i) After the incident she has become fearful;
- (ii) Friends/school mates have teased and made a joke of her;
- (iii) Does not wish to go to school any more.

11. The defence counsel in her supplementary submissions objects to the victim impact statements signed by the parents of the victims to be given any weight since they have alluded to information which has nothing to do with the complainants or the matter before the court.
12. In the victim impact statement both parents have mentioned about the reaction of the villagers towards them and the assault on the father of the victims. I agree with defence counsel and have not addressed my mind to the contents of the parents victim impact statements.
13. However, the contents of the victim impact statements filed by the victims cannot be ignored in light of the evidence given by the victims. The harm caused to the victims was a direct result of what the accused had done to them (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).

## **TARIFF**

### Rape

14. 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 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.

### Sexual Assault

15. The maximum punishment for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epeli Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012)*).

### Attempt to commit Rape

16. The maximum punishment for the offence of attempt to commit rape is 10 years imprisonment. The tariff for the offence of attempt to commit rape is well established which ranges from 1 year to 5 years imprisonment. In *Jioji Aunima vs. The State, criminal appeal no. HAA 033 of 2001 (27 June 2001)* Shameem J. stated:-

*“Applying all these principles, I find that the accepted tariff for Attempted Rape in the Fiji Courts ranges from 12 months imprisonment to 5 years imprisonment. A starting point should then be chosen according to the seriousness of the offending.*

17. In *Rusiate Bulimaiwai vs. The State, criminal appeal no. HAA 0068 of 2005*, Shameem J. mentioned the various factors which would result in higher sentences as follows:

*“... In Joji Aunima v. State, criminal appeal HAA 033 of 2001, I identified the tariff for attempted rape as being 12 months imprisonment to 5 years imprisonment. Sentences at the upper end of the tariff should be imposed where gratuitous violence is inflicted, where a weapon is used, where there is a gross breach of trust or where there is a large age gap between the complainant and the offender. In Hari Chand v State (supra) I upheld a 3 year term for the attempted rape of his daughter-in-law by the offender. There was no gratuitous violence but there was a gross breach of trust.”*

18. 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.”*

19. 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 three offences.

20. 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.

21. 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 the offences on the two victims.

22. 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.”*

23. 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.”*

24. 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.*


25. 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. The sentence is increased for the aggravating factors. The personal circumstances and family background of the accused has little mitigatory value. However, I note that the accused is a first offender who has come to court with a clean record. In this regard, I reduce the sentence for good character and his other mitigation.



27. I note from court file that the accused was remanded for 1 year 7 months and 4 days, in accordance with section 24 of the Sentencing and Penalties Act the remand period is deducted as a period of imprisonment already served. The final aggregate sentence is 13 years, 4 months and 26 days imprisonment.
28. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of sexual assault, one count of attempt to commit rape and one count of rape is 13 years, 4 months and 26 days imprisonment.
29. This court is satisfied that the term of 13 years, 4 months and 26 days 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.
30. Mr. Racevua you have committed serious offences against your two nieces who you were supposed to protect and care. The victims were unsuspecting and vulnerable. You cannot be forgiven for what you have done to these victims.
31. As a result of your actions as per the victim impact statements the victims were psychologically and emotionally affected to the extent that they do not wish to go to school. Rape is not only a physical act, it not only destroys the very soul of the victims, but also brings about a sense of hopelessness and anxiety which cannot be measured or repaired by anyone.
32. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the two victims (aged 10 and 7 years at the time of the offending) who were the accused's nieces 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.

33. 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.
34. Considering the above, I impose 12 years and 4 months 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.
35. In summary I pass an aggregate sentence of 13 years, 4 months and 26 days imprisonment with a non-parole period of 12 years and 4 months to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victims a permanent non-molestation and non-contact orders are issued to protect the victims under the Domestic Violence Act.
36. 30 days to appeal to the Court of Appeal.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
26 July, 2022

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid commission for the Accused.**