

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 174 of 2017**

**STATE**

**V**

**LIVAI BATILOTE**

**Counsel** : Mr. T. Tuenuku for the State.  
: Ms. K. Vulimainadave for the Accused.

**Dates of Hearing** : 06 October, 2020  
**Closing Speeches** : 07 October, 2020  
**Date of Summing Up** : 07 October, 2020  
**Date of Judgment** : 08 October, 2020  
**Date of Sentence** : 30 October, 2020

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**SENTENCE**

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*(The name of the victim is suppressed she will be referred to as "L.R")*

1. In a judgment delivered on 8<sup>th</sup> October, 2020 this court found the accused guilty and convicted him for one count of rape as per the following information:

***Statement of Offence***

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

### ***Particulars of Offence***

**LIVAI BATILOTE** between the 1<sup>st</sup> day of January to the 31<sup>st</sup> day of December, 2015 at Yasawa Island in the Western Division, penetrated the vagina of “L.R”, a 10 year old child with his penis.

2. The brief facts were as follows:

The victim and the accused are cousins, in the year 2015 the victim was 10 years of age and a class 4 student living with the accused and his family. One day during the second term of school after the victim returned from school she was alone in the house with the accused.

3. The accused told her to go to his bedroom and bring a torch. When the victim was in the bedroom the accused came and pushed her on the floor and made her lie on her back facing up. The accused forcefully removed the victim's panty, the victim was scared, the accused removed his  $\frac{3}{4}$  pants and underwear then penetrated the vagina of the victim with his penis and had sexual intercourse with her for about 3 minutes. The accused threatened the victim not to tell anyone about what he had done to her. Later the victim told her aunt about what the accused had done to her, the matter was then reported to the police.

4. Both counsel filed their sentence and mitigation submissions including the victim impact statement for which this court is grateful.

5. The following personal details and mitigation have been submitted by the accused counsel:

- a) The accused is a first offender;
- b) He was 20 years of age at the time of the offending;
- c) Is in a defacto relationship;
- d) Sole bread winner of the family;
- e) Looks after his elderly parents.

6. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj -vs.- 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**

7. The following aggravating factors are obvious:

a) Breach of Trust

The victim is the cousin of the accused, he grossly breached the trust of the victim by what he did to her. The accused also abused the sanctity of the relationship that exists between the two. He knew the victim was alone and vulnerable. The accused and the victim were staying together in one house where she was expected to be safe.

b) Planning

The accused had planned what he did, he had deliberately sent the victim to his bedroom to bring a torch and then he followed her.

c) Age difference

The victim was 10 years of age whereas the accused was 20 years. The age difference is substantial.

d) Exposing a child to sexual abuse

The accused had exposed the victim to sexual activity at a very young age which is unacceptable.

e) Victim Impact Statement

In the victim impact statement the victim mentioned that after the incident she was ashamed to face people, emotionally hurt, cannot live a normal happy life and had to undergo counseling.

8. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs The State, Criminal Petition no. CAV 0012 of 2018 (02 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now between 11 years to 20 years imprisonment.
9. There has been an increase in sexual offences involving offenders who are known to the victim. It is shocking to note the manner in which the accused had committed this offence on the victim.
10. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely. 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 not expect any mercy from this court. The punishment ought to be such that it takes into account the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
11. 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 [offences]*

*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.”*

12. 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.”*

13. 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 pre sent;*
- (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.*

14. After assessing the objective seriousness of the offence committed I take 12 years imprisonment (lower range of the scale) as the starting point of the sentence. I add 6 years for the aggravating factors, bringing an interim total of 18 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. However, I note that the accused has no previous conviction he comes to court as a person of good character. For this reason the sentence is reduced by 1 year for the accused good character, and mitigation. The sentence is now 17 years imprisonment.

15. I note from the court file that the accused was remanded for 1 month 13 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 2 months as a period of imprisonment already served. The final sentence is 16 years 10 months imprisonment.

16. Mr. Batilote, you have committed a serious offence against your cousin sister who you were supposed to protect. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to her.
17. I am certain as a result of your action the victim has been psychologically and emotionally affected for some time. Rape is not only a physical act, it destroys the very soul of the victim.
18. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was the accused's cousin aged 10 years compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
19. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation as a young offender. A non-parole period too close to the final sentence will not be justified for this reason.
20. Considering the above, I impose 12 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 and also meet the expectations of the community which is just in the circumstances of this case.

21. In summary I pass a sentence of 16 years and 10 months imprisonment with a non-parole period of 12 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.
22. 30 days to appeal to the Court of Appeal.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

30 October, 2020

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**