

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 182 OF 2016

STATE

v

SILAS SANJEEV MANI

Counsel : Ms D.S. Alagendra with Ms R. Uce and Ms S. N. Navia for State
: Ms J. Singh for Accused

Date of Judgment : 17 October 2018

Date of Sentence : 16 November 2018

(Name of the victim is suppressed. She is referred to as KR)

SENTENCE

1. Mr. Silas Sanjeev Mani (accused), stand convicted of one count of Rape after a full defended trial. The information on which the accused was convicted reads as follows:

Statement of Offence

RAPE: Contrary to Section 207 (1) & (2) (a) & (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SILAS SANJEEV MANI between the 30th day of April, 2016 to the 11th day of July, 2016 at Sigatoka in the Western Division, inserted his penis into the vagina of **KR**, a 9 year old girl.

2. The accused now comes before this Court for sentence.
3. The State has filed a comprehensive and useful sentencing submission for which I must thank. Ms. Alagenda, Counsel for Prosecution in her oral submission requested that a sentence above the established tariff for child rape is warranted in this case given the seriousness of the offending and the harm caused to the child victim. I carefully considered the request made by the State. I also considered the helpful mitigation submission filed by Ms. J. Sing on behalf of the accused.
4. The facts proved in court are shocking. This is one of the worst child rape cases I have ever tried in Fiji. The victim in this case was only 9 years old at the time of the offence.
5. The accused is the brother of the victim. She was living with her mother and siblings in Kulukulu. They are from a broken family and shared the same father. Victim's mother went to prison after being convicted of murdering her own daughter. The deceased in the murder case is victim's elder sister. Accused's wife (victim's sister-in-law) also went to prison with victim's mother in the same murder case. The victim went through all the agonies and bitter experiences of her household.
6. After her mother and sister-in-law went to prison, the victim had to be relocated in several places. Firstly, she was taken by Suman, one of her aunties. Suman

could not keep the victim for long as she had a dispute with her husband and had to leave her own house. The victim had to be relocated again. Finally the the victim was taken care of by the accused.

7. When the incident occurred, the victim was living with the accused and his two children in a two bedroomed house owned by another aunty, Jocelyn. The victim shared a double bunk bed with the accused and his children. The victim slept on the top bunk and the accused and his children slept on the bottom bunk.
8. On the day of the incident, the, accused woke the victim up and told her to come down to the bottom bunk. Accused smelled of liquor and was drunk at that time. The victim refused to come down. She was then slapped and forced to come down. She finally complied and came down to the bottom bunk. Accused then carried his both children up and put them on the top bunk. Accused then came to the bottom bunk. He lifted victim's dress, took off her panty and inserted his penis into her vagina. It was a painful experience for her. She screamed. She was slapped and told to keep quiet. She started crying. When the accused heard somebody knocking the door he stopped and went away.
9. The victim complained to her aunty Roselyn on the following day. When Roselyn noted blood in victim's vagina, she slapped the victim and gave her a pad and was told to go to school.
10. The maximum penalty for rape is life imprisonment. The tariff for rape of a child is between 10 and 16 years (Anand Abhay Raj [2014] FJSC 12; CAV0003.2014 (20 August 2014)).
11. In sentencing offenders, the Courts must have regard to the Constitution of Republic of Fiji and its proportionality principle in sentencing. Within that constitutional framework, Section 4 of the Sentencing and Penalties Act 2009 requires the courts to have regard to the maximum penalty prescribed for the offence and current sentencing practice and applicable guidelines issued by the courts. The courts are also required to consider the seriousness of the offending and the impact or harm caused to the victim in selecting the starting point of the sentence.

