

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: 009 OF 2012

STATE

-v-

USAIA LUTUNAIVALU VUNISA

Counsels : Mr. S. Babitu for the State

The accused in person

Date of Trial : 14 October -18 October 2013

Date of Sentence : 28 October 2013

(Names of the victims are suppressed. They are referred to as KN and CB)

SENTENCE

1. The accused is before the Court for sentence, after being convicted to the following charges.

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA, on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN**, in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **KN**, a 4 year old.

COUNT 2
Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA, on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **KN**, in that **USAIA LUTUNAIVALU VUNISA** rubbed his penis against the vagina of **KN**, a 4 year old.

COUNT 3
Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA, on the 1st day of January 2012, at Ba in the Western Division, unlawfully and indecently assaulted **CB**, in that **USAIA LUTUNAIVALU VUNISA** licked the vagina of **CB**, a 6 year old.

COUNT 4
Statement of Offence

RAPE: Contrary to Section 207 (1), (2)(a) and (3) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA, on the 1st day of January 2012, at Ba in the Western Division, raped **CB**, in that **USAIA LUTUNAIVALU VUNISA** used his penis to penetrate the vagina of **CB**, a 6 year old.

COUNT 5
Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (b) and (3) of the Crimes Decree, 2009.

Particulars of Offence

USAIA LUTUNAIVALU VUNISA, on the 1st day of January 2012, at Ba in the Western Division, raped **CB**, in that **USAIA LUTUNAIVALU VUNISA** used his right fore-finger to penetrate the anus of **CB**, a 6 year old.

2. You pleaded not guilty to above charges. Following trial lasting five days in this Court, you were found guilty on above counts against you.
3. After considering the unanimous verdict of Guilty of the assessors and having reviewed the evidence and summing up in this trial, the Court decided to concur with the verdict of the assessors and found you guilty of the above charges.
4. The following facts were proven in evidence during the trial. The two victims in this matter are KN aged 4 years and CB aged 7 years. The victims are related to the wife of the accused. On 1st January 2012 you have taken victims for a bath at the river with your step son. At there you sexually abused KN, sexually abused and raped CB in the presence of each other.
5. You had no remorse for your above conduct.
6. According to the Victim Impact Statements filed, there is change in the behavior of the victims after this incident.
7. According to the Crimes Decree the maximum punishment for rape is Imprisonment for life. It is a serious offence.
8. The tariff for rape is well settled since the Judgment of then A.H.C.T. Gates J in **State v Marawa** [2004] FJHC 338; HAC 0016T.2003S (23 April 2004). The starting point of a rape of an adult is 7 years. The tariff is 7 years to 15 years.
9. In **Mohamed Kasim v The State** (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993; 27 May 1994, The Court of Appeal observed:

"We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular

circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

10. The tariff for the rape of children differs from that of adults and takes the tariff of 10 to 16 years.

11. In **State v Mario Tauvoli** [2011] FJHC 216, HAC 027.2011 Madigan J held that:

“Rape of children is a very serious offence in deed and it seems to be very prevalent in Fiji at the time. The legislation had dictated harsh penalties and the 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.”

In this case 42 year step father was sentenced for 13 years with non parole period of 10 years for digital rape of 14 year old step daughter.

12. In **State v Anthony** [2012] FJHC 1013; HAC 151.2010 Nawana J held that:

“The accused’s engagement in his unilateral sexual activity with a little girl who was insensitive to such activity is most abhorrent. This kind of immoral act on a little girl of MB’s standing is bound to yield adverse results and psychological trauma, the effect of which is indeed difficult to foresee and asses even by psychologists and sociologists. The depravity of the accused in committing the offence should be denounced to save little children for their own future; and, the men of the accused’s caliber should not be allowed to deny the children of their legitimate place in the community. In passing down the sentence in case of this nature, deterrence is therefore, of paramount importance.”

13. It was held further by Nawana J that:

“The accused had not shown any remorse or repentance. On the contrary, he relentlessly castigated the witnesses saying that they were making up a false allegation at the expense of the little girl to avenge an unsubstantiated previous incident of refusing a loan to MB’s mother. This added, in my view, insult to the injury. While court recognizes that the accused was entitled to advance any proposition in support of his case, court equally recognizes that it should show its displeasure by showing no mercy in the matter of sentence when such allegations are found to be totally ill-founded as in this case.”

14. Considering the above, I commence your sentence at 12 years imprisonment for each charge of Rape.

15. Aggravating factors;

- (a) The victims were of a younger and tender age,
- (b) Each victim was subjected to more than one sexual act,
- (c) The accused had made the victims sexually active at a young age,
- (d) The accused had traumatized the life of the victims,
- (e) The accused showed no remorse for his actions and no repentance,
- (f) The accused breached the trust bestowed on him by the victims.

Considering all I increase your sentence by 3 years now the sentence is 15 years imprisonment.

16. Mitigating circumstances

- (a) You are first offender
- (b) Family dependent on you - father of two children.

Considering all, I reduce 1 year from your sentence now your sentence is 14 years imprisonment.

17. You were in remand from 3.1.2012 for a period of 1 year and 10 months. I deduct that period from above sentence. Now your sentence is 12 years and 2 months.

18. Considering Section 18 (1) of the Sentencing and Penalties Decree, I impose 11 years as non parole period.

19. The maximum penalty for the offence of Indecent Assault is 5 years imprisonment.

20. The tariff for the offence of Indecent assault is between 1 to 4 years imprisonment as decided in **Ratu Penioni Ratoka v State** [2002] FJHC 168;HAA 0068J.2002S. Further court observed that *"The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence."*

21. I start the sentence for each charge of indecent assault at 2 years and add 2 years for the aggravating factors mentioned above and deduct 1 year for the mitigating factors.

22. For each charge of indecent assault, I sentence you for a period of 3 years with a non parole period of 2 years.

23. Your sentences are as follows:

- | | | | |
|-------|--|---|-------------------|
| (i) | 1 st count of Indecent assault of victim KN | - | 3 years |
| (ii) | 2 nd count of indecent assault of victim KN | - | 3 years |
| (iii) | 3 rd count of Indecent assault of victim CB | - | 3 years |
| (iv) | 4 th count of Rape of victim CB | - | 12 years 2 months |
| (v) | 5 th count of Rape of victim CB | - | 12 years 2 months |

24. The Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013) cited with approval the following citation of D.A. Thomas, Principles of Sentencing (2nd edition, 1979) p. 56-57 which was cited in High Court of Australia judgment **Mill v The Queen** [1988] HCA 70:

“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; ‘when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences.’”

25. Considering the totality principle I order the sentences for the 1st and 2nd counts to run concurrently. Further I order sentences of 3rd, 4th and 5th counts to run concurrently. However, the court is of the view that there should be separate consecutive sentences for criminal behavior in respect of each victim. Thus sentences to 1st and 2nd counts to run consecutive to the sentences for the 3rd, 4th & 5th counts.

Summary

26. You are sentenced to 15 years and 2 months imprisonment. You will not be eligible for parole until you complete serving 13 years of imprisonment.

27. 30 days to appeal to Court of Appeal.

Sudharshana De Silva
JUDGE

**At Lautoka
28th October 2013**

**Solicitors : Accused in person
Office of the Director of Public Prosecutions for Prosecution**