

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 192 OF 2011

STATE

-v-

SV

Counsel: **Mr. A. Singh for the State**
 Ms J. Lagilagi for the Accused

Date of Hearing: **11th June 2015**
Date of Sentence: **15th June 2015**

SENTENCE

Names of both the victim and the accused are suppressed.

1. As the information was read-out on 04th February 2013, the accused pleaded 'not guilty' to the charge of one count of rape (penetrating the anus with a finger) of a four year old boy (JN) contrary to Section 207 (2) (b) of the Crimes Decree No. 44 of 2009. SV, at that time was not represented by a Counsel.
2. Despite his 'plea of not guilty', SV had tendered a letter to this court indicating that the cautioned interview statement, in which he had admitted the act complained of, was made voluntarily and did not wish to challenge the interview.
3. Having considered the reservation he had about the manner in which he was arrested, the court proceeded to hold a *voir dire* inquiry to ascertain the admissibility of the cautioned interview statement.
4. In the *voir dire* proceedings, SV again admitted the voluntariness of the statement, whereupon the admissibility of the statement was upheld. The cautioned interview statement supplied the main basis of the prosecution case.

5. On the eve of trial proper, SV changed his earlier 'plea of not-guilty' in respect of the count on rape instead tendered an unequivocal 'plea of guilty' on 9th June 2015 when he was represented by a Counsel.
6. Court accepted the plea of guilt after having being satisfied that it was voluntary and free from any influence.
7. SV agreed a set of amended summary of facts filed by the State on 9th June 2015 based on the contents of the cautioned-interview statement (which was attached thereto) in which the 'act' on the victim was admitted.
8. On 11th June 2015, SV was convicted after he had agreed the relevant facts of the case. He now comes before this Court for sentence on the conviction.
9. I reproduce the summary of facts filed by the State in verbatim which SV agreed:

*.....On the 20th day of August, 2011 at about 1pm, the victim, **JN**, aged four years old, a Kindergarten student of Nakavu Village in Nadi was going to his cousin's place named Margie when he heard the accused, **SV**, aged 18 years old, a form six student of Nadi Muslim College also of Nakavu Village in Nadi calling him into his house. The victim went inside the bedroom. Inside his bedroom, the accused pulled down the victim's pants and told him to turn his back towards him and then the accused inserted his finger inside the victim's anus and then pushed in and out two to three times. The victim could feel pain whilst the accused was inserting his finger into his anus and the victim started to cry. Around the same time, the victim also heard his grandmother calling out for him. The accused then took his finger out of the victim's anus and began to blow his anus in order to relieve the pain. The accused asked the victim to stop crying and then asked him if he wanted to have juice or ice block, but the victim did not answer him and then the accused opened the door and told the victim to go back to his house...*

*When the victim's mother was bathing him on that day, he told his mother what the accused had done to him. The victim's mother, **SG** of Nakavu Village in Nadi then called the Nadi Police Station and reported the matter.*

*The accused was arrested and interviewed under caution wherein he admitted to committing the offence. The victim was medically examined on the 21st of August, 2011 by **Doctor Losana Natuva Lelagavesi**. The doctor noted that there was laceration at 12 o'clock position of anal opening.*

10. The Counsel for SV filed submission in mitigation on 11th June 2015 which I summarize below:

- a. Accused is a young and first offender. He was 18 years of age and had just passed adulthood only by two months at the time of offending.
- b. Waiter/bartender by profession, the accused financially supports and cares elderly grandmother and thirteen year old sister who were abandoned by his mother in his teens.
- c. His early guilty plea, although not at the first instance, saved time of the court, prevented complainant from having to relive the ordeal he had unfortunately encountered and reflects remorse, empathy and willingness to rehabilitate.
- d. Accused fully cooperated with police during investigation and questioning.
- e. Accused sympathizes with the victim and his family for his act resulted from some error of decision, when he was severely annoyed by the actions of the young victim.

11. Rape is a serious offence. The maximum penalty for rape is life imprisonment. The starting point for rape of an adult victim is 7 years imprisonment (Mohammed Kasim v. State (1994) Cr. App. No.21 of 1993).

