

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 74 of 2020**

**STATE**

**V**

**KRISHNEEL KAUSHAL NAIDU**

**(FIRST ACCUSED)**

**AND**

**KARTIK KUMAR**

**(SECOND ACCUSED)**

**Counsel** : Mr. U. Lal for the State.  
: Mr. N. Chand and Mr. P.R. Sharma for the First  
Accused.  
Mr. J. Reddy for the Second Accused.

**Dates of Hearing** : 12, 13, 14, and 15 September, 2023  
**Closing Speeches** : 20 September, 2023  
**Date of Judgment** : 21 September, 2023  
**Date of Sentence** : 12 October, 2023

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**SENTENCE**

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

1. In a judgment delivered on 21<sup>st</sup> September, 2023 this court found both the accused persons guilty of one count of abduction of young persons contrary to section 285 of the Crimes Act, 2009.
2. The first accused was found guilty of the lesser offence of defilement of a young person between 13 and 16 years contrary to section 215 of the Crimes Act, 2009 and one count of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.
3. The second accused was found guilty of two counts of rape contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009 and both were convicted him accordingly.
4. The brief facts were as follows:
  - a. The victim in the year 2020 was 15 years of age and she knew the two accused persons, the victim and Krishneel were in contact by mobile phone, Facebook and messenger platforms. On 18<sup>th</sup> March, 2020 there was an exchange of messages between the first accused and the victim and in one of the messages the first accused (Krishneel) messaged the victim to meet him later in the night. The victim was under the care of her mother.
  - b. As the victim arrived at the road junction a car came driven by the second accused (Kartik). The first accused was in the back seat of the car he opened the door for the victim to get in.
  - c. Both the accused persons took the victim away in the car without the permission and against the will of the victim's mother. The car stopped near Dugapatu temple the first accused had sexual intercourse with the victim. The car was driven further to an

isolated place near the bushes where the first accused left the car to answer his mobile phone. The victim was still naked in the back seat when the second accused seeing the victim alone came and forcefully had sexual intercourse with the victim.

- d. The victim did not like what the second accused was doing and she told him to stop but he did not. The victim did not consent to have sex with the second accused. When the second accused left the car the first accused came to the back seat. The car was driven to another isolated place where houses were far away on the left side of the road.
- e. Here the first accused had forceful sexual intercourse with the victim. The victim did not want to have sex with the first accused on this occasion and she was continuously told the first accused to stop but he did not. The victim was yelling and the first accused told the victim to yell as much as she wants.
- f. After the first accused finished, the second accused came on top of the victim and had forceful sexual intercourse with her, at this time she was feeling like she will faint since by this time the sexual intercourse on her by the two accused persons were four times. The victim did not consent for the second accused to have sex with her the second time.
- g. In the meantime a missing persons report was lodged with the Rakiraki Police Station and when the victim was about to be dropped home the police stopped the car and arrested both the accused persons.

- h. The victim was medically examined a few hours later and the examining doctor had observed extensive bruises on her neck and breast, and upon vaginal examination dried blood was seen around the vaginal area as a result of forced penetration. Both the accused persons were arrested, caution interviewed and charged.
5. The state counsel filed his sentence submissions including the victim impact statement and both the defence counsel filed mitigation for which this court is grateful.
6. The following personal details and mitigation have been submitted by the counsel for both the accused persons:

FIRST ACCUSED

- a) The accused is a first offender and a person of good character (character references attached);
- b) He is now 28 years of age;
- c) Is a Farmer, part time truck and bus driver and Sardar of cane cutters;
- d) Married with two children;
- e) Educated up to form 5;
- f) Cooperated with police during investigation;
- g) Is remorseful for his actions;
- h) Promises not to reoffend and if given the opportunity he will reform himself;
- i) Sole bread winner of the family.

SECOND ACCUSED

- a) The accused is a first offender;

- b) He is 30 years of age;
  - c) He is a motor mechanic and part time bus driver;
  - d) Comes from a poor family background;
  - e) Sole bread winner of the family;
  - f) Elderly parents are dependent on the accused;
  - g) Is an active and important member of a Ramayan Mandali;
  - h) Promises not to reoffend;
  - i) Seeks leniency and mercy from the court;
  - j) Cooperated with police during investigation.
7. 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**

8. The following aggravating factors are obvious:

(a) Breach of Trust

The victim and both the accused persons were known to each other. The accused persons grossly breached the trust of the victim by their actions.

