

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 205 of 2017

STATE

V

- 1. SEMI NAIKAU**
- 2. ISIKELI NASAKU**

Counsel : Ms. S. Naibe for the State.
: Ms. K. Vulimainadave for the First Accused.
: Ms. J. Singh for the Second Accused.

Dates of Hearing : 01, 02 and 03 December, 2020
Closing Speeches : 07 December, 2020
Date of Summing Up : 08 December, 2020
Date of Judgment : 10 December, 2020
Date of Sentence : 20 January, 2021

SENTENCE

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

1. In a judgment delivered on 10 December, 2020 this court found the first accused guilty of two counts of indecent assault and one count of rape. The second accused was found guilty of one count of rape and both the accused persons were convicted accordingly.

2. The brief facts were as follows:

The first accused is the victim's maternal uncle, on 16th October, 2017 the victim who was 16 years of age after finishing her Fiji Junior Examination went to the house of the first accused to spend her school holidays.

3. The next day the first accused asked the victim whether she had sexual intercourse. The victim responded she had not, at this time the first accused came close and touched the top portion of the victim's breast and her vagina from on top of her clothes.
4. The victim was afraid because her uncle wasn't supposed to do what he had done. She did not consent to what the first accused had done to her.
5. On the 18th the second accused the grandfather of the victim (from her mother's side) came to the house of the first accused. During the night the first accused told the second accused to lie down beside the victim, when the light was switched off the first accused said whatever he was going to do to his wife, the victim and the second accused will have to do as well.
6. The second accused did everything the first accused told the second accused to do to the victim. The second accused removed the victim's clothes and started sucking her breast and licking her vagina. Thereafter the second accused forcefully inserted his penis into the victim's vagina and had sexual intercourse with the victim for about 4 to 5 minutes. The first accused aided and abetted in the rape of the victim by the second accused.
7. The victim did not consent to what both the accused persons had done to her. The matter was reported to the police after the victim told her mother about what had happened to her.
8. Both counsel filed their sentence submissions including the victim impact statement and mitigation for which this court is grateful.

9. The following personal details and mitigation have been submitted by the counsel for both the accused persons.

First Accused - Semi Naikau

- a) The accused is now 40 years of age;
- b) He is a yagona and dalo farmer;
- c) His wife is sickly;
- d) Sole bread winner of the family.

Second Accused – Isikeli Nasaku

- a) The accused is now 53 years of age;
- b) First offender;
- c) Sole breadwinner of the family;
- d) Looks after his elderly mother, his son and grandchildren.

10. 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

11. The following aggravating factors are obvious in this case:

a) Breach of Trust

The victim had gone to the house of the first accused who is her maternal uncle to spend her school holidays. The second accused is the grandfather of the victim. Both the accused persons grossly breached the trust of the victim by their actions including the sanctity

of the relationship that existed between both the accused persons and the victim.

b) Age Difference

The victim was 16 years of age whereas the first accused was 37 years and the second accused was 48 years at the time of the offending. The age difference is substantial.

c) Exposing a child to sexual abuse

Both the accused persons exposed the victim to sexual activity at a young age.

d) Planning

The facts and circumstances of the offending points to a thought out plan by both the accused persons to do what they did.

e) Victim was vulnerable and helpless

The victim was vulnerable and helpless, both the accused persons were aware and they took advantage of this.

f) Victim Impact Statement

In the victim impact statement the victim states that after the incidents she could not concentrate in her school work, she lost her self-esteem, she started distancing herself from her family and friends. At one stage of her life she had become suicidal.

TARIFF

12. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs. The State, CAV 0012 of 2018 (2 November, 2018)* has confirmed the new tariff for the rape of a juvenile to be a sentence between 11 years to 20 years imprisonment.

13. There has been an increase in sexual offences involving offenders who are known to the victim and are mature adults. It is shocking to note the manner in which both the accused persons had committed these offences on the victim.
14. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely. 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.
15. 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 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."

16. 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."

17. 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:

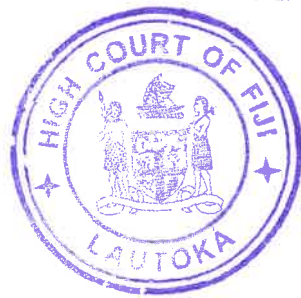
- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, 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 present;*
- (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.*

18. The two counts of indecent assault and one count of rape for which the first accused has been found guilty and convicted are founded on the same facts and are of similar character, I therefore prefer to impose an aggregate sentence for the three offences in accordance with section 17 of the Sentencing and Penalties Act. For the second accused he faces only one count of rape for which he will be sentenced with the first accused.
19. After assessing the objective seriousness of the offences committed I take 11 years imprisonment (lower end of the scale) as the starting point of the sentence for both the accused persons. I add 6 years for the aggravating factors, bringing an interim total of 17 years imprisonment. The personal circumstances and family background of both the accused persons have little mitigatory value.
20. The first accused has two active previous convictions, one for injuring animal and the other for assault causing actual bodily harm in 2014 and 2017 respectively. These previous convictions are unrelated to the offences before this court therefore in exercise of my discretion I consider the first accused as a first offender. The second accused has expired previous convictions he will also be considered as a first offender. For mitigation and good character the sentence is reduced by 1 year. The aggregate sentence for the first accused and the sentence for the second accused is now 16 years imprisonment.
21. I note from the court file that the first accused was remanded for 2 months and 22 days, and the second accused was remanded for 3 months. In accordance with section 24 of the Sentencing and Penalties Act the sentence of both the accused persons is reduced by 3 months as a period of imprisonment already served. The final aggregate sentence for the first accused is 15 years and 9 months imprisonment and for the second accused the sentence is also 15 years and 9 months imprisonment.

22. For the first accused I am satisfied that the term of 15 years and 9 months 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.
23. Mr. Naikau and Mr. Nasaku you have committed serious offences against the victim who was your niece and granddaughter respectively. The victim was unsuspecting and vulnerable you cannot be forgiven for what you have done to her. You never gave a second thought about what you were doing to this innocent child.
24. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 16 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 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.
25. 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 offenders whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
26. Considering the above, I impose 13 years as a non-parole period to be served before both the accused persons are eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused persons and also meet the expectations of the community which is just in the circumstances of this case.
27. In summary, I pass an aggregate sentence of 15 years and 9 months imprisonment with a non-parole period of 13 years to be served before the

first accused is eligible for parole. For the second accused he is sentenced to 15 years and 9 months imprisonment with a non-parole period of 13 years to be served before he is eligible for parole. Due to the closeness of the relationship between both the accused persons and the victim a permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.

28. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

20 January, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Accused persons.