

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

CRIMINAL CASE NO: HAC 319/ 2011

BETWEEN : STATE

AND : AISAKE NAULUMOSI

**COUNSELS : Ms L Latu and Ms R Uce for the State
Ms N Nawasaitoga and Mr P Tawake for the
Accused**

Date of Trial : 11-13/11/ 2013

Date of Summing Up : 15/11/ 2013

Date of Judgment : 18/11/2013

Date of Sentence : 21/11/2013

SENTENCE

[Name of the victim is suppressed. She will be referred to as WT]

[1] The Director of Public Prosecution had preferred the following charges against the accused above named.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code, Cap.17

Particulars of Offence

AISAKE NAULUMOSI between the 1st of January 2003 and the 31st day of December 2003 at Nasoki Village, Moala, Lau in the Eastern Division, had unlawful carnal knowledge of WT without her consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 154(1) of the Penal Code, Cap.17.

Particulars of Offence

AISAKE NAULUMOSI between the 1st day of January 2005 to the 31st day of December 2007 at Kinoya, in the Central Division, unlawfully and indecently assaulted WT.

THIRD COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Decree No: 44 of 2009.

Particulars of Offence

AISAKE NAULUMOSI between the 1st day of January 2011 to the 18th September 2011 at Nabua in the Central Division, unlawfully and indecently assaulted WT.

- [2] After trial on the charges, the accused was found guilty on all the counts. Accordingly he was convicted on all the charges.
- [3] In this case the accused is the step father of the victim. He raped the victim when she was 6 years old and a Class 1 student. Thereafter he sexually assaulted the victim twice. First she was sexually assaulted when she was 10 years old. At that time she was in Class 5. The final sexual assault had taken place when she was 14 years old. As she could not bear this pain any more finally she complaint to her class teacher in the year 2011. She did not divulge these incidents to anybody due to fear of the accused and her mother.

- [4] As per Section 150 of Penal Code Cap.17 the maximum sentence for the offence of Rape is to imprisonment for life, with or without corporal punishment.
- [5] As per Section 154(1) of Penal Code Cap.17 the maximum sentence for the offence of Indecent Assault is to imprisonment for 5 years, with or without corporal punishment.
- [6] As per Section 212(1) of the Crimes Decree No: 44 of 2009 the maximum sentence for an offence of Indecent Assault is to imprisonment for 5 years.

Tariff for Rape

- [7] In the case of **Chand v State** [2007] AAU005. 2006S (25 June 2007), the court referred to the case of **Mohammed Kasim v The State** Appeal 14 of 1993 where the same court observed:

“We consider that any rape case without aggravating or mitigating feature the starting point for sentencing an adult should be a term of imprisonment of 7 years. It must be recognized by the courts that the crime of rape has become altogether too frequent. The sentences imposed by the courts for that crime must reflect an understandable public outrage”

In **Sireli v State** [2008] FJCA 86;AAU0098 of 2008S(25 November 2008). The court also referred to the case of **State v Lasaro Turagabeci & others** HAC 0008 of 1996, the court observed:

“The courts have made it clear that rapist will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences of the victim are likely to be severe. The courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentence”.

In the case of *Drotini v The State* [2006] FJCA 26; AAU0001.2005 (24 March 2006); the court noted following:

“There are few more serious aggravating circumstances than where the rape is committed on a juvenile girl by a family member or someone who is in a position of special trust. The seriousness of the offence is exaggerated by the fact that family loyalties and emotions all too often enable the offender or other family members to prevent a complaint going outside the family. If the child then remains in the family home, the rapist often had the opportunity to repeat the offence and to hope for the same protection from the rest of the family

Cases of rape by fathers or step fathers appears before the court in Fiji far too frequently and ,in such cases, the starting point should be increased to ten years. Where there are further aggravating circumstances beyond those basic circumstances, such as repeated sexual molestation of any nature, threat of violence or actual violence or evidence that the offender has attempted to persuade other family members to help cover up the offences or discourage complaint to the police, there should be substantial increases above that starting point.

In *State v AV* [2009] FJHC24: JAC 192.2008 (2 February 2009) the court stated:-

“Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assault on children. Children are our future. The courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences.”

