

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 32 of 2020

STATE

V

SATENDRA CHAND

Counsel : Mr. J. Nasa for the State.
: Ms. K. Vulimainadave for the Accused.

Date of Submissions : 18 October, 2022
Date of Sentence : 21 October, 2022

SENTENCE

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

1. The accused is charged with the following offences as per the information filed by the Director of Public Prosecutions dated 17th March, 2020:

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SATENDRA CHAND on the 28th day of January, 2020 at Nadi in the Western Division penetrated the vagina of “R.K”, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SATENDRA CHAND on the 28th day of January, 2020 at Nadi in the Western Division unlawfully and indecently assaulted “R.K” by licking her vagina.

THIRD COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SATENDRA CHAND on the 28th day of January, 2020 at Nadi in the Western Division unlawfully and indecently assaulted “R.K” by rubbing her vagina with his penis.

2. This file was first called in the High Court on 12th February, 2020 after the accused pleaded not guilty the matter proceeded to pre-trial stages. After pre-trial conference hearing a voir dire hearing was scheduled for 3rd October, 2022. On 3rd October, 2022 (after about 2 years and 8 months) the accused in the presence of his counsel pleaded guilty.
3. On 4th October, 2022 the accused admitted the summary of facts read by the state counsel. The brief summary of facts is as follows:

On 28th January 2020, the victim (5 years of age) went with her sister, and grandparents to visit her grandaunt, the wife of the accused.

When the victim and her family reached the accused residence, they were hosted to lunch. After, having lunch, the victim went inside the house to put away two empty water bottles that were consumed during lunch.

However, the accused met the victim and took her to his bedroom. Therein, the accused removed the victim's tights and panty and inserted his finger into her vagina.

The accused also licked the vagina of the victim with his tongue. Subsequent to the act of licking, the accused rubbed his penis on the surface of the victim's vagina.

The victim did not like what the accused had done to her and felt pain in her vaginal region as a result of the accused's conduct. After this the accused told the victim not to tell anyone about what he had done to her.

In the evening of the same day, the victim informed her grandmother of what the accused had done to her inside his bedroom.

The matter was reported to police and the accused was apprehended and interviewed by Cpl. 2286 Lalta Prasad in the presence of DC 5084 Sami at Namaka Police Station. At question and answers 37 to 42, the accused admitted to taking the victim to his bedroom removing the victim's tights and panty and inserted his finger into her vagina at the material time. The accused further admits to licking the victim's vagina with his tongue and rubbing her vagina with his penis.

4. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview this court is satisfied that the accused has entered an unequivocal plea of

guilty on his freewill. This court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty.

5. The summary of facts admitted by the accused satisfies all the elements of the offences of rape and sexual assault as charged.
6. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly.
7. The state counsel filed written sentence submission and the victim impact statement whereas the accused filed mitigation submissions for which this court is grateful.
8. The accused counsel presented the following mitigation:
 - a) The accused is a first offender;
 - b) He was 54 years of age at the time;
 - c) Is unemployed and relies on his children for support;
 - d) Is educated up to class 6;
 - e) Takes full responsibility for his actions;
 - f) Sincerely remorseful and seeks forgiveness of the court;
 - g) Regrets what he has done;
 - h) Pleaded guilty;
 - i) Has mild intellectual disability.

9. 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

10. The aggravating factors are:

(a) Breach of Trust

The accused is the grand uncle of the victim. He grossly breached the trust of the victim by his actions and also abused the sanctity of the relationship that existed between the two.

(b) Planning

There is some degree of planning involved in what the accused did, he knew the victim was obedient to him, so he took her into his bedroom. The victim being a naive, innocent and vulnerable person followed the accused into his bedroom. The accused took advantage of the situation.

(c) Age difference

The victim was 5 years of age whereas the accused was 54 years of age. The age difference was substantial, the accused being a matured adult.

(d) Exposing children 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 unexpected sexual encounters.

(e) Victim Impact Statement

In the victim impact statement the victim expressed her anger about what the accused had done to her. She is also scared that the accused will do those things to her again.

TARIFF

11. The maximum penalty for the offence of sexual assault is 10 years imprisonment the tariff is a sentence between 2 years to 8 years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks (see *State vs. Laca, HAC 252 of 2011 (14 November, 2012)*).
12. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs. The State, Criminal Petition no. CAV 0012 of 2018 (02 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now between 11 years to 20 years imprisonment.

GUILTY PLEA

13. The accused pleaded guilty about 2 years and 8 months after the matter was called in this court. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the

following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

[14]. In **Rainima -v- The State** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In **Mataunitoga -v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating

factors the discount must reduce, and in the worst cases shorten considerably.

14. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
15. This court does not believe that the accused has shown genuine remorse when he pleaded guilty on 3rd October, 2022. The date of allegation is 28th January, 2020 and the accused did not plead guilty until 3rd October, 2022.
16. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. Here there is no doubt the timing of the guilty plea is late and that the prosecution had a strong case against the accused.
17. Nevertheless, by pleading guilty the accused saved the court's time and expenses and also prevented the victim from reliving her experience in court. Bearing this in mind, the accused ought to receive some reduction for his guilty plea.
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.”

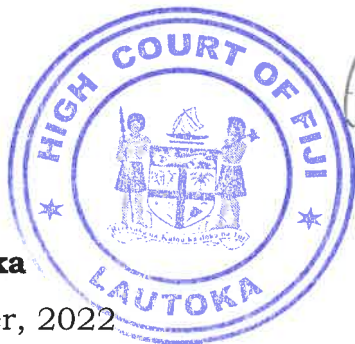
19. I am satisfied that the three offences for which the accused stands convicted are offences of the same or similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the three offences.
20. After assessing the objective seriousness of the offences committed I take 11 years imprisonment as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, and reduced for mitigation. The accused personal circumstances and family background has little mitigatory value, however, I find the accused good character has substantive mitigating value. The sentence is reduced for the accused good character and other mitigating factors. For guilty plea (although late in time) the sentence is further reduced.
21. I also note that the accused had been remanded for about 1 month and 5 days. In exercise of my discretion I further reduce the sentence by 1 month and 10 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served.
22. The final aggregate sentence is 15 years, 10 months and 20 days imprisonment. I am satisfied that the above term of 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.
23. Mr. Chand you have committed serious offences against your grandniece who you were supposed to protect and care. The victim was unsuspecting

and vulnerable. You cannot be forgiven for what you have done. I also note that you have pleaded guilty (although late in time), however, you should have known better being a matured adult.

24. 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 a positive and a happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
25. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults. It is shocking to note the manner in which the accused had committed these offences on the victim.
26. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final aggregate sentence of imprisonment for one count of rape and two counts of sexual assault is 15 years, 10 months and 20 days.
27. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 5 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 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.
28. Under section 18 (1) of the Sentencing and Penalties Act (as amended), 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 which is just in all the circumstances of this case.

29. This court has a duty and an obligation to protect the vulnerable from any form of sexual violations accordingly an immediate long term imprisonment is warranted.
30. In summary I pass an aggregate sentence of 15 years, 10 months and 20 days imprisonment for one count of rape and two counts of sexual assault with a non-parole period of 13 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.
31. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

21 October, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.