

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

**Criminal Case No.: HAC 100 of 2017**

**STATE**

**V**

**JOSEVATA TUIVIWA**

**Counsel** : Mr. S. Seruvatu for the State.  
: Ms. E. Radrole [LAC] for the Accused.

**Dates of Hearing** : 08, 09, 12 October, 2020  
**Closing Speeches** : 13 October, 2020  
**Date of Summing Up** : 13 October, 2020  
**Date of Judgment** : 16 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 "SQ")*

1. In a judgment delivered on 16<sup>th</sup> October, 2020 this court found the accused guilty and convicted him for one count of rape as per the following amended information:

## COUNT ONE

### ***Statement of Offence***

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

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

**JOSEVATA TUIVIWA** on the 4<sup>th</sup> day of May, 2017 at Nadi in the Western Division, penetrated the vagina of “SQ” a child under the age of 13 years, with his penis.

2. The brief facts were as follows:

On 4<sup>th</sup> May, 2017 the victim who was 10 years of age and a class 5 student came to the Nadi market in the morning she was accompanied by her mother and her baby sister Mereia to sell their produce.

The first time the victim met the accused on this day was at the ladies washroom, the accused had followed her into the washroom. At this time, the victim heard the security officer Baka telling the accused to get out of the washroom.

After a while the accused came at the victim's mother's market stall, he asked her if she had her breakfast, the victim replied she had. Upon hearing this, the accused invited the victim to have tea again, the victim refused.

In the afternoon the victim went to the washroom when she came out the accused was standing at the door he gave her 20 cents then put his arm on her shoulder and both left the washroom.

The accused told the victim to go with him to pick his daughter at his house. The victim refused but he kept on holding her hand and he insisted that she go with him.

The accused took the victim to a cane field where he removed his clothes when the victim refused to remove her clothes the accused forcefully removed her skirt and panty, laid on top of her and then had sexual intercourse with her.

The accused threatened the victim not to scream otherwise he will take a knife and cut her hands. It was painful so she pushed him away.

When the victim returned to the Nadi market she told her mother about what had happened to her the matter was reported to the police upon investigations the accused was arrested and charged.

3. Both counsel filed sentence and mitigation submissions for which this court is grateful.
4. The accused counsel presented the following personal details and mitigation on behalf of the accused:
  - a) The accused is a first offender;
  - b) He was 34 years of age at the time of the offending;
  - c) He is a vegetable farmer who earns \$200.00 per week;
  - d) He looks after and maintains his elderly parents;
  - e) His mother is sickly.
5. 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**

6. The following aggravating factors are obvious:

a) Breach of trust

The victim trusted the accused so she went with him to an unknown place. The accused breached the trust of the victim by what he did to her.

b) Planning

There is a degree of planning by the accused he had approached the victim at Nadi market on three occasions. Finally, he lied to the victim that he wanted the victim to go with him to pick his daughter.

c) Age difference

The victim was 10 years of age and the accused was 34 years of age. The age difference is substantial.

d) Exposing a child to sexual abuse

The accused exposed the victim to sexual activity at a very young age he basically robbed her of her innocence by exposing her to an unexpected sexual encounter.

e) Victim was alone and vulnerable

The victim was alone, vulnerable and naive, the accused took advantage of this.

7. 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 *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.
8. There has been an increase in sexual offences involving offenders who are mature adults. It is shocking to note the manner in which the accused had committed this offence on the victim.

9. 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. 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.

10. 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."*

11. 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."*

12. 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.*


13. 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.

14. I note from the court file that the accused was remanded for 5 months and 15 days, in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 6 months as a period of imprisonment already served. The final sentence is 16 years 6 months imprisonment.
15. Mr. Tuiviwa you have committed a serious offence against an unsuspecting victim who trusted you. You cannot be forgiven for what you have done to the victim.
16. I am certain as a result of your actions the victim has suffered psychologically and emotionally. Rape is not only a physical act, it destroys the very soul of the victim, and also brings about a sense of hopelessness and anxiety.
17. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 10 years old 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.
18. 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.

19. Considering the above, I impose 14 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.
20. In summary I pass a sentence of 16 years and 6 months imprisonment with a non-parole period of 14 years to be served before the accused is eligible for parole.
21. 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.**