

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

**Criminal Case No.: HAC 048 of 2021**

**STATE**

**V**

**SARWAN KUMAR SINGH**

<b>Counsel</b>	:	Ms. S. Swastika for the State.
	:	Mr. M. Kumar and Ms. R. Prasad for the Accused.
<b>Dates of Hearing</b>	:	03, 04, 05 June, 2024
<b>Closing Speeches</b>	:	06 June, 2024
<b>Date of Judgment</b>	:	07 June, 2024
<b>Date of Sentence</b>	:	21 June, 2024

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**SENTENCE**

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

1. In a judgment delivered on 7<sup>th</sup> June, 2024 this court found the accused guilty for two counts of indecent assault and two counts of rape and he was convicted accordingly.
2. The brief facts were as follows:

- a) The victim is the youngest biological daughter of the accused and they lived together in a two bedroom house. In the year 2019 the victim was 12 years of age.
- b) One day in February, 2019 the victim was in her bedroom alone since her two sisters had gone to town. The accused went into the bedroom of the victim, when the victim saw her father she got scared because she did not know what he wanted.
- c) The accused without saying anything went and stood behind the victim. He touched her breasts with his hand from over her clothes. The victim did not like what the accused had done.
- d) Since the victim was standing the accused slowly took his hand towards her private part he got her legs apart and poked his fingers into her vagina from over her undergarments at this time the victim was scared of the accused. The accused did the above to her on many occasions. The victim felt embarrassed, guilty and angry she did not do anything because she was scared.
- e) In March 2020 again when the victim was alone at home the accused went into her bedroom at this time the victim was lying on her bed face up. The accused went beside her bed and started touching her breasts by putting his hand inside her clothes. The accused did all of the above to the victim on many occasions.
- f) After this the accused removed the victim's clothes making her naked spread her legs and then inserted his penis into her vagina and had sexual intercourse with her. The victim again felt embarrassed, guilty and angry, she was pushing the accused away but she could not do so because he was holding her tight. Before leaving the accused threatened the victim that if she told anyone he will kill and bury her.

- g) On 1<sup>st</sup> March 2021 the victim was medically examined and she told the doctor and her sister Riya about what the accused was doing to her. The accused was arrested, caution interviewed and charged.
3. The state counsel filed her sentence submissions including the victim impact statement 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 was 44 years of age at the time;
  - c) Currently in a defacto relationship;
  - d) Was a Taxi Driver;
  - e) Has four children.
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 victim is the daughter of the accused. The accused grossly breached the trust of the victim by his actions and also abused the sanctity of the relationship that existed between the two. The Supreme Court in *Gordon Aitcheson vs. The State, criminal*

*petition no. CAV 0012 of 2018 (02 November, 2018) at paragraph 62 of the judgment endorsed the comments of the trial judge as follows:*

*"...Parents are the only trusted and dependable persons that a child has in her growing tender years. Turning that trusted dependable person into a monstrous demon who penetrated in to the innocent childhood of the child and destroy it with his own lustful sexual satisfaction, would undoubtedly jeopardise the child's entire future life. Therefore, incest is a rape by extortion, in which a child's very childhood becomes a weapon used to control her".*

(b) Planning

There is some degree of planning involved the accused abused the victim when her sisters were not at home. He knew the victim was alone, naive, innocent and vulnerable and he continued with his unlawful conduct.

(c) Age Difference

The victim was 12 years of age whereas the accused was 44 years of age. The age difference is substantial.

(d) Exposing a child to sexual abuse

The accused had exposed the victim to sexual activity at a young age he basically robbed her of her innocence by exposing her to such unexpected sexual encounters.

(e) Victim Impact Statement

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

- a) Could not finish her education since students were teasing her;
- b) Lost all her friends since her friends had judged her to be a bad girl;
- c) Villagers were not talking to the victim and the villagers also did not allow their children to play with the victim;
- d) Her family/relatives disowned her after the incidents came to light and therefore she had to move from place to place.

(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 being the mature of the two did not give a second thought about what he was doing to his daughter. He was bold and undeterred in what he did.

(g) Safety at home

The victim was at home in her bedroom where she was supposed to be safe but this was not to be due to the actions of the accused.

## **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*, (*supra*) 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 four offences.

## REPRESENTATIVE COUNTS

11. The accused faces two lesser offences of indecent assault being representative counts one and four and one representative count of rape being count two. The evidence before the court is that there were multiple incidents of indecent assault and rape.

12. The accused cannot be punished for the other occasions of indecent assault and rape but for one occasion only as charged (*see Senilolokula v State, Criminal Petition no. CAV 0017 of 2017 (26 April, 2018)*).

13. The Supreme Court in *Mohammed Alfaaz v State [2018] FJSC 17; CAV0009.2018 (30 August 2018)* has stated the following at paragraph 54:

*“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.”*

14. 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.”*

15. 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.*

16. 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. However, I note that the accused has no previous convictions he comes to court as a person of good character. The sentence is reduced for good character and other mitigating factors.

17. I note from the court file that the accused was remanded for 1 month and 14 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 1 month and 20 days as a period of imprisonment already served. The final aggregate sentence is 16 years 10 months and 10 days imprisonment.
18. Mr. Singh you have committed serious offences against your biological daughter who you were supposed to protect and care. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to her. I am lost for words you are a shame to the society it was due to your lust for sexual gratification that you targeted the victim when she was alone at home. What of kind of a parent are you? Have you thought of the misery, shame and pain you have brought to the victim. At an age when the victim was to have enjoyed her childhood you spoil it. You are a menace and a disgrace to the society a long term imprisonment term is inevitable.
19. 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 healed. You have scarred the life of the victim forever. There is no doubt that 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.
20. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was the accused's daughter aged 12 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.

21. 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.
  
22. 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 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 re-habilitation 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.*

23. 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.*

24. Considering the above, I impose 14 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.
25. In summary, I pass an aggregate sentence of 16 years 10 months and 10 days imprisonment with a non-parole period of 14 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**

21 June, 2024

**Solicitors**

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

**Messrs Fazilat Shah Legal, Lautoka for the Accused.**