

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 190 of 2020

STATE

V

JOSEFA DRAVULEVU TAGICAKI

Counsel : Ms. S. Swastika for the State.
: Ms. K. Vulimainadave for the Accused.

Dates of Hearing : 22, 23, 26 September, 2022
Closing Speeches : 28 September, 2022
Date of Judgment : 29 September, 2022
Date of Sentence : 20 October, 2022

SENTENCE

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

1. In a judgment delivered on 29th September, 2022 this court found the accused guilty of one count of rape and convicted him accordingly.
2. The brief facts were as follows:

The victim is the sister in law of the accused after the death of the victim's father in 2005 the victim moved to Natokowaqa to live with the accused and his family primarily for her education. The accused assisted the victim financially and provided for her necessities.

In the year 2014 the victim was 16 years of age, one day she was alone with the accused, whilst having her shower the accused forcefully pushed open the bathroom door and went inside. He blocked the mouth of the victim with one hand and then forcefully laid her on the floor and had forceful sexual intercourse for about half an hour. The victim felt pain in her vagina she was struggling to push the accused away but could not. The victim did not consent to what the accused had done to her.

The accused threatened the victim not to tell anyone about what he had done. After two days the victim told her sister in law, at this time she left the accused house and moved to the house of her brother and sister in law.

After some time, the accused went to the house of the victim's brother and in the presence of the victim he started seeking forgiveness for what he had done to the victim. The victim did not forgive and forget what the accused had done to her. In 2017 the matter was reported to the police the accused was arrested, caution interviewed and charged.

3. The state counsel filed written sentence submissions and the defence counsel filed mitigation for which this court is grateful.
4. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused is 64 years old;
 - b) First offender;

- c) Is separated and has 6 adult children;
 - d) Retired Military Officer;
 - e) Had cooperated with the police during investigations;
 - f) Promises not to reoffend if given the opportunity he will reform himself.
5. 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

6. The following aggravating factors are obvious in this case:

a) Breach of Trust

The victim is the sister in law of the accused. She trusted the accused that is why she was alone in the house with the accused. The accused grossly breached the trust and the sanctity of the relationship that existed between him and the victim.

b) Victim was vulnerable

The victim was vulnerable and unsuspecting the accused took advantage of this and sexually abused the victim in the bathroom. The accused over powered the helpless victim. The victim was 16 years whereas the accused was 55 years. The accused was a mature adult who should have known better. The age difference is substantial.

c) Planning

There is some degree of planning by the accused he knew the victim was alone and having her shower he forcefully pushed open the door and went into the bathroom without any regard to her privacy.

d) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victim by mature adults known to the victim. The accused was bold and undeterred in what he did to the victim.

TARIFF

7. The maximum penalty for the offence of rape is life imprisonment. 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.
8. Bearing in mind the objective seriousness of the offence committed I take 11 years imprisonment (lower range of the scale) as the starting point of the sentence. The sentence is increased for the aggravating factors, for mitigation it is noted that the accused is a first offender hence a person of good character
9. The personal circumstances and family background of the accused has little mitigatory value, however, his good character being a first offender has substantive mitigating value. The sentence is reduced to reflect good character and other mitigation.

10. I note from the court file the accused was remanded for 1 month and 21 days. In exercise of my discretion I reduce the sentence by 1 month and 25 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence for one count of rape is 14 years, 10 months and 5 days imprisonment.
11. It is the duty of the court to protect children from sexual abuse or exploitation of any kind that is the reason why the law has imposed life imprisonment for the offence of rape as the maximum penalty.
12. There has been an increase in sexual offences involving offenders who are known to the victim and matured adults.
13. 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 an offender sexually abuses a child, he or she should expect condign punishment to mark the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
14. 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 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.”*”

15. 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.”*
16. 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.*
17. Mr. Tagicaki, you have committed a serious offence against your sister in law who was unsuspecting and vulnerable by forcefully entering the bathroom and having forceful sexual intercourse with her. You cannot be forgiven for what you have done to this victim.
18. Exposing a child to sexual activities at a time when they are in transition to maturity has a negative impact upon a child's development. Your conduct on the victim is unthinkable and deplorable a long term imprisonment is the only answer. Being a matured adult you should have known better.
19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim of 16 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.

20. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 12 years imprisonment 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 to meet community expectations which is just in all the circumstances of this case.
21. In summary I pass a sentence of 14 years, 10 months and 5 days imprisonment with a non-parole period of 12 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.
22. 30 days to appeal to the Court of Appeal.



At Lautoka

20 October, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.

Sunil Sharma
Judge