

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 164 of 2022

STATE

V

MELI TUTUDUA

Counsel : Ms. S. Swastika for the State.
Ms. S. Ali for the Accused.
Date of Submissions : 05 April, 2023
Date of Sentence : 11 April, 2023

SENTENCE

(The name of the victim is suppressed he will be referred to as "E.S").

1. The accused is charged with the following offence as per the information filed by the Director of Public Prosecutions dated 3rd November, 2022:

Statement of Offence

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

Particulars of Offence

MELI TUTUDUA, on 8th day of July, 2022 at Korotogo Village, in the Western Division, penetrated the anus of “E.S” a child under the age of 13 years, with his penis.

2. This file was first called in the High Court on 28th October, 2022 after the filing and serving of the information and disclosures the accused on 21st February, 2023 pleaded guilty. On 28th March, 2023 the accused admitted the summary of facts.
3. The summary of facts read by the state counsel is as follows:
 - a) The victim and the accused are known to each other since they lived in the same village. In the year 2022 the victim was 5 years and 4 months and the accused was 41 years.
 - b) On 8th of July, 2022, the accused was alone at his home when he saw the victim pass by. The accused called the victim inside his home and took him inside his bedroom. The accused closed the door and removed the victim’s trousers.
 - c) Thereafter the accused undressed himself and inserted his penis into the victim’s anus. The accused warned the victim not to tell anyone about what he had done the victim ran home from the accused house.
 - d) On 11th of July 2022 the victim informed his mother about what the accused had done to him. The matter was immediately reported at Sigatoka Police Station. The victim was examined by a Dr. Naidu at the Sigatoka Hospital the same day. The medical examination revealed that there was a perianal ecchymosis due to forceful penetration of the anal canal.

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 charge and the consequences of pleading guilty. The summary of facts admitted by the accused satisfies all the elements of the offence of rape. As a matter of caution I had referred the defence counsel to answer 46 of the caution interview whereby the accused had mentioned that he was assaulted by police. The defence counsel informed the court that the accused did not wish to challenge his confession which he had given voluntarily. This was also confirmed by the accused in court.
5. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly.
6. State counsel filed written sentence submissions and the defence counsel filed mitigation and supplementary submissions for which this court is grateful.
7. The accused counsel presented the following mitigation:
 - a) The accused is a first offender;
 - b) He is now 43 years of age;
 - c) Is a person with disability who receives a benefit under the Social Welfare Scheme;
 - d) Is remorseful of his actions and he seeks forgiveness of the court;
 - e) Pleaded guilty.
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 person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

9. The aggravating factors are:

(a) Breach of Trust

The victim and the accused are known to each other and they resided in the same village. The accused called the victim into his house. The victim trusted the accused so he obliged. The accused grossly breached the trust of the victim by his action.

(b) Age difference

The victim was 5 years of age whereas the accused was 41 years of age. The age difference is substantial and the accused being a matured adult.

(d) Exposing children to sexual abuse

The accused has exposed the victim to an unexpected sexual activity at a very young age and he basically robbed him of his innocence by exposing him to an unexpected sexual encounter.

(e) Victim was vulnerable

The victim was alone, vulnerable, naive and helpless the accused took advantage of this situation and sexually abused the victim. The accused was bold in what he did.

TARIFF

10. 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

11. The accused pleaded guilty at the earliest after the matter was first 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.*

11. 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)*).
12. When looking at this case, this court accepts that the accused has shown remorse when he pleaded guilty (on 21st February, 2023). By pleading guilty the accused prevented the victim from reliving his experience in court which is also a factor to the credit of the accused.
13. 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* (*see Gordon*

Aitcheson's case supra). 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 early and the accused by taking the path of accepting his guilt has shown remorse.


14. Furthermore, by pleading guilty the accused has also saved the court's time.
15. After assessing the objective seriousness of the offence committed I take 11 years imprisonment (lower range of the scale) as the starting point of the sentence. I increase the sentence for aggravating factors, the accused gets a reduction for mitigation and good character (although the personal circumstances and family background of the accused has little mitigatory value). The sentence is further reduced for early guilty plea, the accused has been in remand for 2 months and 16 days in exercise of my discretion I reduce the sentence by 3 months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence is 14 years imprisonment.
16. Mr. Tutudua you have committed a serious offence against your neighbour a child of 5 years 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 expressed remorse and pleaded guilty at the earliest opportunity, however, you should have known better being a matured adult.
17. There has been an increase in sexual offence cases 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 this offence on the victim.

18. 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 and offenders of such crime 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.
19. 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."*
20. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 5 years and 4 months 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.
21. 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.

22. Considering the above, I impose 12 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.
23. In summary, I pass a sentence of 14 years imprisonment with a non-parole period of 12 years to be served before the accused is eligible for parole.
24. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

11th April, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.