

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 039 of 2024

STATE

V

TANIELA KASA

Counsel : Ms. S. Swastika and Ms. R. Pai for the State.
: Ms. K. Vulimainadave and Ms. M. Totovasau
for the Accused.

Dates of Hearing : 11, 12, 13 November, 2024
Closing Speeches : 14 November, 2024
Date of Judgment : 15 November, 2024
Date of Sentence : 27 November, 2024

SENTENCE

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

1. In a judgment delivered on 15th November, 2024 this court found the accused guilty for one count of sexual assault and one count of rape and he was convicted accordingly.
2. The brief facts were as follows:

- a) The victim in the year 2023 was 11 years of age. She is the biological daughter of the accused and both lived together with the other family members.
- b) One day in the year 2023 the victim after relieving herself in her grandmother's house opened the door of the washroom to come out when the accused pushed her inside. The victim shouted so the accused removed his t-shirt and covered the victim's mouth. Thereafter the accused open the victim's sarong removed her panty took out his penis and started rubbing it on top of the victim's vagina whilst both were standing. According to the victim this lasted for about one minute. When the accused did this the victim got scared. The accused stopped when the victim's mother started calling the victim.
- c) The second incident happened on a Friday in February, 2024 the victim and her younger brother were sleeping at home. In the night the accused came and pulled the victim underneath the bed. Upon seeing this, the victim's brother started to cry and he ran out of the house. The victim was face down so the accused turned her upwards and then he lay on the victim. Shortly after, the accused removed the victim's and his trousers and started rubbing his penis on the victim's vagina until he ejaculated. At this time the elder sister of the victim came into the bedroom with a torch and showed the torch light under the bed on the accused.
- d) The accused moved away and lay beside the victim, at this time the victim came out from under the bed and went to her aunt's house. The victim told her aunt about what the accused had done. The matter was reported to the police and the victim was medically examined.

- e) According to the doctor there was reddening of the labia minora and fossa navicularis and the hymen was not intact. In the professional opinion of the doctor there was vaginal penetration about 24 hours ago. The accused was arrested, caution interviewed and charged.
3. The state counsel filed 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 39 years of age;
 - b) Married with 5 children all below 18 years;
 - c) Was a Fisherman;
 - d) Cooperated with police during investigation;
 - e) Promises not to reoffend.
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 he saw the victim alone in the washroom and on another occasion he had specifically gone to the victim's grandmother's house to call the victim to sleep at home. He knew the victim was naive, innocent, helpless and vulnerable and he continued with his unlawful conduct.

(c) Age Difference

The victim was 11 years of age whereas the accused was 39 years of age. The age difference is substantial.

(d) Victim Impact Statement

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

- a) After the incidents the victim could not concentrate in her school work as a result she was unable to finish her education;
- b) Had to relocate away from her mother and siblings;
- c) Life changed after the incidents;
- d) Still carries the trauma of what the accused had done.

(e) 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.

(f) Safety at home

The victim was at her grandmother's house when the first incident happened and she was at home where the second incident happened. The complainant was supposed to be safe at these places 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.

SEXUAL ASSAULT

8. The maximum penalty for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epli Ratabacaca Laca criminal case no.HAC 252 of 2011(14 November, 2012)*).

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 two offences.

11. 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.”

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 by 5 years 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 by 2 years for good character and other mitigating factors. The interim aggregate sentence is 14 years imprisonment.

15. I note from the court file that the accused was remanded for 9 months and 1 day, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 9 months and 10 days as a period of imprisonment already served.

The final aggregate sentence is 13 years, 2 months and 20 days imprisonment.

16. Mr. Kasa 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. I am lost for words you are a shame to the society it was due to your lust for sexual gratification that you targeted your own daughter. What of kind of a father are you? Have you thought of the misery, shame and pain you have caused to the victim. At an age when the victim was to have enjoyed her childhood you spoilt it. You are a disgrace to the society, a long term imprisonment is inevitable.
17. Rape destroys the very soul of the victim, and also brings about a sense of apprehension and disquiet which cannot be healed. From the victim impact statement it is obvious to me that the victim continues to suffer the consequences of what the accused has done. A happy childhood memories contribute towards child development which is an inspiration for the future. Unfortunately, this is not so for the victim.
18. 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 11 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. 0
19. 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.

20. 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.

21. 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.

22. Considering the above, I impose 11 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.
23. In summary, I pass an aggregate sentence of 13 years, 2 months and 20 days imprisonment with a non-parole period of 11 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.
24. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

27 November, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.