

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 379 OF 2013S

STATE

vs

NIZAM ALI KHAN

Counsels : Ms. S. Puamau and Ms. B. Kantharia for State
Ms. P. Lal for the Accused
Hearings : 29, 30 and 31 March, 2016
Summing Up : 1 April, 2016
Judgment : 1 April, 2016
Sentence : 8 April, 2016

SENTENCE

1. In a judgment delivered on 1 April 2016, the court found you guilty and convicted you on all counts in the following information:

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Decree
No. 44 of 2009.

Particulars of Offence

NIZAM ALI KHAN between the 1st day of August 2013 and the 31st day of October 2013, at Waidamudamu Settlement, Nasinu in the Central Division, unlawfully and indecently assaulted **ZZK**.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NIZAM ALI KHAN between the 1st day of August 2013 and the 31st day of October 2013, at Waidamudamu Settlement, Nasinu in the Central Division, penetrated the mouth of **ZZK**, a child under the age of 13 years, with his penis.

THIRD COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NIZAM ALI KHAN between the 1st day of August 2013 and the 6th day of November 2013 at Waidamudamu Settlement, Nasinu in the Central Division, unlawfully and indecently assaulted **SSK**.

FOURTH COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NIZAM ALI KHAN on the 3rd day of November 2013 at Waidamudamu Settlement, Nasinu in the Central Division, unlawfully and indecently assaulted **SSK**.

2. The brief facts were as follows. Between 1 August and 6 November 2013, you were 30 years old, married with two daughters and a son. You and your family lived in a two bedroom house. You, your wife (PW1) and your youngest son occupied bedroom no. 1, while your two daughters occupied bedroom no. 2. On one occasion, between 1 August and 6 November 2013, you called your youngest daughter (PW2) to your room, then you forced yourself on her by sucking her breasts, licking her vagina and touching her bum (count no. 1).
3. Again on another occasion, you forcefully inserted your penis into PW2's mouth, forced her to suck the same and you ejaculated into her mouth (count no. 2). You also, at times, sneaked into your daughters' bedroom, and forcefully touched your other daughter's (PW3) breast and vagina. You did the above several times, and on 7 November 2013, the girls reported the above to their mother. They were both under 13 years old at the time. You were later taken to court charged with rape and sexual assault.
4. We will start with the rape offence (count no. 2) because it is the most serious offence. "Rape" carries a maximum penalty of life imprisonment (section 207 (1) of the Crimes Decree 2009). The tariff for the rape of a juvenile is now a sentence between 10 to 16 years imprisonment: see **Anand Abhay Raj v The State**, Criminal Appeal Case No. CAV 0003 of 2014, Supreme Court of Fiji. The actual sentence will depend on the aggravating and mitigating factors.
5. "Sexual assault" carries a maximum sentence of 10 years imprisonment (section 210 (1) of the Crimes Decree 2009). The tariff for the offence is a sentence between 2 to 8 years imprisonment, with serious offences attracting the higher end of the scale, while the minor offences will attract the lower end of the scale: see **State v Ratabacacalaca**, Criminal Case No. HAC 252 of 2011S, High Court, Suva.
6. The aggravating factors in this case were as follows:
 - (i) *Serious Breach of Trust*. The accused was 30 years old, and his two daughters were aged 11 years and 13 years at the time. The accused's was the girls' biological father and guardian. As such, he was supposed to protect them and look after them well. The girls relied on their father for support and protection. Yet he did the unthinkable by raping his younger daughter by forcing his penis into her mouth and forcing her to suck the same. Furthermore, he continually molested the girls, by touching their breasts and vaginas, and on some occasions sucking the same. These were certainly an

abuse of the trust the girls had in their father, and it calls for a custodial sentence to teach the father a lesson.

- (ii) *Rape and Abuse of Children*. These offences are becoming prevalent in our society and a deterrent sentence is called for to warn other would-be offenders.
- (iii) By offending against his daughters, the accused had shown utter disregard to their rights as human being and their rights not to be harmed within their own family.

7. The mitigating factors were as follows:

- (i) At the age of 32 years, this is your first sexual offence;
- (ii) You have been remanded in custody from 30 March 2016, that is, 9 days ago.

8. On count no. 2 (rape), I start with a sentence of 12 years imprisonment. I add 3 years for the aggravating factors, making a total of 15 years imprisonment. For being remanded in custody for 9 days, I deduct one month, leaving a balance of 14 years 11 months. I deduct 1 year 11 months for this being his first sexual offence, leaving a balance of 13 years imprisonment.

9. On count no. 1 (sexual assault), I start with 3 years imprisonment. I add 3 years for the aggravating factors, making a total of 6 years imprisonment. For the mitigating factors, I deduct 2 years imprisonment, leaving a balance of 4 years imprisonment.

10. I repeat the above process and sentences for counts 3 and 4.

11. The summary of your sentences are as follows:

(i)	Count no. 1	:	Sexual Assault	:	4 years imprisonment
(ii)	Count no. 2	:	Rape	:	13 years imprisonment
(iii)	Count no. 3	:	Sexual Assault	:	4 years imprisonment
(iv)	Count no. 4	:	Sexual Assault	:	4 years imprisonment

12. Because of the totality principle of sentencing, I direct the above sentences to be concurrent to each other, that is, a final total sentence of 13 years imprisonment.

13. Mr. Nizam Ali Khan, for raping and sexually assaulting your daughters between 1 August and 6 November 2013 at Nasinu in the Central Division, I sentence you to 13 years imprisonment, with a non-parole period of 12 years imprisonment, effective forthwith.
14. The name of the complainants are permanently suppressed to protect their privacy.



Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva
Solicitor of Accused : Legal Aid Commission, Suva.