12. The courts of the Republic of Fiji, at all levels, have repeatedly pronounced that rape of a child is one of the most serious forms of sexual violence and that rapists will be dealt with severely. The United Nations Convention on Rights of the Child to which Fiji is signatory and the Constitution of the Republic of Fiji require the courts to protect children who are our future generation. The courts have underscored that children are vulnerable members of our society. They are entitled to live their lives free from any form of physical or emotional abuse. They are entitled to trust their family member to protect them and keep them safe from sexual violence. When family members sexually abuse children, violating the Domestic Violence Act, they should expect condign punishment to mark the society's outrage and denunciation against sexual abuse of children. The courts have also emphasized that the increasing prevalence of such offending in the community calls for deterrent sentences.

13. Recently, the Supreme Court in Alfaaz v State [2018] FJSC 17; CAV0009.2018 (30 August 2018) observed that:

"It is useful to refer to the observation expressed by the Fiji Court of Appeal in Matasavui v State; Crim. App. No. AAU 0036 of 2013: 30 September [2016] FJCA 118 wherein court said that "No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilised entity." The Court of Appeal referred to the same judgment in paragraph 60 of the judgment which is being canvassed before this court having taken into consideration the gravity and cruelty of the case before court and observed that highest possible punishment should be given to the prospective offenders of sexual assault on children who are vulnerable to fall prey to the offenders. I agree with the observations expressed by the Court of Appeal in this regard and would not hesitate to add further that the Court of Appeal had been lenient not to enhance the sentences on the petitioner in view of the aggravating factors in this case"

14. Madigan J in State v Mario Tauvoli HAC 027 of 2011 (18 April 2011) said:

“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 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.”

15. The Court of Appeal of Fiji has endorsed the principles of punishment as laid down by the New Zealand Criminal Court of Appeal in R v Radich [1954] NZLR 86 that:

“... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.”

“If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.”

16. The Supreme Court in Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015) proclaimed a long list of factors that should be considered in punishing the offenders of child rape cases. Those factors would include:

- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*
- (f) *whether the impact on the victim had been severe, traumatic, or continuing;*
- (g) *whether actual violence had been inflicted;*
- (h) *whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
- (i) *whether the method of penetration was dangerous or especially abhorrent;*

- (j) *whether there had been a forced entry to a residence where the victim was present;*
- (k) *whether the incident was sustained over a long period such as several hours;*
- (l) *whether the incident had been especially degrading or humiliating;*
- (m) *If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
- (n) *Time spent in custody on remand.*
- (o) *Extent of remorse and an evaluation of its genuineness;*
- (p) *If other counts or if serving another sentence, totality of appropriate sentence.*

17. The Supreme Court in *Raj v State* (supra) found the following aggravating factors, many of which occur in the present case, as factors which “made this a particularly bad case of child abuse and for the specific crime charged namely rape”:

[63] *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” [Record p24].*
- (iii) *She was a child of 10 years. It is not clear what factors the learned judge took into account when fixing the starting point on the tariff. The age of the child, if very young, could yet be an aggravating factor. In this case it is more likely and appropriate that it be put into consideration for arriving at the tariff only, and not added on later as an aggravating factor.*
- (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.*

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

18. The authorities indicate that whilst rehabilitation is a factor to be considered arriving at the final sentence [Section 4 (d) of the SPA] and when fixing a non-parole period, so also are deterrence, denunciation, condign punishment and community protection and expectations [*Tora v State* [2015] FJSC 23; CAV11.2015 (22 October 2015)]. In the present case rehabilitation is not a particularly relevant purpose in sentencing whereas the expectations of the community and the protection of young girls should be reflected in both the head sentence and the non-parole term so as to send a strong signal that the courts will come down harsh on child rapists.

19. **AGGRAVATING FACTORS**

(a) Age Disparity

The disparity in the age between the victim and the accused was very wide. There is an age difference of 22 years between the accused and the child victim.

(b) Vulnerability

The victim was extremely vulnerable by reason of her age and other circumstances in the case. She was only 9 years old when the accused started to rape her. Children below the age of 13 years are the most vulnerable victims.

