

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 158 of 2022

STATE

V

NEOPOLIAN AJAY KISSUN

Counsel : Mr. A. Singh for the State.
Ms. S. Ali for the Accused.
Date of Submissions : 27 April, 2023
Date of Sentence : 28 April, 2023

SENTENCE

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

1. The accused is charged with the following offences as per the information filed by the Director of Public Prosecutions dated 16th December, 2022:

FIRST COUNT

(REPRESENTATIVE COUNT)

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act.

Particulars of Offence

NEOPOLIAN AJAY KISSUN between the 1st day of January, 2018 and the 31st day of December, 2022 at Lautoka in the Western Division, unlawfully and indecently assaulted, Z.N.

**SECOND COUNT
(REPRESENTATIVE COUNT)**

Statement of Offence

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

Particulars of Offence

NEOPOLIAN AJAY KISSUN between the 1st day of January, 2018 and the 31st day of December, 2022 at Lautoka in the Western Division, unlawfully and indecently assaulted Z.N by licking the vagina of the said Z.N.

**THIRD COUNT
(REPRESENTATIVE COUNT)**

Statement of Offence

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

Particulars of Offence

NEOPOLIAN AJAY KISSUN between the 1st day of January, 2018 and the 31st day of December, 2022 at Lautoka in the Western Division, unlawfully and indecently assaulted Z.N by licking the buttocks of the said Z.N.

FOURTH COUNT
(REPRESENTATIVE COUNT)

Statement of Offence

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

Particulars of Offence

NEOPOLIAN AJAY KISSUN between the 1st day of January, 2018 and the 31st day of December, 2022 at Lautoka in the Western Division, penetrated the mouth of Z.N a child under the age of 13 years, with his penis.

FIFTH COUNT
(REPRESENTATIVE COUNT)

Statement of Offence

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

Particulars of Offence

NEOPOLIAN AJAY KISSUN between the 1st day of January, 2018 and the 31st day of December, 2022 at Lautoka in the Western Division, penetrated the vagina of Z.N a child under the age of 13 years, with his finger.

2. This file was first called in the High Court on 11th October, 2022 after the filing and service of the information and disclosures the accused on 31st January, 2023 pleaded guilty to all the counts. After numerous adjournments since the summary of facts was not ready on 4th April, 2023 the accused admitted the further amended summary of facts.
3. The brief summary of facts is as follows:

- a) The victim in this case was between 6 to 10 years of age and a class 4 student in the year 2022.
- b) The accused was in a defacto relationship with the mother of the victim and they were living together in Tavakubu, Lautoka.

First Count – Indecent Assault (01/01/18 to 31/12/22)

- c) The first incident took place when the victim had started kindergarten education in the year 2018. The accused used to touch the victim’s buttocks and her vagina when her mother was not at home. The accused touched her from the top of her clothes.
- d) The indecent assault happened on more than one occasion between the 1st of January 2018 and 31st December 2022.

Second Count – Sexual Assault (01/01/18 to 31/12/22)

- e) Between the 1st of January 2018 and 31st December 2022 on more than once occasion the accused would remove all the victim’s clothes, make her lie down on the bed and then he would lick her vagina.

Third Count – Sexual Assault & Fourth Count – Rape (01/01/18 to 31/12/22)

- f) The accused would remove all the victim’s clothes and lay on top of the victim. He would kiss her lips, neck, breast, stomach and buttocks.

- g) To make it worse the accused made the victim suck his penis. The victim was alone with the accused he used to tell her to hold his penis in her hand and also to put it inside her mouth. When she refused, the accused held her head and forced her to suck his penis. He only stopped when he ejaculated and later wiped it on the bed sheet and his t-shirt. The accused threatened her not to tell anyone or else he will break her leg.
- h) The sexual assault and the rape happened on more than one occasion between the 1st January 2018 and 31st December 2022.

Fifth Count – Rape (01/01/18 to 31/12/22)

- i) The accused used to remove the victim's clothes, lie on top of her after removing his clothes. He would then kiss her lips, neck, breast and stomach. The accused used to rub oil on her vagina with his hand and he penetrated his finger into the victim's vagina. The accused used to do this on more than one occasion between 1st January, 2018 and 31st December, 2022.
 - j) The matter came to light in the month of August, 2022 when the victim informed her friend about what the accused had been doing to her. The victim was medically examined on 24th August, 2022 at M.S.P Lautoka Clinic.
 - k) Upon investigation the accused was arrested, interviewed and charged.
4. After considering the summary of facts read by the state counsel which was admitted by the accused, 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. The summary of facts admitted by the accused satisfies all the elements of the offences of indecent assault, sexual assault and rape as charged.

5. In view of the above, this court finds the accused guilty as charged and he is convicted accordingly.
6. State counsel filed victim impact statement, written sentence submissions and the defence counsel filed mitigation 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 46 years of age;
 - c) Is a Farmer;
 - d) Is remorseful of his actions and he seeks forgiveness of the court;
 - e) Pleaded guilty at the earliest opportunity.
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. The accused is the step father of the victim and they were living in the same house. The accused grossly breached the trust of the victim by his actions.

(b) Age difference

The victim was 6 to 10 years of age during the period of offending whereas the accused was 41 to 45 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 her of her innocence by exposing her to such unexpected sexual encounters.

(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 to the victim.

(f) Planning

There is a degree of planning involved the accused knew the mother of the victim was not at home and he took advantage of the victim.

(g) Victim Impact Statement

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

- a) Still feels bad about what the accused has done to her;
- b) Gets scared when boys and men come near her;
- c) Is fearful that the accused may come and hurt her again.

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.
11. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (*Rokota vs. The State, criminal appeal no. HAA 0068 of 2002*).
12. The maximum penalty 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)*). At paragraphs 6 and 7 Madigan J. had stated the following:

6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight 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.

7. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim's body;

(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

These very sensible categories of offending are adopted by this Court and they provide a very useful guide to sentencing within the tariff of two to eight years.

GUILTY PLEA

13. The accused pleaded guilty at the earliest opportunity 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.

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. When looking at this case, this court accepts that the accused has shown some remorse when he pleaded guilty (on 31st January, 2023). By pleading guilty the accused prevented the victim from reliving her experience in court which is also a factor to the credit of the accused.
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* (*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 some remorse.
17. Furthermore, by pleading guilty the accused has also saved the court's time. 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.”

18. I am satisfied that the five 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 for the five offences.

REPRESENTATIVE COUNT

19. Although the accused is charged with one representative count of indecent assault, two representative counts of sexual assault and two representative counts of rape. The accused cannot be punished for the other occasions of rape but for one occasion only as charged (*see Senilokula v State, Criminal Petition no. CAV 0017 of 2017 (26 April, 2018)*).
20. 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 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 accused has expired previous conviction which is disregarded and he is taken as a first offender. The sentence is further reduced for early guilty plea, the accused has been in remand for 7 months and 1 day in exercise of my discretion I reduce the sentence by 7 months and 14 days in accordance with section 24 of the Sentencing and Penalties

Act as a period of imprisonment already served. The final aggregate sentence is 18 years, 4 months and 16 days imprisonment.

21. Mr. Kissun you have committed serious offences against your step daughter a child who was 6 to 10 years old at the time 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 some remorse in the face of a strong prosecution case and pleaded guilty at the earliest opportunity, however, this does not exculpate you from what you had done to this child over a considerable period of time. You were a matured adult who should have known better.
22. 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 these offences on the victim. The facts show a dreadful account of what the accused has done to the victim.
23. 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.
24. 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.”

25. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 6 to 10 years of age 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.
26. 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.
27. Considering the above, I impose 16 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.
28. In summary, I pass an aggregate sentence of 18 years, 4 months and 16 days imprisonment with a non-parole period of 16 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. It is also recommended that the Commissioner of Correction Services arrange for the counseling of the accused.

29. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Sunil Sharma

Judge

At Lautoka

28 April, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.