

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 144 OF 2013

STATE

-v-

PRADEEP KUMAR

Counsel : Mr. J. Niudamu for the State
Mr. W. Nainima for the Accused

Date of Conviction : 15th July, 2016

Date of Hearing : 20th July, 2016

Date of Sentence : 20th July, 2016

SENTENCE

[1]. On the 15th day of July, 2016, Mr. Pradeep Kumar (Accused) was convicted after trial on the following counts.

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PRADEEP KUMAR between the 1st day of March 2013 to the 31st day of March 2013 at Rakiraki in the Western Division, penetrated the vagina of **POONAM SANDHYA LATA** with his penis, without the consent of the said **POONAM SANDHYA LATA**.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PRADEEP KUMAR on the 26th day of May 2013 at Rakiraki in the Western Division, penetrated the vagina of **POONAM SANDHYA LATA** with his penis, without the consent of the said **POONAM SANDHYA LATA**.

COUNT 3

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PRADEEP KUMAR on the 26th day of May 2013 at Rakiraki in the Western Division, on an occasion other than referred to in Count 2 and Count 4 of this Information, penetrated the vagina of **POONAM SANDHYA LATA** with his penis, without the consent of the said **POONAM SANDHYA LATA**.

COUNT 4

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

PRADEEP KUMAR on the 26th day of May 2013 at Rakiraki in the Western Division, on an occasion other than referred to in Count 2 and Count 3 of this Information, penetrated the vagina of **POONAM SANDHYA LATA** with his penis, without the consent of the said **POONAM SANDHYA LATA**.

- [2]. He comes before this Court for sentence. Counsel for accused from the Legal Aid Commission filed helpful written submissions in mitigation and State Counsel tendered a Victim Impact Statement with his sentencing submission. This Court has taken into account all of these matters in crafting the sentence.
- [3]. Complainant is now married and has a child by her marriage. In 2013, during the period of offences, she was a 16 year old student. Her father passed away and her mother was in a *de facto* relationship with another man. Complainant's brother wanted her to stay with accused's family because he did not like his mother's relationship with another man. Complainant moved to accused's place in 2012. Accused's wife is Complainant's cousin.
- [4]. During the period between the 1st day of March 2013 and the 31st day of March 2013, first incident happened. On the day of the first incident, accused's wife had gone to Colasi. While Complainant was sleeping accused entered her room and threatened her with death. Then he removed her panty and inserted his erected penis into her vagina. She was bleeding. Bed sheet was soaked with blood and her vagina was paining. She did not report the incident to anybody due to fear.
- [5]. After the March incident, Complainant's mother made a complaint to police saying that accused was in a sexual relationship with her daughter (Complainant). To counter this allegation, accused and his wife forced the Complainant to write a letter to the Magistrate who had issued a DVRO against Complainant's mother saying that the allegation was not true. On 21st May 2013 Complainant wrote a letter exonerating the accused. The letter was retained by the accused.
- [6]. A few days later, on the 26th day of May 2013, accused raped Complainant three times forcibly. First attack took place around 4 – 5 p.m., the 2nd attack around 6 p.m. and the

third around 9.30 p.m. Complainant reported the incidents to her mother and then to police on the 27th May 2013. Complainant was medically examined by a doctor who opined that the injuries noted on Complainant's vaginal wall were consistent with forceful sexual intercourse.

[7]. Maximum penalty for Rape is life imprisonment.

[8]. It is now well settled, and confirmed by the Supreme Court in Anand Abhay Raj CAV003.2014 that the tariff for rape of a juvenile is 10-16 years' imprisonment.

[9]. In Raj (*supra*), the appellant sought leave to appeal against a sentence of 16 years with a non-parole period of 12 years for the offence of 'Rape' of his step-daughter. In dismissing the application (unanimously), the Justice Madigan stated the following at paragraph [18]:

"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".

[10]. Supreme Court upheld the judgment of the Court of Appeal, and at paragraph [66] the Chief Justice Anthony Gates endorsed the remarks of the Justice Madigan mentioned above.

Starting Point

[11]. Rape is a serious offence. By prescribing life imprisonment for Rape convicts, the law makers expect Courts to impose harsher punishment on such offenders. In State v AV [2009] FJHC 24; HAC 192 21.02.2009 it was stated that:

"rape is the most serious form of sexual assault.... Society cannot condone any form of sexual assault on children...Sexual offenders"

[12]. When the victim is a juvenile, offending becomes more serious. In State v Tauvoli [2011] FJHC 216; HAC027.2011 (18 April 2011) Madigan J observed:

"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 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”.