The accused was fully aware of the circumstances which led the victim to be in his care and her vulnerability. The victim was badly affected by the murder of her sister, by the fact that the murderer was her mother and of her imprisonment. Accused was fully aware that the crimes this young child was exposed to had affected her as was evidenced by behavioural problems already manifesting themselves. The accused testified that even before the victim came to live with him (and after the murder of her sister) he received complaints that she was misbehaving doing naughty things. When the victim came to live with him, aunt Roselyn always complained to him that victim didn't wear undergarments in the

house. The Victim Impact Report which has been prepared by a counsellor states that the victim was scared, felt helpless and in pain witnessing the traumatic experience.

According to victim's evidence she had been raped by the accused many times although he was charged only for one such incident. When the victim complained to her aunt Roselyn about what the accused was doing to her, the aunt would slap her and give her a pad. The way aunts Roselyn and Suman testified against this innocent girl blaming her for her childish behaviour (that she did not wear under garments etc) is indicative of the magnitude of the vulnerability she would have faced before and after the rape incidents. Whenever the victim had complained, Roselyn had told that '*I know what is going on*'. The fact that the child had no avenue of complaint and was disbelieved again added to her vulnerability. The accused must have known all these things. The accused knowing all these has exploited victim's vulnerability.

(c). Breach and Abuse of Trust

The victim was accused's younger sister. The accused testified that "KR is his sister but he treated her like his small daughter". The responsibility the accused had towards this young victim was further enhanced by the circumstances which led to her coming into his care. The accused testified that "K.R. had to leave her house at Kulukulu and finally came to him because her mother went to prison."

The accused was supposed to be victim's saviour and had a duty of care to ensure victim's safety and well being after her being exposed to such extremely shocking events. Instead of protecting her, and allowing her to recover, the accused callously preyed upon her for his sexual gratification in disregard for her emotional and physical wellbeing.

(d). Actual violence had been inflicted

The child victim testified that before she was raped, the accused assaulted her. When she refused to come down to the bottom bunk she was slapped. When she

screamed in pain after the penetration, he again slapped her and told her to keep quiet.

(e). The victim suffered pain and injury

When the accused inserted his penis into her vagina she screamed in pain. She testified that it was painful. She testified that after she was raped she was bleeding from her vagina. Aunt Roslyn had seen blood in her vagina. By reason of the accused penetrating the victim's vagina, he took away her virginity.

In Fiji the courts have considered the loss of virginity as an aggravating factor. State v Narayan [2018] FJHC 266; HAC344.2016S (9 April 2018).

The Supreme Court in Senilokula v State [2018] FJSC 5; CAV0017.2017 (26 April 2018) when considering the appropriate sentence in that case where the accused was charged with one representative count of rape, made reference to the fact that *"He has to be treated for the purpose of sentence as having done that just the once, but whereas the loss of her virginity should have been an occasion which she would remember with love or at least affection, she has been robbed of one of the great joys of life."*

The Supreme Court in Raj (supra) when considering the aggravating factors in that case, in addition to the matters listed in paragraph 17 above, also considered that the victim in that case had "lost her hymen at age 10".

(f). Accused was under the influence of alcohol

The victim testified that accused smelled of liquor and was drunk. Accused admitted that he used to come home drunk during night when the victim was home.

(g). Psychological and emotional impact

The impact of the crimes on the victim was extremely traumatic and it is continuing. In the sentencing process of rape cases, the courts in Fiji have considered the Victim Impact Statements to evaluate the harm caused to the victims.

The Victim Impact Report (VIR) filed in this case identifies the psychological sequelae of the victim which shows not only that she has suffered psychological harm but that the harm is clearly severe and extreme. The allegation of the Defence that the VIR had been compiled by the State Counsel was rejected and the Court was assured that it was prepared by a competent Counsellor. The VIR was made available to the Defence in advance to be scrutinised and challenged. It would have been better if the VIR was made available to the Defence with trial disclosures enabling the Defence Counsel to challenge it at the trial itself. (in England, the maker of a Victim Personal Statement (VPS) may be cross-examined on its content). However the late submission did not affect the probative value of the VIR as it reinforces the factual matrix transpired during the course of trial as to the trauma caused to the victim.