Tariff for Indecent Assault

- [8] In the case of **Rokota v The State** [2002] FJHC 168; HAA0068].2002S (23 August 2002), Justice Shameem highlighted the tariff for this offence:

“from these cases a number of principles emerge. Sentences for indecent assault range from 12 months to 4 years imprisonment. The gravity of the offence will determine the starting point for the sentence. The indecent assaults of small children reflect on gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapon or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence”.

- [9] In the case of **State v Simione Talenasila**, Criminal Case No: HAC 11 of 2010L (12 March 2010) Justice Madigan highlighted the gravity of the offence and stated in paragraph 10:

“The maximum penalty for indecent assault is 5 years imprisonment and in the case of State v Kumar [2003] FJHC 71 Shameem J said that the indecent assaults on children should attract sentence of 3 years imprisonment”

- [10] The accused is 44 years of age living with his wife and two of their children. He works as a machine operator and earns an income of \$80.00 weekly.

- [11] In **O’Keefe v State** [2007] FJHC: 34 the Fiji Court of Appeal held that the following principle of sentencing:

“When sentencing in individual cases, the court must strike a balance between the seriousness of the offence as reflected in the maximum sentence available under the law and the seriousness of the actual acts of the person”

[12] I have carefully considered these submissions in light of the provisions of the Sentencing and Penalties Decree No: 42 of 2009 especially those of the sections set out below in order to determine the appropriate sentence.

[13] Section 15(3) of the Sentencing Decree provides that:

“as a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4, and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in the General Sentencing Provisions of the decree”.

[14] The objectives of sentencing, as found in Section 4(1) of the Decree, are as follows:

1. To punish offenders to an extent and a manner, which is just in all the circumstances;
2. To protect the community from offenders;
3. To deter offenders or other persons from committing offences of the same or similar nature;
4. To establish conditions so that rehabilitation of offenders may be promoted or facilitated;
5. To signify that the court and the community denounce the commission of such offences; or
6. Any combination of these purposes.

[15] Section 4(2) of the Decree further provides that in sentencing offenders, a Court must have regarded to:

- (a) The maximum penalty prescribed for the offence;
- (b) Current sentencing practice and the terms of any applicable and guideline Judgments;
- (c) The nature and gravity of the particular offence;
- (d) The defender’s culpability and degree of responsibly for the offence;
- (e) The impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

- (f) Whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

[16] Now I consider the aggravating factors:

1. The accused is the step father of the victim.
2. The accused seriously disregarded and breached the trust between him and the victim.
3. Accused was 35 years old and victim was 6 years old at the time of first incident.
4. The accused took advantage of the trust that the victim had placed on him.
5. The accused completely disregarded of the clearly defined societal, religious and traditional rules that prohibits sexual relationship between a step father and a daughter.
6. The lack of remorse demonstrated by the accused person for what the victim has suffered emotionally, physically as reflected in the medical findings.

[17] Now I consider the mitigating circumstances:

- (a) The accused is a first offender.
- (b) He is the sole bread winner of the family.
- (c) He has his wife and two children to support.
- (e) He works as a machine operator and earns \$80.00 weekly.
- (f) He contribute to the church by giving his contribution of \$320.00 annually for the family.

[18] Considering all aggravated and mitigating circumstances I sentence you as follows:

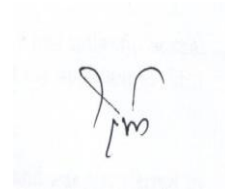
- For the 1st count I take 12 years imprisonment as the starting point. I add 03 years for aggravating factors to reach the period of imprisonment at 15 years. I deduct 02 years for the mitigating factors.
- For the 2nd count I take 02 years imprisonment as the starting point. I add 02 years for aggravating factors to reach the period of imprisonment at 04 years. I deduct 01 year for the mitigating factors.

- For the 3rd count I take 02 years imprisonment as the starting point. I add 02 years for aggravating factors to reach the period of imprisonment at 04 years. I deduct 01 year for the mitigating factors.

[19] I order that you serve all the sentences concurrently to each other. In summary you are sentenced to 13 years imprisonment.

[20] Acting in terms of Section 18(1) of the Sentencing and Penalties Decree, I impose 10 years as non-parole period.

[21] 30 days to appeal.



P Kumararatnam
JUDGE

At Suva
21/11/2013