12. The tariff for juvenile rape is a sentence between 10 and 16 years of imprisonment; the actual sentence will depend on mitigating and aggravating factors.

13. The Supreme Court in a Special Leave to Appeal application (CAV00030f 2014) affirmed the decision of the Court of Appeal in Ananda Abhay Raj v State AAU 0038/10 which set the tariff as follows...

“Rapes of juveniles (under the age of 18 years) must attract a sentence of at least 10 years and the accepted range of sentences is between 10 and 16 years”.

14. The question is whether this court, in all the circumstance of this case, is empowered or has a lawful justification to deviate from the accepted tariff set by the Apex Courts of this country.

15. Sentencing and Penalties Decree 2009 provides as follows;

Section 4(2) (b)-

In sentencing offenders a court must have regard to current sentencing practice and the terms of any applicable guideline judgment;

Section 6 (2)

A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies.

16. Given the mandatory nature of Section 6 (2) of the Decree, there can be no doubt that this court is obligated to apply and take into account the guideline judgment of the Court of Appeal and the Supreme Court to cases where the guideline judgment applies.
17. Application of sentencing guidelines is important, I suppose, in bringing about transparency and uniformity in sentencing policy throughout each and every courthouse in the Republic of Fiji.
18. Having said that, I venture into exploring all the possibilities within the legal framework to see whether SV, given the special circumstances of the case, could be sentenced below the tariff set by the Supreme Court.
19. Constitution of the Republic of Fiji in Section 11 (1) provides as follows;

Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhuman, degrading or **disproportionately severe treatment or punishment....**(emphasis mine).

20. What 18 year old SV (as he then was) had done in this case was penetration of anus of the victim with his pointing finger. What prompted him to do that 'dirty deed' was explained to the police in his cautioned interview statement as follows;

Q.19: It is been alleged by one JN that you called him while he was going to his cousin brother and sisters house, Margie. What can you say about this?

A: I did not call JN, he followed me to the shop when his grandmother, Litiana sent me to go and buy cigarette from the shop and at the same time JN followed me.

Q.20: Then what happened?

A: I then came back and then gave Litiana her cigarette then straight went home.

Q.21: Then what happened?

A: At home I watched TV for sometimes and then went inside my bedroom to sleep.

Q.22: Then what happened?

A: While I was lying down inside the bedroom, JN came inside the room and then started to wake me up.

Q.23: Then what happened?

A: I was so angry and then wake up.

Q.24: Then what happened?

A: I then pulled down his pants and underwear and then told JN to turn his back to me.

Q.25: Then what happened?

A: I then inserted my pointing finger inside JN's anus.

Q.26: Then what happened?

A: I then pushed in and out for 2-3 times.

Q.27: Then what happened?

A: Then JN started to cry as it was painful so I pulled my finger out of his anus.

Q.28: Then what happened?

A: Then I went and close all the doors and then went and calm JN not to cry.

Q.29: Then what happened?

A: I then asked him what he wants, if he wants to have ice-block or juice.

Q.30: Then what happened?

A: JN kept on crying then I told him to go to their house.

21. In a rape case of penile penetration, the act speaks for itself and mentality of the perpetrator can easily be understood. When the penetrating object or thing is something other than the penis, it is not easy to comprehend what type of mentality the perpetrator possessed at the time of the offending.
22. SV says in his cautioned interview statement that he was angered by the act (call to wake up) of the victim which prompted him to do this.
22. Since there is no requirement to prove, in a juvenile rape case, the mental status of the perpetrator at the time of the offence, a conviction can safely be entered once the physical act is proved or admitted. The question here is that are we to treat a person who is activated by lust for sex on the same footing with a person activated by anger when it comes to punishment for an offence in the nature of 'sexual' (rape)?

23. The facts revealed in evidence in Anand Abhy Raj case (supra), no doubt justified, in the opinion of the judges of Apex Courts, harsher punishment ranging from 10 to 16 years of imprisonment.
24. His Lordship the Chief Justice Anthony Gates has quoted in his judgment the following aggravating factors the trial judge had taken into consideration in imposing the punishment.

