

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 082 of 2016

[CRIMINAL JURISDICTION]

STATE

V

MICHAEL SHAILENDRA PRATAP

Counsel : Mr. M. Vosawale with Mr. S. Seruvatu for State  
Mr. M. Yunus with Ms. A. Prakash for Accused

Dates of Hearing : 23<sup>rd</sup> - 26<sup>th</sup> January 2017

Date of Summing up: 27<sup>th</sup> January 2017

Date of Judgment : 30<sup>th</sup> January 2017

Date of Sentence : 31<sup>st</sup> January 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as IM)

SENTENCE

1. Michael Shailendra Pratap, you stand convicted of the following offences;

**FIRST COUNT**

*Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**MICHAEL SHAILENDRA PRATAP** on the 22<sup>nd</sup> day of January 2016, at

Suva in the Central Division, penetrated the vagina of IM with his penis without her consent.

#### SECOND COUNT

##### *Statement of Offence*

**RAPE:** contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

##### *Particulars of Offence*

**MICHAEL SHAIENDRA PRATAP** on the 22<sup>nd</sup> day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his finger without her consent.

#### THIRD COUNT

##### *Statement of Offence*

**RAPE:** contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

##### *Particulars of Offence*

**MICHAEL SHAIENDRA PRATAP** on the 22<sup>nd</sup> day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his tongue without her consent.

#### FOURTH COUNT

##### *Statement of Offence*

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

##### *Particulars of Offence*

**MICHAEL SHAIENDRA PRATAP** on the 22<sup>nd</sup> day of January 2016, at Suva in the Central Division, unlawfully and indecently assaulted IM by sucking her breast.

2. On 22/01/16, you raped a 14-year-old school girl inside the old gym near the Nasese Police Stores. At the time you committed the above offences you were 41 years old. Victim was residing in the police barracks situated near the police stores. Her Father was a member of the police band. You were serving as a police officer attached to the Nasese Police Stores.
3. In the case of *State v Marawa* [2004] FJHC 338 Justice Gates (as he was then) said, '*Rape is the most serious sexual offence. The Courts have reflected increasing public*

*intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences'. The offence of rape is considered more serious when the victim is a child.*

4. Pursuant to section 207(1) of the Crimes Decree 2009 ("Crimes Decree") read with section 3(4) of the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree"), the maximum punishment for rape is life imprisonment. It is settled that the sentencing tariff for rape of a child victim is a term of imprisonment between 10 to 16 years (*Anand Abhay Raj v State* [2014] FJSC 12).

5. Section 17 of the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree"), reads thus;

*"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."*

6. I consider it appropriate to apply the above provisions to impose an aggregate sentence for the three rape counts.

7. I select 11 years imprisonment as the starting point of your aggregate sentence in respect of the three rape counts.

8. I consider the following as aggravating factors;

- a) you committed the offences whilst the victim's hands were tied at the back;
- b) the age gap between you and the victim which is 27 years; and
- c) you exploited the victim's vulnerability and naivety.

9. You had served the Police Force for 21 years. Being a police officer you were tasked with the duty to protect the society. The victim was a daughter of another policeman. You had brought disrepute to the police force by your conduct.
10. However, there was no evidence led in this case to show that you have used the privilege or the trusted position as a police officer to commit the offences. Therefore, I will not consider the fact that you were a police officer as an aggravating factor to increase your sentence.
11. You have no previous convictions. Your previous good character will be considered as a mitigating factor.
12. Your counsel says that you are extremely sorry for your actions and seeks courts' forgiveness. However, I did not notice any indication of remorse through your conduct during the trial. Your counsel submits that this court should consider the fact that you are not related to the victim, that you did not prevent the complainant from lodging a complainant, the sexual act was not repeated and the fact that there was no planning involved; as mitigating factors. Absence of these circumstances cannot be considered as mitigating factors to decrease your sentence.
13. Your counsel has highlighted the following as your personal circumstances;
  - a) you are 42 years old, married;
  - b) you have 3 daughters; and
  - c) your wife is employed at the Fiji National University. She is pursuing her further studies.
14. Considering the aforementioned aggravating factors, your sentence is increased by 4 years and I deduct 2 years of your sentence considering your previous good character.



15. Accordingly, I sentence you to an aggregate sentence of 13 years imprisonment for the three counts of rape.
16. The offence of sexual assault under section 210(1) of the Crimes Decree carries a maximum sentence of 10 years imprisonment. Fernando J, in the case of *State v Ratawake* [2016] FJHC 1078; HAC223.2015 (28 November 2016) referring to the case of *State v Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012), proposed that the tariff for offences under section 210(1) should be 2 to 8 years.
17. I select 2 years as the starting point of your sentence for the fourth count. Considering the aforementioned aggravating factors and the mitigating factor, I sentence you to an imprisonment term of 2 years and 6 months.
18. I order that you serve the two sentences concurrently. Accordingly, your final sentence is 13 years imprisonment.
19. Your counsel requests this court to refrain from fixing a non-parole period in order for you to obtain the maximum benefit of the provisions with regard to remission given the present practice adopted by the Prisons and Corrections Service. That is, the practice of calculating the remission as one-third of the difference between the sentence and the non-parole period.
20. Section 18(1) of the Sentencing and Penalties Decree provides that *'when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole'*. The only exception where a court can refrain from fixing a non-parole period when sentencing an offender for an imprisonment term of two years or more is provided under section 18(2) of the Sentencing and Penalties Decree.

21. Section 18(2) of the Sentencing and Penalties Decree reads thus;  
*“If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).”* [Emphasis added]
22. My reading of the above section is that the said section is to be applied if a sentencing court considers that an offender should not be released on parole and should serve the full sentence, given the nature of the offence or the past history of the offender. I am not convinced that the provisions of the said section can be used to grant an offender the benefit of an early release.
23. Nevertheless, the fact that you were a serving police officer when you raped a 14 year old school girl, does not justify an early release. You were a person who were educated and trained to protect the society for 21 years. It was your duty to protect the society including the victim. Therefore, in my view, you should serve a substantial period of your sentence.
24. Given the above, I find that this is not an appropriate case to apply the provisions of section 18(2) of the Sentencing and Penalties Decree to decline to fix a non-parole period. Having considered all the circumstances, I order that you are not eligible to be released on parole until you serve 12 years of your sentence in terms of section 18(1) of the Sentencing and Penalties Decree.
25. I note that you have spent 18 days in remand for this matter. I order that the time you spent in custody shall be regarded as a period of imprisonment already served by you in terms of the provisions of section 24 of the Sentencing and the Penalties Decree. I hold that the period to be considered as served should be one month.

26. In the result, you are sentenced to an imprisonment term of 13 years with a non-parole period of 12 years. Considering the time spent in custody, the time remaining to be served is as follows;

Head Sentence - 12 years and 11 months

Non-parole period - 11 years and 11 months

27. 30 days to appeal to the Court of Appeal.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera

JUDGE

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