

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 134 of 2017

STATE

V

SEREMAIA BATIALIVA

Counsel : Ms. L. Latu for the State.
: Ms. V. Narara and Ms. S. Ali [LAC] for the Accused.

Dates of Hearing : 17, 18 April, 2019
Closing Speeches : 23 April, 2019
Date of Summing Up : 23 April, 2019
Date of Judgment : 24 April, 2019
Date of Sentence : 29 April, 2019

SENTENCE

(The name of the complainant is suppressed she will be referred to as "JS").

1. In a judgment delivered on 24 April, 2019 this court found the accused guilty of one count of sexual assault and one count of rape as per the following information:

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

SEREMAIA BATIALIVA, on the 24th day of June, 2017 at Matanagata, Vatukoula, in the Western Division, unlawfully and indecently assaulted "JS".

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

SEREMAIA BATIALIVA, on the 24th day of June, 2017 at Matanagata, Vatukoula in the Western Division, penetrated the vulva of “**JS**”, a child under the age of 13 years, with his finger.

2. The brief facts were as follows:

On 24th June, 2017 the victim who was 7 years of age and a class 3 student in the morning was sitting on the settee and reading at her home when the accused her *Tatai* meaning her grandfather came and sat beside her. The accused touched her thighs and then put his right hand inside her shorts and touched her private part meaning her vagina with his finger.

3. As a result of what the accused had done the victim felt pain in her private part. After the accused left the victim told her mother everything the accused had done to her she had waited for the accused to leave because she was scared of him.
4. The mother of the victim Siteri Nabite reported the matter to the police the victim was medically examined. The doctor confirmed the victim had sustained injuries in her vulva. Upon investigations the accused was arrested and charged.
5. Both counsel filed written sentence submissions the prosecution also filed the victim impact statement of the victim for which this court is grateful.
6. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:

- a) The accused is 55 years of age;
 - b) He is a first offender;
 - c) Married with three children.
7. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs. the State, CAV 0003 of 2014* that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature.
8. The aggravating features are:
- a) Breach of Trust
The accused was the grandfather of the victim. The victim trusted the accused who came to her house and stayed for a few days. The accused knew the victim was vulnerable and naive and he breached the trust of the victim by what he did to her. The accused has also breached the sanctity of the relationship between a grandfather and a granddaughter.
 - b) Injuries caused to the victim
The medical report of the victim shows some injuries caused to the vulva of the victim namely excoriation on the left labia at the lower side.
 - c) Planning
The accused had planned what he wanted to do. The victim was reading on the settee the mother of the victim was not around. The accused went to the victim he knew she was unsupervised and he took advantage of the situation which resulted in him committing the offences.

d) Age difference

The victim was 7 years of age where as the accused was 53 years of age at the time of the offending, the age difference was substantial. It is a matter of concern to note the prevalence of rape and sexual assault cases on children by relatives.

9. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in the recent judgment of *Gordon Aitcheson vs. The State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now a sentence between 11 years to 20 years imprisonment.
10. It is the duty of the court to protect children from sexual exploitation of any kind that is the reason why the law has imposed life imprisonment as the maximum penalty.
11. There has been an increase in sexual offences involving offenders who are known to the victim and are matured adults. It is shocking, sickening and appalling to note the manner in which the accused had committed both the offences on this child.
12. Section 17 of the Sentencing and Penalties Act states:

“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.”

- 13 I am satisfied that both the offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for both the offences.
14. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely and there is no two ways about it. Children are entitled to live their lives free from any form of physical or emotional abuse. 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 such conduct. A long term imprisonment becomes inevitable in such situations.
15. The Supreme Court in *Mohammed Alfaaz v State* [2018] FJSC 17; CAV0009.2018 (30 August 2018) has stated the above in the following words at paragraph 54 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"

16. 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.”

17. The Supreme Court in *Felix Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015) mentioned 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.*

18. The Supreme Court in *Anand Abhay Raj v State (supra)* found the following aggravating factors, some of which appear in the present case, stated at paragraph 63 as follows:

- (i) *The Petitioner was the victim'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."*

19. After assessing the objective seriousness of the offences committed I take 13 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. I add 6 years for the aggravating factors, bringing an interim total of 19 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. The accused has previous convictions but they are expired or irrelevant hence the accused will be treated as a first offender. In this regard I reduce the sentence by 1 year. The sentence now is 18 years imprisonment.
20. I note from court file that the accused was remanded for one month and 22 days. In exercise of my discretion I deduct two months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final aggregate sentence is 17 years 10 months imprisonment.
21. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of sexual assault and one count of rape is 17 years and 10 months.
22. I am satisfied that the term of 17 years and 10 months imprisonment 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 offence.
23. Mr. Batialiva you have committed serious offences against your granddaughter who you were supposed to protect, care and love. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to this victim who was 7 years of age at the time.
24. As a result of the accused person's actions in the victim impact statement the victim states that she was affected for some time by what the accused had done to her.

25. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was his granddaughter of 7 years compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
26. Under section 18 (1) of the Sentencing and Penalties Act, I impose 16 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.
27. In summary I pass an aggregate sentence of 17 years and 10 months imprisonment with a non-parole period of 16 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.
28. 30 days to appeal to the Court of Appeal.



Sunil Sharma



At Lautoka
29 April, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.