

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 67 of 2019

BETWEEN: **STATE**

PROSECUTION

A N D: **DAVID NARAYAN**

ACCUSED PERSON

Counsel : Ms. K. Semisi for the State
 : Mr. P. Kumar for Accused

Date of Sentence : 15th August 2019

SENTENCE

1. The name of the complainant is suppressed.

2. Mr. David Narayan, You are being charged with one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act, which carries a maximum penalty of life imprisonment. The particulars of the offence are that:

COUNT 1

Statement of Offence

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

Particulars of Offence

DAVID NARAYAN on the 10th day of February 2019 at Cunningham in the Central Division penetrated the vagina of TS, a child under the age of 13 years, with his finger.

3. You pleaded not guilty to the offence on the 30th of April 2019, hence, the matter proceeded to the pre-trial stages. After the conclusion of the pre-trial steps, the matter was set down for hearing on the 19th to 21st of August 2019. However, you changed your position of plea and pleaded guilty to the offence on the 1st of August 2019. Satisfied by the fact that you have fully comprehended the legal effect of your plea and your plea was voluntary and free from influence, I now convict you to this offence of Rape.
4. According to the summary of facts, which you admitted in the court, you have inserted your finger into the vagina of the complainant on the 10th of February 2019. The complainant was 10 years old at that time. The complainant was living with her family at the house next to your house at Stage 4 Cunningham in Suva. On the 10th of February 2019, your wife had gone to the complainant's house in order to help the mother of complainant to make some food for the prayers. Your wife had then requested the complainant and her brother to go to your home, which is at next door, and bring a pot. The complainant and her brother came to your house asking for the pot. At that time, you were ironing your clothes. You have told them to wait until you finish the ironing. While you were ironing your clothes, the complainant and her brother had started to play hide and seek in the house. The complainant had gone into your room and hid under the bed, while her brother went and hid at another part of the house. You found her under the bed when you went to the room after ironing. You have called the complainant out and asked her to remove her clothes, which she refused. You then forcefully put your hand inside the clothes of the complainant and inserted your finger into her vagina.
5. Rape is one of the most humiliating and distressing crimes. It becomes more serious when it is involved with a child victim. Hence, I find the rape in this nature is a very serious crime.

In this case, the complainant was sexually abused by a person who is known to her. This form of sexual exploitation of children by the known adult is a serious offence.

6. The Fiji Court of Appeal in Subramani v State [2018] FJCA 82; AAU0112.2014 (1 June 2018) has discussed the objective of the sentencing of offenders who have committed offences of gross sexual exploitation of young children, where the Fiji Court of Appeal held that:

"The offence of rape of young person related to the appellant is a serious offence. In this case the complainant was 11 years old and the appellant was her grand uncle (her grandfather's brother). The authorities indicate that whilst rehabilitation is a factor to be considered when fixing a non-parole period, so also are deterrence, denunciation, condign punishment and community protection and expectations. The appropriate person to balance these objectives in each case is the sentencing judge. In the present case, given the age of the appellant, re-habilitation is not a particularly relevant matter 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 impose appropriate sentences in such cases."

7. The Supreme Court of Fiji in Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018) held that the increasing prevalence of the crimes of this nature demands the courts to consider widening the tariff for the rape against children. The Supreme Court of Fiji held that:

"The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child

victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.”

Purpose of the Sentence

8. In view of the serious nature of the crimes of this nature, the main purpose of this sentence is founded on the principle of deterrence. It is a responsibility of the court to deter offenders or other persons from committing offences of the same or similar nature and protect the community from offenders of this nature. A harsh and long custodial sentence is inevitable for the offences of this nature in order to demonstrate the gravity of the offence and also reflect that the civilized society denounce such crimes without any reservation.

Tariff

9. The tariff for rape of a child is between 11 -20 years' imprisonment period **Aitcheson v State (Supra)**

Level of Harm and Culpability

10. The complainant was ten years old when this incident took place. The victim impact report provides the details of the emotional and psychological effect that this offence has caused to the complainant. It has adversely changed the complainant to a withdrawn, scared and paranoid child from a fun, active and happy young child. The complainant and her family had to relocate to a new house as a result of this incident. In view of these facts, I find the level of harm in this offence is significantly high.
11. It was revealed that you have found an opportunity and then executed your heinous plan of raping this young complainant. I accordingly find the level of culpability in this offence is also significantly high.

Starting Point

12. Having taken into consideration, the seriousness of the crime, the purpose of the sentence, the level of culpability and harm, I find this is an appropriate case to fix a higher starting point. I accordingly select fourteen (14) years as the starting point.

Aggravating and Mitigating Factors

13. You have breached the trust that the complainant had in you not only as an elderly person but also as a close neighbour. She trusted you that you would not harm her in this manner, and came to the house to get the pot as requested by your wife. Instead of caring and looking after this small young complainant, you manipulatively used the opportunity to satisfy your lustful sexual gratification. The complainant was ten years old and was joyfully playing with her brother when you found an opportunity to commit this crime. You used the vulnerability of this child to fulfil your disgraceful sexual desire. The age difference between you and the complainant is substantially high. She was just ten (10) years old and you were sixty one (61) years old at the time this offence took place. By committing this crime, you have exposed this ten years old child to the sexual activities at very young age, thus preventing her to have a natural growth of maturity in her life. I consider these grounds as aggravating factors in this offending.
14. The learned counsel for the defence in his mitigation submissions submitted your personal and family background, which I do not find any mitigatory value.
15. The learned counsel for the defence submitted his submission that you are a first offender and has a reputable standing in the community through your social works, hence, you are entitled to a substantive discount. However, I find that your previous good character and the acquired social standing have given you an opportunity to freely move around in the community and had access to the kids without any suspicion of risk. The community has perceived you as a man of good character and not as a child paedophile and allowed you to feely moved in the community. Moreover, there is no information or fact that you have

significantly contributed to the community or have any reputation in the community as per Section 5 of the Sentencing and Penalties Act. Therefore, I find that the previous good character has a meagre mitigatory value.

16. You pleaded guilty to this matter just before the commencement of the hearing, which prevented the complainant to come and give evidence. Therefore, you are entitled to certain discount for your plea of guilty.
17. In view of the reasons discussed above, I increase further three (3) years for the aggravating factors to reach interim period of seventeen (17) years. In view of the above discussed mitigatory grounds I reduce one (1) year to reach a period of sixteen (16) years imprisonment as your final sentence.
18. Having considered the seriousness of this crime, the purpose of this sentence and your age, I find fourteen (14) years of non-parole period would serve the purpose of this sentence. Hence, you are not eligible for any parole for a period of fourteen (14) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

19. Accordingly, I sentence you for a period of **sixteen (16) years** imprisonment to the offence of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act. Moreover, you are not entitled to any parole for a period of **fourteen (14) years** pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of The Sentence

20. You have been in remand custody for this case for a period of nearly six (6) months as you were not granted bail by the court. In pursuant of Section 24 of the Sentencing and Penalties Act, I consider the period of six (6) months as a period of imprisonment that have already been served by you.

21. Accordingly, the actual sentencing period is **fifteen (15) years and six (6) months** imprisonment with non-parole period of **thirteen (13) years and six (6) months**.
22. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
15th August 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Patrick Kumar Lawyers for the Defence.