

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 149 of 2014

BETWEEN : STATE

AND : PENISONI LAGILAGI

Counsel : Mr Seruvatu for the State
Ms Vulimainadave for the Accused

Dates of Hearing : 25 & 27 June 2019

Closing Speeches : 27 June 2019

Date of Summing up: 28 June 2019

Date of Judgment : 01 July 2019

Date of Sentence : 14 October 2019

(The complainant's name is suppressed and referred to as RT)

SENTENCE

1. You, Penisoni Lagilagi stand convicted for two representative counts of indecent assault contrary to section 212(1) of the Crimes Act and another count of rape contrary to Section 207(1) and (2)(b) and (3) of the Crimes Act.

2. The complainant was 9 years old and you were 35 years old at the time of the offences. The complainant is your niece. You pleaded not guilty to all three counts and after a full hearing the assessors unanimously found you guilty to all three counts. Later you were convicted for the three counts by the judgment of this court dated 01 July 2019.
3. The brief facts in respect of each count are as follows;

Representative Count - Indecent Assault

Between 28 April 2014 to 02 May 2014 when the complainant's parents were not at home you asked her to scratch your back. When she was scratching your back, you started touching her legs on top of her clothes. Again, on 02 May 2014 when the complainant was going to church you called her inside an empty house. You kneeled down and started touching her feet and went up to her hips. You touched her under her clothes.

Representative Count - Indecent Assault

Between 12 May and 31 October 2014 when the complainant was at her aunt's place in Nadi, you touched her vagina under her clothes. Again, during the same period you called her into your room. You pulled down the complainant's skirt and started touching her. You massaged her vagina and touched her vagina by putting your hand inside her panty. On another occasion when her aunt and her sister were watching a video, you called her to your room. You pulled down her panty and touched her vagina.

Third Count - Rape

On 01 November 2014 when the complainant was sleeping in a room with her aunt you came and laid beside her. You pulled down her pants and inserted your finger into her vagina.

4. The age gap between the complainant and you is 26 years. You breached the trust as the uncle of the complainant. You exposed the mind of a small child to

sexual activities. You took advantage of the vulnerability of a child. I consider those as the aggravating factors in this case.

5. In mitigation it was submitted that;
 - a) You are 40 years old.
 - b) You are in a de facto relationship.
 - c) You have two children who are schooling.
 - d) You were a farmer and the sole breadwinner.

6. In cases of sexual offences, personal circumstances and family background carry only a little mitigatory value. You have one previous conviction for attempted rape, and you are currently serving a term of 3 years 11 months and 3 days.

7. The maximum punishment for indecent assault is 5 years and the tariff is 12 months to 4 years imprisonment.

8. The maximum punishment for rape is life imprisonment. The tariff for child rape is 11 years to 20 years. It was observed in *Aitcheson v State* [2018] FJSC 29; CAV 0012.2018 (2 November 2018);

“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.”

9. Section 17 of the Sentencing and Penalties Act provides for the court to impose aggregate sentences on offenders as follows;

“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.”

10. I am satisfied that the offences that you committed form a series of offences of the same and similar character. Therefore, I think it appropriate to impose an aggregate sentence on you in respect of the three counts.

11. Having considered the objective seriousness of the offences I pick a starting point of 13 years. For the aggravating factors I add 4 years. For your personal circumstances I deduct 6 months. Now your aggregate sentence is 16 years and 6 months imprisonment.

12. You had been in remand custody for this case for 7 months. I deduct seven months pursuant to section 24 of the Sentencing and Penalties Act as any period of time spent in custody should be regarded as a period of imprisonment already served by the offender.

13. In the recent decision of the Supreme Court, in *Nacani Timo V State Criminal Petition No: CAV 0022 of 2018* it was decided that;

“It is not mandatory for a Court to award a non-parole period to every convict. However, a decision to award or decline to award a non-parole period must be taken by a court after hearing a convict and the decision must be accompanied by reasons, with an economy of words, as a part of a just, fair and reasonable procedure keeping the interests of the convict and society (including the victim) in mind”.

14. No specific submissions were made on your behalf on setting a non-parole period in this case apart from pleading for a minimum sentence with a non-parole period in your mitigation submissions. In *State v Tubunavau* [2019] FJHC 950; HAC346.2018 (30 September 2019) Justice Perera observed the following in a situation where no submissions were made on the issue of setting a non-parole period;

“In this case no specific submissions were made by either the prosecution or the defence in relation to the fixing of the non-parole period. There is nothing wrong with that for two reasons. Firstly, whether parties make submissions or not, the sentencing court should conform to the clear provisions in section 18 of the Sentencing and Penalties Act in relation to the fixing of a non-parole period. In fact, as far as the prosecutor is concerned, the prosecutor is not expected to canvass for a specific punishment or a non-parole term. The duty of the prosecutor at the sentencing stage is to assist the court to identify the applicable sentencing tariff, the facts and circumstances relevant to sentencing and the relevant sentencing principles. Secondly, the factors that are required to be considered in fixing the non-parole term are the nature and the circumstances of the offending, the aggravating factors, the mitigating factors and the personal circumstances of the accused which are the same factors that are submitted to the court in order to determine the appropriate term of imprisonment. “

15. In view of the above guidelines, I have taken into account the nature and circumstances of offending, the aggravating factors and your personal circumstances. You have committed these offences in domestic context, and you committed the offences against a child. Undoubtedly the domestic violence nature of the offences makes this an exceptional case to consider a non-parole period. Having borne in mind the interest of the society as well as of the victim, I think it fit to set a non-parole period in this case.

16. Although sexual offences committed against children leave scars in their minds for the rest of their lives, in this case no victim impact assessment has been done to assess the extent of emotional and psychological impact on the complainant. Nevertheless, the sentence imposed on you must reflect that the sexual offences committed against children, specially in domestic context attract severe consequences.

17. In the circumstances, you should serve an aggregate sentence of 15 years and 11 months imprisonment. You are eligible for parole after 10 years.

18. I order this sentence to run concurrent to any sentence that you are currently serving.

19. Further I issue a permanent domestic violence restraining order for non-molestation and for non-contact for the safety of the complainant.

30 days to appeal to the Court of Appeal.



A blue ink signature of Rangajeeva Wimalasena, consisting of several overlapping loops and lines.

Rangajeeva Wimalasena
Acting Judge

At Lautoka

14 October 2019

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Legal Aid Commission