

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 112 of 2021

STATE

V

ASAELI LESU

Counsel : Mr. S. Seruvatu for the State.
: Ms. N. Sharma and Mr. A. Barinisavu for the Accused.

Dates of Hearing : 09, 10, 11, 12 April, 2024
Closing Speeches : 16 April, 2024
Date of Judgment : 16 April, 2024
Date of Sentence : 07 May, 2024

SENTENCE

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

1. In a judgment delivered on 16th April, 2024 this court found the accused guilty of two counts of rape and one count of indecent assault as charged and he was convicted accordingly.
2. The brief facts were as follows:

- a. The victim and the accused are known to each other. The accused is the maternal uncle of the victim and both were living in the same house. One day in the year 2019 the 16 year old victim with the accused and some others went to Wailoaloa Beach. At the beach while the drinking was continuing the victim wanted to relieve herself.
- b. When the victim was on her way to relieve herself about 50 meters away from the others the accused followed. The accused went to the victim and put a cutter knife on her neck and told her that he wanted to have sex with her. Despite the victim's refusal, the accused kept on putting the cutter knife a 5 cm long blade on the neck of the victim and made the victim forcefully lie down, with the other hand the accused was able to pull down and remove her trousers and panty.
- c. The victim did not like this, and she started to cry the accused went on top of the victim and inserted his penis into the victim's vagina and had forceful sexual intercourse. The victim tried to stop the accused by pushing him away but she could not. The accused continued having sexual intercourse with her. At this time, the accused also pulled up the victim's thin strap bra and massaged her breast.
- d. After the sexual intercourse the accused threatened the victim if she told anyone about what he had done he will kill her, cut her into pieces and throw her in the water. Upon hearing this, the victim got scared when she went home she did not tell anyone about what the accused had done.
- e. One day in the year 2021, the accused went into the kitchen and forced the victim to go with him to Masimasi. The accused drove the victim in his car to Masimasi and into the bush.

- f. The accused got off the car but the victim refused, she questioned the accused why they were there. The accused replied that he wanted to have sex he then pulled the victim out of the car by holding her hand and neck.
 - g. When outside the car, the victim was told to bend down and hold on to the car door. The accused removed the victim's trousers and panty took out his penis and he forcefully inserted it into her vagina from behind. When the accused was doing this, the victim was crying and she did not know what to do.
 - h. The victim did not consent to have sexual intercourse with the accused on any of the occasions. The victim told her sister Mereseini and the matter was reported to the police. The accused was arrested, caution interviewed and charged.
3. The state counsel filed sentence submissions and the defence counsel filed mitigation for which this court is grateful.
 4. The following personal details and mitigation have been submitted by the counsel for the accused:
 - a) The accused is a first offender;
 - b) He is 56 years of age;
 - c) Has one adult child;
 - d) Was employed as a Driver earning \$160.00 weekly;
 - e) Has a medical condition of pain in the bone.
 5. 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

6. The following aggravating factors are obvious:

(a) Breach of Trust

The accused is the maternal uncle of the victim he grossly breached the trust of the victim by his actions.

(b) Victim was vulnerable

The victim was vulnerable, helpless and alone the accused knew this and he took advantage of the situation by continuing his unlawful conduct.

(c) Exposing a child to sexual abuse

The accused exposed the victim to a series of unexpected sexual encounters at a young age he basically robbed her of her innocence.

(d) Prevalence of the offending

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

(e) Use of weapon

On the first occasion of rape a 5 cm cutter blade was used on the complainant by the accused and she was threatened to submit to the accused.

(f) Age difference

At the time of the first offending the victim was 16 years of age and the accused was 51 years. The age difference is substantial.

TARIFF

RAPE

7. 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.

INDECENT ASSAULT

8. 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*).
9. 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.”

10. 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.

11. 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.”*

12. 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.”

13. 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.*

14. 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 the accused has little mitigatory value. I note that the accused has one previous conviction which is over 10 years for an unrelated matter. I will not take this against the accused but consider him as a first offender. The sentence is reduced for other mitigation and good character.
15. I also note from the court file that the accused was remanded for 6 months and 10 days, in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 6 months and 15 days as a period of imprisonment already served. The final aggregate sentence is 16 years, 5 months and 15 days imprisonment.
16. Mr. Lesu you have committed serious offences against your niece who you were supposed to protect and look after. The victim was unsuspecting, vulnerable and she trusted you.
17. You cannot be forgiven for what you have done to the victim. I am lost for words you are a shame to the society it was your lust for sexual gratification that you sexually abused the victim. Considering the culpability of the accused and the circumstances of the offending a long term imprisonment is inevitable.
18. Rape is not only a physical act, it destroys the very soul of the victim. You have scarred the life of the victim forever.

19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 16 years of age at the time of the first offending 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.
20. 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.
21. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State AAU0063.2011 (27 February 2015)* at paragraph 2 where Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the

Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

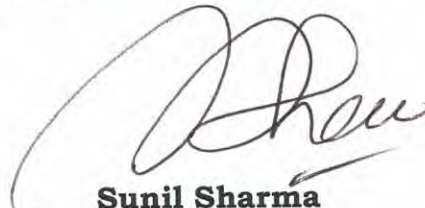
22. The Supreme Court in accepting the above principle in *Akuila Navuda v The State* [2023] FJSC 45; CAV0013.2022 (26 October 2023)] stated the following:

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

23. Considering the above, I impose 13 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.
24. I am satisfied that the term of 16 years, 5 months and 15 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.

25. In summary, I pass an aggregate sentence of 16 years, 5 months and 15 days imprisonment for two counts of rape and one of indecent assault with a non-parole period of 13 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.

26. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka
07 May, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.