They were:

- (i) The Petitioner was the complainant's stepfather who should have protected her. Instead he breached the trust expected of him, and the breach was gross.
- (ii) The rape offences took place continuously over a long period of time. Such an experience "will surely scar her for the rest of her life" 9 Record p.24].
- (iii) She was a child of 10 years.
- (iv) The frequency of the crime against children in Fiji, and therefore the need for deterrence.
- (v) She had been subjected to threats to kill her, assaulted and injured by the Petitioner.
- (vi) She was observed to be in real fear of the Petitioner. Such threats besides causing fear and anxiety in the victim over a long period, had postponed the exposure of these offences.

His Lordship emphasized

"...these aggravating factors made this a particularly bad case of child abuse and for the specific crime charged namely rape..."

25. In the case before me, the factual position is quite different in that;
 - a. The convicted person is a young man aged 22. He was 18 years of age and had just passed adulthood only by two months at the time of offending.
 - b. He is a first offender and has no criminal background.
 - c. He is engaged in a resort as a waiter/bartender.
 - d. He financially supports and cares elderly grandmother and thirteen year old sister who were abandoned by his mother in his teens.
 - e. His early guilty plea, although not at the first instance, saved time of the court.

- f. Early guilty plea prevented complainant from having to relive the ordeal and misery, fear and embarrassment and having to give evidence and be cross examined.
- g. His conduct reflects remorse, empathy and willingness to rehabilitate.
- h. He fully cooperated with police during investigation and questioning.
- i. He sympathizes with the victim and his family for his act resulted from some error of decision, when he was severely annoyed by the actions of the young victim.

26. In the case of Moses Nariva v the State (2006) FJHC;HAA 0148J 2005, the accused was a young offender of 17 years old, juvenile. He was a first offender who pleaded guilty without wasting time of court and was remorseful. Madam Justice Shameem stated;

“the courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment”.

- 27. Had SV committed the offence three months before, provisions of Juvenile Act would have prevented this court from imposing on him any imprisonment and this would have been a fit case to act according to Justice Shameem’s wishes.
- 28. Short span of three months can’t justifiably make such a big difference (zero to ten years) and minimum sentence of 10 years is excessive and disproportionate to the wrong SV has committed in his youth.
- 29. Sentence should be in accordance with the facts of the case. Sentencing and Penalties Decree incorporates sentencing guidelines where it is provided in Section 4 (1) (a) that one of the purposes for which sentencing may be imposed by court is to punish the offenders **to an extent and in a manner which is just in all the circumstances**. (emphasis mine).
- 30. This section reflects the Constitutional underpinning in Section 11(1) that disproportionately severe punishment violates basic human rights.
- 31. In the case of Kasim v State (1994) FJCA 25; AAU 0021 j 93s (27 May 1994) the Court of Appeal said;

While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this court to give a clear guidance to the Courts

*in Fiji generally on this matter. We consider that in 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.** (emphasis mine).*

32. Although this judgment predates the Sentencing and Penalties Decree 2009, His Lordship had emphasized the pragmatic approach that a trial judge should take in sentencing rape offenders.
33. Current sentencing practices and the terms of any applicable guideline judgment is only one criterion to be considered by a court in sentencing among the long list of criteria in Section 4 (2) of the Sentencing and Penalties Decree.
34. I believe that every judge who sits in a court and hears the case in the court of first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The judge could hear the evidence and observe the body language of those who give evidence.
35. In my mind, the Sentencing and Penalties Decree 2009 does not stifle the hands of the trial judge thus taking away the judicial discretion in sentencing even where there is a tariff imposed by Apex Courts.
36. According to Section 26 (1) of the Constitution of the Republic of Fiji, every person is equal before the law and has the right to equal protection, treatment, and benefit of the law. The imposition of minimum mandatory sentences would amount to an erosion of an essential judicial discretion in regard to sentencing.
37. The imposition of minimum mandatory sentences would result in imposing identical sentences in cases where court thinks it appropriate and where court thinks it most inappropriate which amounts to treating unequals as equals in violation of Article 26 (1) of the Constitution.
38. There are instances where Judges of the High Court have deviated from existing tariff when they find that the sentencing within tariff either disproportionately excessive or unjust in all the circumstances of the case.

