

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 34 of 2016

STATE

V

- 1. VILIAME LIVANASIGA SEMO**
- 2. NACANIELI BULIVOU**

Counsel : Ms. R. Uce for the State.
: Ms. P. Reddy for the first Accused.
: Ms. K. Vulimainadave for the second Accused.

Dates of Hearing : 05 and 06 May 2020
Closing Speeches : 07 May, 2020
Date of Summing Up : 07 May, 2020
Date of Judgment : 08 May, 2020
Date of Sentence : 05 June, 2020

SENTENCE

(The name of the victim is suppressed she will be referred to as "KK")

1. In a judgment delivered on 8 May, 2020 this court found the first accused guilty of one count of sexual assault and the second accused guilty of two counts of sexual assault and convicted them accordingly. These counts were representative counts.

2. The brief facts were as follows:
In the year 2014 the victim was 9 years of age and a Year 4 student. The first accused is the cousin brother of the victim whereas the second accused is the grandfather.
3. In the year 2015 the first accused came to the house of the victim with his parents and sister Seruwaia. The parents of the victim and the parents of the first accused were having a kava session, since it was night time the victim with her two year old cousin Kini and Seruwaia went to sleep.
4. After a while the first accused came into the bedroom and walked to where the victim was lying down. The accused removed his pants and underwear and then removed the victim's pants and panty and started to rub his penis on her vagina.
5. The victim was afraid so she did not do anything, the victim did not tell anyone about what the first accused had done to her because she was afraid that nobody would believe her.
6. In the year 2014 the second accused was living in the house of the victim on one occasion during the night the accused came into the victim's bedroom. In the bedroom the victim was sleeping with her two year old cousin brother. The victim was wearing her pants, t-shirt and panty. The second accused came into the bedroom opened his pants and rubbed his penis on the victim's buttocks from on top of her clothes whilst she lay on the bed. Whilst doing this, the second accused came to know that the victim was awake so he turned her to face him and then pulled down her pants and panty and licked her vagina.
7. The victim was helpless, she did not do anything, after a while the second accused left, thereafter the victim pulled up her panty and pants and went to sleep. The victim did not tell anyone about what the accused had done to

her because she was afraid. According to the victim the accused had done this to her on more than one occasion.

8. On another occasion, in late 2014 or early 2015 the second accused took the victim and her two year old cousin Kini to her aunt's house at Navakai, Nadi. In the night the victim felt uncomfortable sleeping in the living room so she went into the bedroom where the second accused was sleeping and she slept on the bed next to the accused.
9. After a while the second accused started to touch the victim's thighs and then pulled down her skirt and panty and started licking her vagina.
10. In 2016 the victim told her cousin Seruwaia about what the first and the second accused persons had done to her in 2014 and 2015. The matter was then reported to the police by the victim's parents.
11. Both counsel filed their sentence submissions, victim impact statement and mitigation for which this court is grateful.
12. The following personal details and mitigation have been presented by the counsel for both the accused persons:

Accused One

- a) He was 18 years at the time of the offending but is now 23 years of age;
- b) First offender;
- c) Single and unemployed;
- c) Has four siblings;
- d) Seeks the leniency of the court;
- e) Cooperated with the police during investigations;

- f) Did not use any physical violence to make the victim submit to him.

Accused Two

- a) He was 64 years at the time of the offending but is now 70 years;
- b) Is a first offender;
- c) He is retired but does farming at home;
- d) He is a single parent who has a 28 year old daughter;
- e) Has had a surgery for appendicitis which affects him during the cold season;
- f) Seeks the court's mercy and leniency.

13. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v. The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

14. The aggravating factors are:

a) Breach of Trust

The first accused is the cousin brother of the victim whereas the second accused is the grandfather of the victim. The victim trusted both the accused persons who grossly breached this trust by their actions.

b) Victim was vulnerable

The victim was vulnerable and helpless, both the accused took advantage of this. The offences took place in an environment where the victim is supposed to be safe.

c) Age difference

The victim was 9 years of age whereas the first accused was 18 years and the second accused was 64 years of age. The age difference is substantial.

d) Victim Impact Statement

The victim has been emotionally and psychologically affected by the incidents she gets flashbacks at times, self-blame, has become forgetful, her life has changed she feels scared and isolates herself from everyone.

REPRESENTATIVE COUNTS

15. The first accused faces one representative count of sexual assault whereas the second accused faces two representative counts of sexual assault.
16. Although the first accused is charged with a representative count of sexual assault the evidence was that there was only one incident of sexual assault.
17. As for the second accused the victim informed the court about more than one occasion of sexual assault. This accused cannot be punished for all the other occasions of sexual assault but for one occasion only (*see Senilokula v State, Criminal Petition no. CAV 0017 of 2017 (26 April, 2018)*).
18. The maximum penalty for the offence of sexual assault is 10 years imprisonment.

TARIFF

19. The tariff for the offence of sexual assault is between two (2) years to eight (8) years imprisonment see *State v. Khaiyum criminal case no. 160 of 2010 (10 August, 2012)*. It appears the top of the range is reserved for flagrant

handling or assault of the naked genitalia or anus and the bottom range is for less serious assaults such as brushing of covered breasts or genitalia or buttocks.

20. Madigan J. in *Epeli Ratabacaca Laca vs. The State*, criminal case no. HAC 252 of 2011(14 November, 2012) provided the following sentencing guideline under three categories of the sexual assault as follows:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.

Category 2

- (i) *Contact between the naked genitalia of the offender and another part of the victim's body;*
- (ii) *Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
- (iii) *Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

21. In this case there are two accused persons. The first accused had rubbed his penis on the vagina of the victim. This act by the first accused falls under category one which requires a punishment on the higher scale of the tariff.

22. For the second accused there are two incidents involved, firstly rubbing his penis on the victim's covered buttocks (category two (i)), secondly, licking of the vagina after removing her panty (category two (ii)).
23. For the first accused after assessing the objective seriousness of the offence committed I take 3 years imprisonment (lower end of the scale) as the starting point. I add 5 years for the aggravating factors, bringing an interim total of 8 years imprisonment. For the mitigating factors and the accused's good character I reduce the sentence by 1 year. The interim sentence is now 7 years imprisonment.
24. I note from the court file that the accused has been remanded for 4 months and 3 days. In exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence by 4 months and 5 days.
25. The final sentence for the first accused is 6 years 7 months and 25 days imprisonment.
26. In respect of the second accused the two offences of sexual assault for which this accused has been convicted are offences founded on the same facts and are of similar character, I therefore prefer to impose an aggregate sentence for both the offences in accordance with section 17 of the Sentencing and Penalties Act.
27. After assessing the objective seriousness of the offences committed I take 2 years imprisonment (lower end of the scale) as the starting point. I add 5 years for the aggravating factors, bringing an interim total of 7 years imprisonment. For the mitigating factors and the accused's good character I reduce the sentence by 1 year. The interim sentence is now 6 years imprisonment.

28. I note from the court file that the accused has been remanded for 4 months and 3 days. In exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence by 4 months and 5 days.
29. The final aggregate sentence for the second accused is 5 years, 7 months and 25 days imprisonment. I am satisfied that the above term of 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.
30. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on a victim who was 9 and 10 years of age compels me to state that the purpose of this sentence is to punish offender's to an extent and in a manner which is just in all the circumstances of this case and to deter offenders and other persons from committing offences of the same or similar nature.
31. Under section 18 (1) of the Sentencing and Penalties Act, I impose 5 years as a non-parole period to be served before the first accused is eligible for parole. For the second accused I impose 4 years as the non-parole period. I consider this non-parole period to be appropriate in the rehabilitation of the accused persons which is just in the circumstances of this case.
32. Both the accused persons have committed serious offences against a child and have brought trauma upon her due to their selfish desires. According to the victim impact assessment the victim's life changed after the incidents she now lives a life with flashbacks, isolation from others and self-blame which has been through no fault of hers. An imprisonment term cannot be avoided this court will be failing in its duty if a long term deterrent sentence is not imposed.

33. In summary I sentence the first accused to 6 years 7 months and 25 days imprisonment with a non-parole period of 5 years to be served before this accused is eligible for parole. For the second accused I order an aggregate sentence of 5 years 7 months and 25 days imprisonment with a non-parole period of 4 years to be served before this accused is eligible for parole.
34. Due to the close family relationship that exists between the accused persons and the victim a permanent Domestic Violence Restraining Order of non-molestation and non-contact is issued against the accused persons to protect the victim.
35. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

05 June, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Accused.