(b) Planning

There is some degree of planning involved both the accused persons took turns in raping the victim. They took the victim to secluded places in the middle of the night. The victim was outnumbered by

the two accused persons. They knew the victim was naive, innocent and vulnerable and they continued with their unlawful conduct.

(c) Age Difference

At the time of the incidents the victim was 15 years of age whereas the accused persons were 25 and 27 years respectively. The age difference is substantial.

(d) Exposing a child to sexual abuse

Both the accused persons exposed the victim to sexual activity at a young age they basically robbed her of her innocence.

(e) Victim Impact Statement

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

- a) Is still scared about what happened to her;
- b) Had suicidal thoughts;
- c) Relationship with elder brother was ruined;
- d) Was isolated by relatives and neighbours;
- e) Her life changed after the incidents;
- f) Felt unwanted by family.

(f) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victims by mature adults known to them. The accused persons being matured adults did not give a second thought about what they were doing to the victim they were bold and undeterred.

## **TARIFF**

### **ABDUCTION OF YOUNG PERSONS**

9. The maximum penalty for the offence of abduction of young persons is 5 years imprisonment. The accepted tariff for this offence is between 1 year to 3 years imprisonment see *State vs. Umendra Kumar [2018] FJHC 215; HAC 199 of 2017 (21 March, 2018)*.

### **DEFILEMENT OF YOUNG PERSONS BETWEEN 13 AND 16 YEARS OF AGE**

10. The maximum penalty for the offence of defilement of young persons between the age of 13 and 16 years is 10 years imprisonment. The tariff for this offence is from a suspended sentence to 4 years imprisonment see *Elia Donumainasava vs. State [2001] HAA 32 of 2001 (18 May, 2001)* and *State vs. Pita Vetaukula, criminal case no. HAC 46 of 2013 (8 July, 2014)*. Suspended sentences are appropriate in cases of non-exploitive relationship between persons of similar age, virtuous relationship of boyfriend and girlfriend. Custodial sentences are appropriate in cases of sexual exploitation of young girls by older man who hold positions of authority over younger girls.

## **RAPE**

11. 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 (2 November, 2018)* has confirmed the new tariff for the rape of a juvenile to be a sentence between 11 years to 20 years imprisonment.

12. 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.”*

13. I am satisfied that the offences for which both the accused persons stand 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 for each of the accused persons.

14. 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.”*



15. 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.”*

16. 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 present;*
- (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.*


17. After assessing the objective seriousness of the offences committed I take 11 years imprisonment (lower end 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 both the accused persons have little mitigatory value. However, I note that both the accused persons have no previous convictions they come to court as persons of good character. The sentence is further reduced for other mitigation and good character.

18. I note from the court file that both the accused persons were granted bail on the day they appeared in the Magistrate's Court, however, they were remanded by this court for 22 days in my discretion the sentence is further reduced by one month as a term of imprisonment already served. The final aggregate sentence for the accused persons is 16 years and 5 months imprisonment respectively.

19. Mr. Naidu and Mr. Kumar you have committed serious offences against the 15 year old victim. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to her. I am lost for words both of you are a shame and burden to the society it was your lust for sexual gratification that you took the victim from one isolated place to the other and to prevent her from seeking any assistance from anyone the first accused had taken the mobile phone of the victim as soon as she got into the car.
20. You were two against one, have you thought of the misery, shame and pain you have brought to the victim, no amount of repentance can get the victim to lead a normal life. Both of you are a disgrace to your respective families and communities a long term imprisonment is inevitable.
21. 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 which cannot be cured. You have scarred the life of the victim forever. A positive and happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
22. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was aged 15 years 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.
23. 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.

24. Considering the above, I impose 14 years as a non-parole period to be served before the accused persons are eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of both the accused persons and also meet the expectations of the community which is just in the circumstances of this case.
25. In summary, I pass an aggregate sentence of 16 years and 5 months with a non-parole period of 14 years to be served by both the accused persons before they are eligible for parole.
26. 30 days to appeal to the Court of Appeal.

  
**Sunil Sharma**  
**Judge**



**At Lautoka**

12 October, 2023

**Solicitors**

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

**Messrs Law Parmendra, Rakiraki for the First Accused.**

**Messrs Jiten Reddy Lawyers, Suva for the Second Accused.**