(h). The accused tried to cover up the crime

The Court heard testimony from the victim and the accused that victim had reported to the headmaster that she had been raped by 'a boy' in the school. The victim testified that the accused had told her to tell this lie. The accused accepted that when the rapes were reported to the headmaster in this way, 'the boy' was never brought before the headmaster.

Under the UK Definitive Guidelines for Sexual offences and Rape of a Child under 13 it is a statutory aggravating factor that the accused took "any steps to prevent the victim reporting the incident". In *Raj v State* [2014] FJCA 18; AAU0038.2010 (5 March 2014) the Fiji Supreme Court has stated that evidence that an offender has attempted to cover up his acts is a further aggravating factor.

In this case this factor should be viewed as being even more egregious because the accused used the child victim herself to cover up his crimes when he told her to lie to the headmaster about who her real rapist was.

(i) The accused exposed the innocent mind of a child to sexual activity at such a tender age

The High Court has considered the fact that an accused has exposed a child to sexual activity at a very young age, thus, robbing her of her innocence as a separate aggravating factor. *State v Navunivesi* [2018] FJHC 954; HAC 318.2015 (5 October 2018); *State v Tuwai* [2018] FJHC 759; HAC319.2015 (17 August 2018).

(j). The crime was planned

The evidence discloses that the crime was planned. Accused has taken the custody the victim from her aunt Suman and brought her under his care. There is evidence that the accused was raped several times before the matter was reported. The accused raped the young child at night when the rest of the household was asleep. The victim was asleep on the top bunk of the bed whilst his two children were asleep in the bottom bunk. He then carried his children and moved them to the top bunk of the bed to commit this crime.

(k). The crime was committed in the presence of children

Accused committed this crime when his own children were sleeping on the top bunk of the same bed. Although there is no evidence that his children had witnessed the incident, the mere presence of children at the crime scene when the offence was being committed should be considered as an aggravating factor.

(l). The crime was repetitive

There is evidence that this crime had been repetitive although the accused was charged only for one such act. The victim testified that she complained to aunt Roselyn on several occasions.

20. MITIGATING FACTORS

(a). Family /Personal circumstances

The accused is 36 years old father of two children. He is the sole bread winner of his family. His wife has served a prison term for the offence she admitted and currently facing a Murder charge in this court. Accused is looking after his young children.

When assessing any submissions on behalf of the accused in mitigation, the State has reminded me of the pronouncement of the Court of Appeal in Drotini v The State [2006] FJCA 26; AAU0001.2005S (24 March 2006) which applies with equal vigour to the facts and circumstances of this case:

"[18] In any such case, there are few possible mitigating circumstances beyond a plea of guilty and the sentencing court should be careful to evaluate any matters put forward as suggested mitigation against the family situation. Thus, for example, whilst subsequent concern for, or assistance of, the victim following rape on a stranger may be accepted as some mitigation of the offence, a similar situation in a family rape would do little to mitigate the initial breach of trust."

In Raj v State [2014] FJCA 18; AAU0038.2010 (5 March 2014) the Supreme Court confirmed that family circumstances of the accused has a very little mitigating value.

The Court of Appeal held at paragraph 20 that

"[l]egitimate aspects of mitigation will include a clear record, proven remorse, mental disorder but not family circumstances because the perpetrator has by his conviction for the crime done everything within his power to destroy the fabric of the family unit."

