

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 269 OF 2020

BETWEEN : STATE

AND : SUDHIR KUMAR

Counsel : Ms S Shameem & Ms S Nisa for the State
Mr T Varinava for the Accused

Date of Hearing : 11 & 12 April 2022

Date of Judgment : 5 May 2022

Date of Sentence : 6 May 2022

SENTENCE

- [1] The victim was about five years old when her parents separated. Her father abandoned her and had not been in contact with her since then.
- [2] Soon after separation the victim's mother entered in a de-facto relationship with the accused. The victim knew the accused was her stepfather but she addressed him as her father.
- [3] The accused started to sexually abuse the victim at the age of 12 in 2014. She was in Year 7 then. She was at home after school when he touched her private parts when her mother was not around. On the same day he returned home late night and penetrated the vagina of the victim with his finger and penis (counts 1 and 2). Her mother was in a different room asleep. He subdued her using physical force. On this occasion she bled. She kept quiet. He convinced her that nobody will believe her if she complained.

[4] Thereafter the accused carried out a campaign of rape against the victim. The magnitude of the abuse is not reflected in the manner in which the accused was charged in this case. He was charged with representative counts but counts one and two reflect two types of sexual penetration carried out in the same transaction. Similarly counts three, four and five reflect three types of sexual penetration carried out in the same transaction on a specific date. All other incidents are uncharged acts. An accused cannot be sentenced without his consent for uncharged acts.

[5] As the Supreme Court said in *Senilolokula v State* [2018] FJSC 5; CAV0017.2017 (26 April 2018) at [25]:

The law on the topic is clear. Where an offender is convicted on a single count, he may not be sentenced on the basis that he was guilty of other offences of a similar nature unless he has admitted that he was guilty. A court is not permitted to base its decision about the appropriate sentence on the commission of offences which did not form part of the offence for which the defendant was convicted. Indeed, the fact that the count on which the defendant was convicted was described by the prosecution as a representative count did not entitle the judge to sentence him as if he had been found guilty of other offences not included in the indictment. That is the effect of a series of decisions in England: *R v Burfoot* (1990) 12 Cr App R (S) 252, *R v Clark* [1996] 2 Cr App R (S) 351 and *R v Canavan* [1998] 1 Cr App R (S) 79.

[6] Since the prosecution did not include all other incidents in the Information and that the accused has not admitted the uncharged acts, he is sentenced only for the convicted crimes. The accused's convictions are for two transactions – counts one and two form one transaction with two types of sexual penetration and counts three, four and five form the second transaction with three types of sexual penetration.

[7] The transaction subject of counts three, four and five took place on 10 August 2020. At the time the victim was 18 years old and repeating Year 12. The accused planned this incident. He took and dropped his partner and children to a relative's home. He went and picked the complainant from school and brought her home.

He got her into his bedroom and penetrated her vagina with his finger, tongue and penis despite her resistance.

- [8] It was only when the victim's maternal aunt got suspicious, she prodded and the victim revealed the abuse to her on 19 August 2020. When the matter was reported to police, the victim's mother cut off all her ties with the victim. The victim had been living with her aunt since then.
- [9] Apart from the accused's previous good character, there is little that mitigates his crimes. He is 46 years of age and after he was remanded in custody he lost his job as a machinist. His de-facto partner and three young children are dependent on him.
- [10] The trial was not long but the victim had to relive the trauma of abuse when giving evidence. The accused has expressed very little remorse for his crimes. He has deprived himself credit by not taking any responsibility for his crimes.
- [11] The aggravating factors are that the victim was vulnerable due to the vast age gap between her and the offender. The accused was the only male figure she had known as a child. She addressed him 'dad'. She respected him. She trusted him. But the accused made her an object of his sexual gratification from a very tender age of 12 years. The breach of trust is gross and the physical and psychological impact of the sexual abuse is substantial. Physical force was used on the first occasion to subdue the victim. On that occasion the victim suffered physical pain and bled. He managed to instill in her the fear of being disbelieved if she complained. The rape was repeated after 6 years when the victim was in Year 12 in 2020. He did not use any protection but withdrew before ejaculating.
- [12] The nature of penetration is not relevant for the purpose of sentence. It is the harm that sexual penetration causes to the victim is relevant. In the present case the victim was raped in her own home by her stepfather when she was only 12 years old. The harm done to the victim is significant.

- [13] The maximum penalty for rape is life imprisonment regardless of the type of sexual penetration involved. The tariff for rape of a child is settled. It is not necessary to refer to tariff judgments in this case. Tariffs serve as a yardstick for the judges to gauge the accused's criminality by having regard to other similar cases. Tariffs are not intended to shackle sentencing discretion.
- [14] The principal purpose of sentence in this case is to convey to the accused the community's disapproval of the abhorrent nature of his crimes by way of denunciation. The other relevant purpose of sentence is deterrence, both special and general. The court's duty is to send a clear message that anyone who sexually abuse a child will be severely punished.
- [15] After taking all these matters into account, the accused is sentenced to an aggregate term of 18 years imprisonment for five counts of rape, with a non-parole period of 12 years.
- [16] The last component of sentence is the accused's remand period of 1 year 8 months.
- [17] The remaining period for the accused to serve is 16 years 4 months imprisonment, with a non-parole period of 12 years.
- [18] A permanent DVRO with standard no contact and non-molestation conditions is issued against the accused for the protection of the victim.



A handwritten signature in blue ink, appearing to read "Daniel Goundar", is written over a dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused