IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 62 of 2020

STATE

V

ILIAPI LILO

Counsel	:	Mr. J. Nasa for the State.
	:	Mr. P. Gade for the Accused.
Dates of Hearing	:	18, 19 May, 2023
Closing Speeches	:	26 May, 2023
Date of Judgment	:	26 May, 2023
Date of Sentence	:	13 June, 2023

SENTENCE

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

1. In a judgment delivered on 26th May, 2023 this court found the accused guilty and convicted him for three counts of rape as charged.

2. The brief facts were as follows:

3. The victim is the niece of the accused in the year 2016 she was 10 years of age during the school holidays she used to visit her father and stay at her father's house at Tomuka, Lautoka.

4. Between 15th April, 2016 and 2nd May, 2016 the victim was at her father's house one day the accused called her into his house for them to watch movies. When the victim entered the house she was told by the accused to go into the room. When the victim went into the room the accused played a pornographic movie on his T.V. Thereafter the accused removed the victim's shorts and panty and laid her on the bed, whilst standing the accused removed his clothes and penetrated his penis into her vagina for about 5 to 10 minutes.

5. When the victim went home she did not tell anyone about what the accused had done to her because the accused had told the victim if she told anyone he will beat her.

6. Thereafter on 17th April 2017 the victim was on her way to attend to her cousin's birthday party the accused called her into his house. When inside the house she was told to sit on the mat. The accused touched her body made her lie down, removed her tights and panty, removed his clothes and then penetrated his penis into her vagina for about 10 minutes. After this the accused told the victim to wear her clothes and to play with other children.

7. The victim did not tell anyone about what the accused had done to her because she was scared the accused would beat her.

8. Finally, on 5th November, 2017 the victim was sitting with her friends outside her father's house when she saw the accused signaling to her to follow him to the toilet. When the victim went into the toilet she saw the accused had already removed his pants and he asked the victim to go to him.

9. The accused removed the victim's shorts and panty and told her to sit on his penis. The victim did as she was told and the penis of the accused penetrated her vagina for about 10 minutes. After this the accused told her to go home. The victim was afraid of what the accused had told her that he would beat her if she told anyone about what he had done. After this incident the victim stopped going to her father's house because of what the accused was doing to her.

10. The victim told her elder sister Kasanita about what the accused had done to her. The matter was reported to the police an investigation was conducted, the accused was arrested, caution interviewed and charged.

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

12. The following personal details and mitigation was presented on behalf of the accused:

a) The accused was 40 years of age at the time;
b) First offender;
c) Married with 3 children; and
d) Is a Farmer earning $100.00 per week .

13. 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

14. The aggravating factors are:

a) Breach of Trust

The accused is the uncle of the victim and also the victim's father's neighbour. The accused grossly breached the trust of the victim by what he did on three different occasions including the sanctity of the relationship that existed between them.

b) Age Difference

The victim was 10 years at the time of the first offending whereas the accused was 40 years of age. The age difference is substantial the accused being a matured adult should have exercised care and restraint. There is also some degree of planning involved the accused called the victim in his house on two occasions when his family members were not at home and on the last occasion he signaled the victim to follow him to the toilet where no one would disturb him from doing what he wanted to do.

c) Vulnerable Victim

The victim was vulnerable, unsuspecting and helpless the accused took advantage of this and sexually abused her.

d) Exposing children to sexual abuse

The accused had exposed the victim to sexual abuse and had exposed her to an unexpected experience at a very young age.

e) Victim Impact Statement

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

(i) Cannot forget what happened to her;
(ii) Constantly has flashbacks;
(iii) Counts herself to be unlucky for what has happened.

f) Prevalence of Offending

There is an increase in sexual offence cases by offenders who are known to the victim and are mature adults. The victim was supposed to spend happy school holidays at her father's place but this was not to be by what the accused had done.

TARIFF

Rape

15. 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 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.

16. 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."*

17. 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.

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. 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.

19. 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 offence on the victim.

20. 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."

21. 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."

22. 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.*

23. 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.

24. I note from court file that the accused was remanded for 2 months and 8 days, in exercise of my discretion I deduct 2 months and 10 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 14 years, 9 months and 20 days imprisonment.

25. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for three counts of rape is 14 years, 9 months and 20 days imprisonment.

26. This court is satisfied that the term of 14 years, 9 months and 20 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.

27. Mr. Lilo you have committed serious offences against your niece who you were supposed to protect and care. The victim was unsuspecting and vulnerable. You cannot be forgiven for what you have done to the victim.

28. As a result of your actions as per the victim impact statement the victim was psychologically and emotionally affected to the extent that she continues to be get flash back of the incidents.

29. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim (aged 10 years at the time of the first offending) who was the accused's niece 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.

30. 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.

31. Considering the above, I impose 12 years and 9 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.

32. In summary I pass an aggregate sentence of 14 years, 9 months and 20 days imprisonment with a non-parole period of 12 years and 9 months 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.

33. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

HIGH COURT OF FIJI
LAUTOKA

At Lautoka
13 June, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.