

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Crim. Case No: HAC 37 of 2021

THE STATE

vs.

APENISA TAVIAKAI

Counsel : Ms. M. Lomaloma with Ms. E. Thaggard for State
Ms. T. Tuiloma with K. Kumar for Defence

Dates of Hearing : 20, 21 June 2022
Date of Judgment : 22 June 2022
Date of Sentence : 27 June 2022

SENTENCE

1. MR. APENISA TAVIAKAI, you stand convicted after trial of two counts of Rape contrary to Section 207 (1) & (2)(a) of the Crimes Act No. 44 of 2009. You now come before this Court for sentence.
2. You have committed these offences on a child. The victim was 14 years of age at the time of the alleged incident. She was living with her parents and siblings. She was your niece and she regarded you as her 'big uncle'. On 29 May 2021, she came to your house to ask for salt. You pulled her by her hand into your bedroom and made her lie down on the carpet that was spread on the floor. You then came and pulled her panty down and forcefully inserted your penis into her vagina twice. She did not want you to do that.
3. The second incident occurred at the cassava patch on 4 June 2021. You called you into your house but she refused. When she went to pick cucumbers from her plantation, you pulled her by her hand to a nearby cassava patch. She tried to run and scream. You blocked her mouth with your hands. You made her lie down and took off her panty. Then you inserted your penis

into her vagina without her consent. When she was struggling and trying to scream, you blocked her mouth again. You warned her not to tell the incident to anyone and, if she did, you threatened to kill her.

4. The maximum penalty for Rape is life imprisonment. The sentencing tariff for rape of a child ranges from 11 to 20 years' imprisonment (*Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018)).
5. In the sentencing process, I must first have regard to the proportionality principle enshrined in the Constitution and the Sentencing and Penalties Act 2009 (SPA). Section 4 of the SPA requires the courts to have regard to the maximum penalty prescribed for the offence, the current sentencing practice and the applicable guidelines issued by the courts. I am then required to gauge the seriousness of the offence and the impact or harm caused to the victim in selecting the starting point of the sentence before coming to the final sentence after making due adjustments for the aggravating and the mitigating circumstances.
6. The courts in the Republic of Fiji, at all levels, have repeatedly pronounced that rape of a child is the most serious form of sexual violence. The United Nations Convention on Rights of the Child to which Fiji is a party and our own Constitution require the courts to protect the children who are vulnerable members of our society. The children are entitled to live their lives free from any form of physical or emotional abuse.
7. The courts have emphasized that the increasing prevalence of this offence in our community calls for deterrent sentences. The duty of this Court is to see that the sentences are such as to operate as a powerful deterrent factor to prevent the commission of such offences. The rapists must receive condign punishment to mark the society's outrage and denunciation against sexual abuse of children. The main purpose of your punishment is to condemn your action and to protect the public from the commission of such crimes by making it clear to you and to other persons with similar impulses that, if anyone yield to this crime will meet with severe punishments.
8. Having taken into consideration the seriousness of the offence and the harm caused to the victim, I select for each count a starting point of 12 years from the lower range of the tariff as the first step in the sentencing process.

9. In the light of the Supreme Court decision in *Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015), and the submissions of the Counsel, I have identified the following aggravating and mitigation factors:

Aggravating factors:

- (a). The victim regarded you as her 'big uncle' and she respected you as an adult. You have breached that trust.
- (b). You were 61 years and she was 14 years of age at the time of the offending. There is a huge age difference between you and the victim.
- (c). You exploited the vulnerability of a child.
- (d). You blocked her mouth and threatened to kill her if she reported the incident to anyone.
- (e). The psychological impact on the victim is enormous and your offence made them move to another village.

Mitigating Factors:

- (a). You are 62 years of age at the time of the offending. You are unemployed. Your personal circumstances are of little mitigation value. *Raj v The State* [2014] FJSC 12 CAV0003.2014 (20th August 2014)
 - (b). You do not have any previous convictions and you have maintained a clear record. However, your clear record is of little mitigatory value in this case because you committed this crime in breach of trust. *Senilokula v State* [2018] FJSC 5; CAV0017.2017 (26 April 2018)
10. For each count, I add 4 years to the starting point of 12 years for above mentioned list of aggravating factors and reduce 1 year for mitigating factors to arrive at a sentence of 15 years' imprisonment.
11. You have been in remand for nearly 6 months. Exercising my discretion under Section 24 of the Sentencing and Penalties Act, I reduce the time spent in remand to arrive at a sentence of

14 years and 6 months' imprisonment on each count. Having considered the totality and the one transaction principle, I order that you serve both the sentences concurrently.

12. Taking into consideration your potential for rehabilitation, and the gravity and the impact of your offences on the society, I impose a non- parole period of 12 years.


13. Summary.

MR. APENISA TAVIAKAI, you are sentenced on each count to an imprisonment term of 14 years and 6 months to be served concurrently with a non-parole period of 12 years.

A Domestic Violence Restraining Order is issued to protect the victim.

You have 30 days to appeal to the Court of Appeal.




Aruna Aluthge
Judge

27 June 2022

At Labasa

Counsel:

- Office of the Director of Public Prosecution for State**
- Legal Aid Commission for Defence**