- [13]. Not only the offender himself but also the potential offenders must be deterred. The sentence must send a clear warning to the society. The offender must be severely punished and be incarcerated to ensure that our younger generation is safe and secure.
- [14]. In the case of *Mohammed Kasim v State* [1994] FJCA 25; AAU 0021j.93S (27 May 1994) it was stated that;

“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”.

- [15]. In *Raj* (*supra*), the accused was the step father of the victim and their age difference was approximately 28 years. The victim was subjected to rape on four occasions over a period of just over 1 year. Victim was 10 years old at the time of the first offending. The Learned Sentencing Judge had selected a starting point of 12 years for each of the 4 representative counts.
- [16]. The circumstances in the present case are slightly different from those in *Raj* (*supra*). In this case the victim was 16 years old and the age difference between the two here was approximately 16 years.
- [17]. Having considered the gravity of the offence, culpability of the offending and its impact on the victim, I pick eleven (11) years as the starting point for each count.

Aggravating Circumstances

- [18]. This is a classic case where children are exploited for sexual purposes when their family is broken. Accused was aware of Complainant's vulnerable situation and he exploited her vulnerability. Her vulnerability was clearly manifested in that:
- a. She lived under the accused's roof and had to depend on accused and his family for everything.
 - b. The DVRO obtained at the instigation of the accused and his wife effectively prevented her from talking to her mother.
 - c. She had nowhere to go. The DVRO prevented her from going to her mother. (Since there was no other option, after a series of rape assaults, she finally decided to go to her mother as the last resort).
 - d. She did not have a cell phone. (This was confirmed by the accused himself) Her brother Sumit lived far away in Vomo Island and her communication ability with her brother was entirely dependent on the accused. Accused even watched her whilst she was on the phone.
 - e. House she lived is the furthest point in the jungle.
 - f. The letter she addressed to the Magistrate effectively estopped her from saying that accused is a rapist. (This letter had been obtained by the accused forcibly after the March incident. In that, she had said that accused is innocent).
- [19]. The accused was the guardian of the Complainant. She moved to accused's place for protection when her mother was having an affair with another man. Accused breached the trust reposed in him.
- [20]. Accused used his authority over the Complainant to instill fear in her. He also frightened her to prevent the incident being reported to anybody.

- [21]. He raped his wife's cousin. An offence committed in this relationship gives rise to a domestic violence under the Domestic violence Decree.
- [22]. According to the Victim Impact Statement and the medical report tendered, Complainant has suffered physically and psychologically. She was depressed and could not concentrate. She lost her virginity at a young age. Offending left a scar and trauma for the rest of her life.
- [23]. The accused has not been remorseful. He maintained his 'not guilty' plea right throughout and failed to save the Complainant from giving evidence of sexual nature which would have been a distasteful experience for her.
- [24] Accused repeatedly committed the crime totally disregarding Complainant's rights.
- [25] Degree of pre planning is involved in the commission of the offences.

Mitigating Circumstances

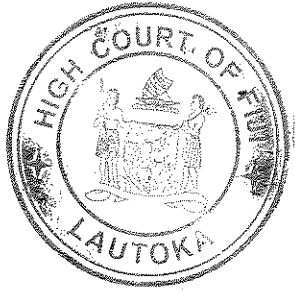
- [26]. Accused cooperated with police.
- [27]. According to the mitigation submission, he is 37 years old sole bread winner of his family with three children. He earns the livelihood as a farmer. He looks after his elderly mother.
- [28]. Accused is a first offender. He deserves a discount on his previous good character.


Sentence

- [29]. I add four years to the above stated starting point for aggravating factors bringing the interim sentence to fifteen years' imprisonment for each count. According to the report filed by the State, accused had spent only five days in remand. I deduct three years for mitigating factors bringing his sentence down to twelve years' imprisonment for each count.
- [30]. Considering Section 18 (1) of the Sentencing and Penalties Decree, his youth, number of children he is having and his willingness to rehabilitate, I impose a non-parole period of eight years.

[31]. Having considered 'one transaction' and 'totality' principles I order the sentences to be to be concurrent to each other.

[31]. 30 days to appeal to the Fiji Court of Appeal.




Aruna Aluthge
Judge

At Lautoka
20th July, 2016

Counsel:

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