39. In State v Nayate Vatu (2015) FJHC 263; HAC 231.2011 (23 April 2015) Justice Madigan sentenced a 21 year old for seven years imprisonment for two counts of juvenile rape with non-parole period of five years. In rationalizing his finding Justice Madigan stated ;

“.....It appears to be extremely important in this case that a balance be struck between expectations of the community that such activity be punished and retribution be afforded the victim with the need to recognize the folly of such a young man with a clean record and the destruction that a long sentence would wreak on his entry into adulthood. Whilst every attempt must be made to keep a young offender from prison and to rehabilitate him (her) when faced with a serious crime or crimes, a Court must act in the interests of the public and their expectations and act to deter others who might want to follow the same course of action....”

40. In his concluding remarks Justice Madigan said;

“... I am aware that this final sentence of seven years is below the tariff for rape of a child and it is in no way meant to distort the tariff already recognized by the Supreme Court. It is a lenient sentence in recognition of the youth of the accused and his remorseful plea of guilty saving the child from giving evidence.

41. In State v Seniqai (2011) FJHC 375; HAC 010.2011 (8th July 2011) Justice Gounder sentenced an 18 year old rape accused for 5 years of imprisonment, below the tariff. Justice Gounder imposing imprisonment without fixing a non- parole said;

“...You are 18 years old. Unfortunately, you are another unemployed without any meaningful purpose in life. You left school after completing Form 4. The International Convention on the Rights of a Child applies to you because of your age. I bear in mind that a prison sentence should be the last resort for a child.....”

“I sentence you to 5 years imprisonment. The purpose of your sentence is to denounce your offence and to deter you and others from committing this type of offence. Due to your youth I do not fix a non-parole period...”

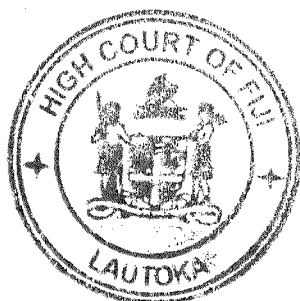
42. There is no victim impact assessment report before me filed by the State although in its submission it speaks of, in general terms, effects on the emotional development of the complainant in a most disturbing and perverse manner. There is no medical report or evidentiary basis to

support such a claim. Absence of such a report indicates that victim's natural upbringing has not been considerably impaired by the act of SV except for the pain the victim suffered when SV inserted the pointing finger into victim's anus. There is no evidence of penile penetration. The medical report only supports possibility of sexual assault.

43. There are two aggravating circumstances. SV exploited the vulnerability of the four year old victim knowing that JN would not resist due to his condition. SV breached the trust reposed on him by his neighbor.
44. Having considered all the facts and authorities I now proceed to impose the sentence on SV.
45. To reflect the gravity of the offence of rape, not the nature of the offending act of SV, I take a starting point of 10 years at the bottom of the tariff for this offence. To reflect the aggravating features of breach of trust and exploiting vulnerability, I add two years to that starting point. In recognition of his strong mitigation of clean record, his duty to family, and his obvious remorse, I deduct those two years and bring the sentence back to ten years. For his extreme youth coupled with his potential for rehabilitation and his plea of guilty saving the child from giving evidence and being cross examined, I deduct a further five years, bringing his sentence down to one of five years.
46. The purpose of the sentence is to denounce the offence of rape. Due to the youth and clean record of SV, I do not fix a non-parole period.

Summary

47. SV is sentenced to 5 years imprisonment. I do not fix a non-parole period.
48. 30 days to appeal to Court of Appeal.




Aruna Aluthge
JUDGE

At Lautoka
15th June 2015

Solicitors: Office of the Director of Public Prosecution for the State
Office of the Legal Aid Commission for the Accused