Recently in Rokolaba v State [2018] FJSC 12; CAV0011.2017 (26 April 2018) where the accused was convicted of child rape, the Supreme Court held that:

"[43] In these serious cases of sexual offending very little mitigation can be derived from being "married with children" and "sole breadwinner". For a crime as serious as this, imprisonment must necessarily be imposed for a substantial period. Families invariably suffer greatly when the supporting member is to be imprisoned. In the absence of strong social security support, vulnerable relatives of the accused, elderly or sickly parents, children at school and overworked wives and mothers have to endure harsh misfortune as a result of the accused person's serious offending."

(b). Clear Record

The accused does not have any previous convictions. His clear record is of little value in this case because he committed this crime in breach of trust.

In *Senilolokula v State* [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court considered this factor and observed:

"the only factor relating to the defendant which could amount to mitigation is that he was a first time offender, but that cannot be significant mitigation in this case since it was because he was a man of good character that he was entrusted with the responsible position of warden of a hostel for deaf children."

21. Time Spent in Remand

The accused was in remand for 14 days. The period of time during which the accused was held in custody prior to the trial must be deducted from the sentence to give effect to Section 24 of the Sentencing and Penalties Act.

Sentence

22. Generally the starting point is picked from middle or lower range of the tariff. I agree with the State Counsel that this is an exceptional case where the circumstances warrant a starting point substantially higher than the starting point of a child rape case.

23. In *Kasim v State* [1994] FJCA 25; Aau0021j.93s (27 May 1994) the Court of appeal observed the following at a time when the record of sexual violence in Fiji was not as bad as today:


“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 recognised 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 added)

24. Having considered the gravity of the offence and the harm caused to the victim, I pick a starting point of 14 years from the top range of the tariff. I add 5 years to the starting point for above mentioned long list of aggravating factors bringing the interim sentence to 19 years’ imprisonment. I deduct 1 year for mitigating factors and the remand period of 14 days bringing the sentence to one of 18 years’ imprisonment.
25. The final sentence is placed substantially above the established tariff for child rape in Fiji. The Court believes that a sentence within tariff is not commensurate with the circumstances of the offending. The tariffs are set to maintain the uniformity and accountability of the sentencing process. A sentence above the established tariff will not offend those principles if legitimate reasons are available. If the courts do not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences.
26. Accused is a first offender. I considered accused’s personal circumstances and chances of rehabilitation as a first offender. In view of the foregoing, I impose a non-parole period of 15 years.

Summary

27. The accused is sentenced to 18 years imprisonment with a non-parole period of 15 years.
28. 30 days to appeal to the Fiji Court of Appeal.




Aruna Aluthge
Judge

At Lautoka

16th November, 2018

Counsel:

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

Addendum

After the above sentencing Ruling was pronounced in court, it was brought to my notice by the State Counsel Ms. Alagenda that the tariff for child rape sentences in Fiji has been amended by the Supreme Court by its judgment in the case of *Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) delivered on 2nd

November, 2018, and that a copy of the said judgment was filed in the Registry during my absence. Unfortunately, the copy of the said judgment was not brought my attention until the sentencing Ruling was pronounced.

This sentencing Ruling was prepared and was to be passed on the 1st November, 2018. Due to unavoidable circumstance (I had to leave the country to attend a workshop, after delivering a summing up on the 1st November 2018), the sentencing Ruling could not be pronounced as scheduled.

The Sentencing and Penalties Act requires the courts to have regard to the current sentencing practice the terms of any applicable guideline judgment (S 4 (2) (b)). Therefore, the new tariff should have been applied to the present case as the sentencing Ruling was delivered after the Supreme Court Judgment was pronounced.

I am pleased to note that the sentence and the reasons given in the sentencing Ruling is in conformity with the Supreme Court judgment when it states:

"[25] The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.

[26] It is entirely possible that the sentencing judge when confronted with a particularly heinous rape as in State v Isoa Rainima Crim. Case HAC 064 of 2017S 25th October 2018 may exceed the tariff when assessing all of the factors. That was a case committed against an adult victim. The total sentence came to 23 years imprisonment with a non-parole period of 20 years"