

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 148 of 2018

STATE

V

JALE CULA

Counsel : Mr. J.B. Niudamu for the State.
: Ms. J. Singh for the Accused.

Date of Submissions : 13 February, 2020

Date of Sentence : 14 February, 2020

SENTENCE

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

1. The accused is charged with the following offence as per the information filed by the Director of Public Prosecutions dated 4th September, 2018.

ONE COUNT

Statement of Offence

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

Particulars of Offence

JALE CULA, on the 26th day of May 2018 at Lautoka in the Western Division had carnal knowledge of “**LR**”, a 9 year old girl.

2. On 10th February, 2020 when the matter was for voir dire hearing the accused in the presence of his counsel pleaded guilty to the charge. Thereafter on 11th February, the accused admitted the summary of facts read by the state counsel.

3. The brief facts are as follows:

On 26th May, 2018 the victim who was 9 years of age and a class 4 student and her elder sister were sent to Lautoka City by their mother to get some money from their brothers who were selling farm produce at the Lautoka Market. At the market the victim met her friend Adi and Adi's sister Nani, since the victim was hungry she went with Nani to buy some food from a restaurant in the city. After they had bought the food the accused approached the victim and Nani and invited them to go and eat with him inside the restaurant. Both girls refused to go with the accused and left.

4. After finishing the food at the food stall of Adi's grandmother, the victim wanted to relieve herself in the Sugar City Mall restroom as she was entering the Mall she felt a hand touch her right shoulder from behind. She turned and saw the accused, he told the victim to go with him to eat but she refused.

5. The accused then told the victim to go with him to pick his baby, at this time the accused held the victim's hand and took her to a supermarket where he bought one ice cream for the victim. Thereafter both went in a bus towards Ba, at the Drasa Primary School junction both got off the bus and walked inside the sugar cane field. In the sugar cane field the

accused took off his clothes, he told the victim to remove her clothes but she refused.

6. The accused forcefully removed the victim's long pants and panty and then made the victim lie down, the accused then inserted his penis into the victim's vagina. The victim started to cry since she felt pain in her vagina at this time the accused stopped and told the victim to wear her clothes since the bus was about to come.
7. After wearing their clothes both caught the bus back to Lautoka City. At the bus stand the accused gave the victim \$2.00 and bought her an ice cream. The victim told Nani what had happened to her and on 4th June, 2018 Nani told their teacher.
8. On 28th July, 2018 the victim was at the Sugar City Mall with her mother when she saw the accused. The victim told her mother and the matter was reported to the police, the accused was arrested, caution interviewed and charged.
9. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading his caution interview, this court is satisfied that the accused has entered an unequivocal plea of guilty on his own freewill.
10. This court is also satisfied that the accused has fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offence of rape.
11. In view of the above, this court finds the accused guilty and he is convicted as charged.
12. Both counsel filed sentence and mitigation submissions for which this court is grateful.

13. The learned counsel for the accused presented the following mitigation and personal details;
- (a) The accused is a first offender;
 - (b) Was 42 years of age at the time of the offending;
 - (c) Labourer by profession who was earning \$280.00 per week;
 - (d) Educated up to High School.
14. 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 mitigating value in cases of sexual nature.

TARIFF

15. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitchison 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.

AGGRAVATING FACTORS

16. The following aggravating factors are obvious:

- a) Victim was unsuspecting and vulnerable

The victim was 9 years at the time of the offending. The accused took advantage of the fact that the victim was vulnerable, unsuspecting, and alone when he deceived her into believing that he was going to pick his baby but instead he took the victim to a sugar cane field away from the city. The victim trusted the accused which he breached. Furthermore, the facts also show that the accused had planned what he intended to do when he took the victim to an isolated place.

b) Age Difference

The victim was 9 years of age and the accused was 42 years, the age difference was substantial.

c) Victim Impact Statement

The victim impact statement was served on the defence. The defence counsel states in her mitigation submissions that the victim impact statement was completed by the victim's class teacher who was not a psychologist hence this court should not treat the contents of the victim impact statement as an aggravating factor. According to the victim impact statement the victim has been emotionally and psychologically affected in that her behaviour has changed she has become withdrawn and she stays in isolation a lot.

17. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victim. However the contents of the victim impact statement cannot be ignored in light of the age of the victim and the facts and circumstances of the offending. The harm caused to the victim was a direct result of what the accused had done to her which is an aggravation (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).

d) Exposing a child to sexual abuse

By exposing the victim to sexual abuse at a young age the accused had robbed the victim of her innocence.

18. The Supreme Court in *Mohammed Alfaaz v State* [2018] FJSC 17; CAV0009.2018 (30 August 2018) has stated the following 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 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.”

19. 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.”

20. 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. The interim sentence is now 18 years imprisonment.

21. The personal circumstances and background of the accused has little mitigatory value, however, the accused comes to court with a good character being a first offender. For the accused good character and mitigation the sentence is reduced by 1 year. The sentence now stands at 17 years imprisonment.

22. This case was assigned a hearing date being voir dire and trial proper the accused pleaded guilty on the day of the voir dire which was not at the earliest opportunity. In *Aitcheson’s* case (supra) the Supreme Court has offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

*In **Rainima -v- The State [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:***

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

*In **Mataunitoga -v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:*

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”


*[15] The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.*

23. This court accepts that genuine remorse leading to a guilty plea is a mitigating factor in favour of the accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (see *Manoj Khera v The State*, CAV 0003 of 2016 (1 April, 2016)).
24. This court does not agree that the accused has shown any genuine remorse when he pleaded guilty on the day of the hearing. The allegation date is

May, 2018 the accused did not plead guilty until the date of the hearing on 10th February, 2020 about nearly 2 years later.

25. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. An early guilty plea is part of that process but the sentencing court then has the responsibility to assess the early guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. before arriving at a conclusion.
26. In this instance, the accused by pleading guilty has saved the court's time and prevented the victim from reliving her experience in court ought to receive some discount. In this regard the sentence is reduced by further 6 months, the interim sentence is now 16 years and 6 months imprisonment.
27. The accused has been remanded for 1 year and 7 months, in accordance with section 24 of the Sentencing and Penalties Act the remand period is deducted as a period of imprisonment already served. The final sentence is now 14 years 11 months imprisonment.
28. Mr. Cula you have committed a serious offence against the victim, she was unsuspecting, alone and vulnerable, you cannot be forgiven for what you have done to this victim.
29. 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. The courts in this country have time and again expressed its revulsion by handing down long term imprisonment sentences but still people are not paying any heed. This is yet again another sad case of a child becoming a victim of someone's sexual lust and desire.

30. 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 an accused sexually abuses a child, he should not expect any leniency but condign punishment from the court to mark the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
31. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 9 years of age 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.
32. Under section 18 (1) of the Sentencing and Penalties Act, 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 society which is just in the circumstances of this case.
33. In summary I pass a sentence of 14 years and 11 months imprisonment with a non-parole period of 12 years to be served before the accused is eligible for parole.
34. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

14 February, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.