

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 108 of 2022**

**STATE**

**V**

**ISOA BALEINAREWA**

**Counsel** : Ms. S. Naibe for the State.  
: Ms. L. Taukei and Ms. S. Shafique for the Accused.

**Dates of Hearing** : 21, 22, 23, 24 and 25 August, 2023  
**Closing Speeches** : 30 August, 2023  
**Date of Judgment** : 31 August, 2023  
**Date of Submissions** : 15 September, 2023  
**Date of Sentence** : 26 September, 2023

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**SENTENCE**

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*(The name of the victim is suppressed she will be referred to as "L.C")*

1. In a judgment delivered on 31<sup>st</sup> August, 2023 this court acquitted the accused of one count of assault with intent to commit rape (count one) and two counts of rape (counts three and four) but found him guilty and convicted him of one count of sexual assault (count two) and three counts of rape (counts five, six and seven).
2. The brief facts were as follows:

The victim and the accused are known to each other the accused is the paternal uncle of the victim. On Sunday 17<sup>th</sup> July, 2022 the 5 year old victim

at the request of the accused went with the accused, Vika and her two brothers Tomasi and Ilai to tether the cattle.

3. The victim was piggybacking on the accused, as the group was about to reach the cattle the accused told Tomasi, Vika and Ilai to take the lead. The victim wanted to go with her brothers and Vika but the accused stopped her. After the cattle were taken away by Tomasi, Vika and Ilai the victim was alone with the accused.
4. At this time the accused made the victim lie down and then he pulled down the victim's panty and forcefully penetrated her vagina with his index finger. When the accused did this the victim felt pain after this the accused removed his pants.
5. The victim was trying to stand up but the accused kept pulling her down. The accused put his penis on the victim's cheeks and also forcefully penetrated his finger into her anus and then his penis into the victim's vagina. The victim felt pain as a result of what the accused had done.
6. The victim told Vika and her mother Anaseini about what the accused had done to her.
7. The matter was reported to the police and the victim was medically examined the same day. The doctor found lacerations in the vagina and the anus of the victim which was consistent with forceful penetration. The doctor also mentioned that the injuries were recent and painful to the victim during the examination of the vagina and the anus.
8. During the police investigation the accused was arrested, caution interviewed and charged.

9. The state counsel filed sentence submissions and the defence counsel filed amended mitigation submissions for which this court is grateful.
10. The following personal details and mitigation was presented on behalf of the accused:
  - a) The accused was 42 years of age at the time of the offending;
  - b) First offender;
  - c) He was a Carpenter earning \$200.00 per week;
  - d) Has a three year old child from a defacto relationship;
  - e) Was looking after his elderly parents.
11. 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**

12. The aggravating factors are:

- a) Breach of Trust

The accused is the paternal uncle of the victim and they were living in the same settlement. The victim trusted the accused and upon his request she went with him to tether the cattle. The accused grossly breached the trust of the victim by what he did to her.

- b) Age Difference

The victim was 5 years of age at the time of the offending and the accused was 42 years of age. The age difference is substantial the accused being a matured adult should have exercised care and restraint.

c) Vulnerable Victim

The victim was vulnerable, helpless and unsuspecting she innocently obliged to the accused's invitation to go and tether the Cattle.

d) Exposing children to sexual abuse

The accused had exposed the victim to sexual abuse and he basically robbed her of her innocence and exposed her to an unexpected experience which she will not forget easily.

e) Planning

There is some degree of planning by the accused he knew the victim was alone with him after he had sent the other children to tether the Cattle.

## **TARIFF**

### Rape

13. The maximum punishment 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.

### Sexual Assault

14. The maximum punishment for the offence of sexual assault as per the facts for this case is 14 years imprisonment.

15. 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.”*

16. 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 four offences.

17. 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.

18. 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 offences on the victim.

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. 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.”*

21. 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;*

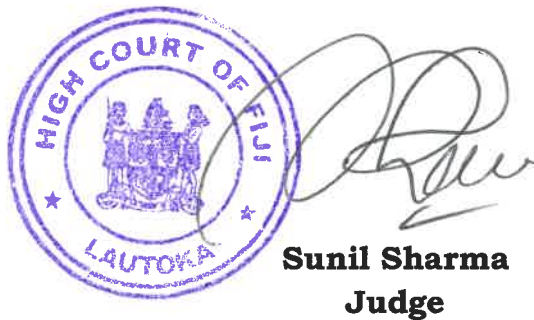
- (j) *whether there had been a forced entry to a residence where the victim was pre sent;*
  - (k) *whether the incident was sustained over a long period such as several hours;*
  - (l) *whether the incident had been especially degrading or humiliating;*
  - (m) *If a plea of guilty was tendered, how 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.*
22. 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.
23. I note from court file that the accused was remanded for 1 year, 2 months and 5 days, the sentence is further reduced as a period of imprisonment already served. The final aggregate sentence is 14 years, 9 months and 25 days imprisonment.
24. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of sexual assault and three counts of rape is 14 years, 9 months and 25 days imprisonment.
25. This court is satisfied that the term of 14 years, 9 months and 25 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.

26. Mr. Baleinarewa you have committed serious offences against your 5 year old 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 this victim.
27. Rape is not only a physical act, it not only destroys the very soul of the victims, but also brings about a sense of hopelessness and anxiety which cannot be measured or repaired by anyone.
28. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the 5 year old victim at the time of the 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.
29. 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.
30. Considering the above, I impose 12 years and 6 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.



31. In summary I pass an aggregate sentence of 14 years, 9 months and 25 days imprisonment with a non-parole period of 12 years and 6 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.
32. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
**Judge**

**At Lautoka**

26 September, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid commission for the Accused.**