

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 42 of 2021

STATE

vs.

NASONI NAWANAWALAGI

Counsel: Ms. U. Tamanikaiyaroi for the State
Mr. T.Varinava & Mr. S. Ravu for the Accused

Date of Hearing: 12th and 13th July 2022

Date of Closing Submission: 14th July 2022

Date of Judgment: 14th July 2022

Date of Sentence/Mitigation Submission: 15th July, 2022

Date of Sentence: 15th July, 2022

SENTENCE

(The name of the victim is suppressed she will be referred to as "P.T.N")

Introduction

1. Mr. Nasoni Nawanawalagi, out of the 4 counts preferred against you this court found you guilty and convicted you of count No. 1 of Sexual Assault contrary to section 210 (1) (a) of the

Crimes Act and of count No.3 of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009. However, due to lack of evidence, you were acquitted of counts No.2 and No. 4. I will now proceed with sentencing you in respect of counts No. 1 and No. 3.

Circumstances of the offending

2. The complainant P.T.N, born on 18th December 2003 was between 15 years in 2018. You were married to P.T.N's late mother Maraia Watidredre. You are thus P.T.N's stepfather. P.T.N had known you for almost 8 years and had been residing together with P.T.N since 2018 along with her siblings and her mother.
3. The two charges you were convicted are in respect several acts of sexual abuse you committed during 2 years and 8 months between 1st January 2018 and 30th September 2020. Now, if I may recap the said acts, in 2018 when you all were living in the house of P.T.N's grandmother you tried to lure P.T.N in to a room on the guise of playing hide and seek by calling her to come and seek you. However as P.T.N did not come you went in to the kitchen approached her from behind and then put your arms around and with one hand squeezed her breasts to satisfy your lustful desires. She was in shock and did not like it.
4. Then in 2019 P.T.N had been alone at home and had gone to sleep during mid-day you have been at work that day and returned surreptitiously got on top of her and inserted your penis in to her vagina when she woke up. Despite her struggling and been in pain you continued to have sexual intercourse for about 3 to 4 minutes then stopped and ejaculated outside. Then you told her to go to the bathroom wash herself before her mum returned.
5. Once again during the same year when she was alone at home you have suddenly returned and then told her that you wanted to have sex with her. When she was reluctant you had held by her hands put her down, forcibly pulled down her shorts and panty, separated her legs with your legs and then inserted your penis into her vagina and raped her. Notwithstanding it been painful to her you continued and upon satisfying your lustful desire you told her that this should not be told to anybody. You very cunningly and artfully waited for the opportunity when her mother and siblings out to sexually abuse P.T.N and take advantage

of her.

6. You continued with your lustful sexual escapade of touching her breasts in 2018 and then raping her in 2019 and continued to commit the said perverted sexual acts for almost 3 years and have artfully and cunningly continued to use this minor girl to satisfy your lustful desires, without any consideration or regard as to her agony or misery. These acts I have reproduced to lay the bare facts of this offending.

Sentencing regime

5. The maximum penalty prescribed for, Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act is life imprisonment as rape undoubtedly is considered to be a very serious offence. The tariff is between 11 years and 20 years imprisonment. Determining the said applicable tariff Gates C.J., in **Aitcheson v. State** ([2018] FJSC 29; CAV0012.2018 (2 November 2018) held that,

“The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.”

6. As for sexual assault in **State v Laca** - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012), Justice Paul Madigan considering the tariff for the offence of sexual assault stated thus,

*“6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in **Abdul Kaiyum** HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.*

7. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

- (i) Contact between the naked genitalia of the offender and another part of the victim's body;
- (ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;
- (iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)".

7. The maximum penalty for the offence of sexual assault under Section 210 (1) (a) is ten years imprisonment. As the law stands now the tariff for sexual assault is between 2 - 8 years' imprisonment. The act of squeezing the breasts will come within category 3.

Objective seriousness, culpability and harm of the offending

8. In the case of *State v. Tauvoli* [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

“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 the 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.”

9. Rape as well as sexual assault are physical invasions committed on the victim under a coercive circumstance. Therefore, the degree of invasion of the victim's bodily integrity and sexual autonomy is an indispensable factor in determining the gravity and impact of the crime on the victim. The degree of invasion should be ascertained based on the level of harm and culpability.
10. You have been found guilty of several of sexual crimes of utmost gravity. The offences involve the exploitation and abuse of a vulnerable child over a long period of time. There are many features that aggravate the culpability and harm factors. You subjected her to repeated abuse in a cruel and harsh form. The victim was threatened, coerced and intimidated to facilitate the commission of the offences and to make the likelihood of her reporting them remote. You had power over the child. If the child showed reluctance, you enforced compliance with force and your familial position and power. You as the step father was in control and in a position to enforce your power over her as you were married to her mother and thus guardian of P.T.N especially as the mother was sick. The complainant felt both fear and misguided loyalty to you. She was reluctant to tell others what you were doing to her. No doubt this encouraged you to carry on your depraved conduct for almost 3 years taking advantage of the opportunities you had whilst living in the same house.
11. The victim impact report states that this crime has adversely affected the Complainant emotionally and psychologically. According to the Victim Impact Report, P.T.N says that she does not engage with families, relatives and friends. During class time and other activities in school, she always suffers from anxiety. She is worried and is ashamed her classmate may know what Nasoni has done to her. She suffers have sleepless night and has nightmares. She always feel guilty because she has lost her virginity. She has a difficulty in communicating with others speaks with a low voice and “*stutter*” when she talk. Finally she states that she is not able to focus and concentrate on her school work or studies.

12. Hence without doubt this crime has caused mental and psychological trauma and affected her self-confidence. Thus, the level of harm of this offence is significantly high. It is clear from the victim impact statement that your offending has had a very significant and long-lasting psychological impact on this vulnerable minor child which I am required to take in to consideration in sentencing. She had written a letter to the Accused (page 8 of The victim impact report) in which she states that, “*because of you I lost my virginity and it’s something I value the most*”, and also states how you betrayed the paternal trust. This statement speaks for itself and requires no further elaboration.

13. In view of the serious nature and the prevalence of crimes of this nature, the primary purpose of this sentence is founded on the principle of deterrence. It is the responsibility of this Court to deter offenders or other persons from committing offences of the same or similar nature and protect the community especially the young children from offenders of this nature. A harsh and long custodial sentence is inevitable for offences of this nature to demonstrate the gravity of the offence and reflect that civilized society denounces such crimes without any reservation.

The aggravating circumstances

14. (i) There is a serious breach of parental trust. Your role was parent to a child *vis-à-vis* the victim and now it is proved that you sexually abused and raped her. You occupied a position of power and trust in relation to your stepdaughter. Such a position of power over the other who is a minor renders such sexual activity morally wrong and punishable within the realms of the criminal law. P.T.N was vulnerable to your seniority in age and the familial standing due to your marital affinity with her mother. You were in a position of trust. The culture and the rich traditions of the Fijian society expects you to protect children in the community and the elders enjoy the respect and veneration of the young. You taking advantage of this rich culture sexually exploited P.T.N a minor child. As echoed in many a judicial pronouncement, sexual exploitation of children within their own home by known elders has become a social menace. The rape of a child is an appalling and perverse use of male power exploiting to the full the position of power which you held over her. She was raped and molested in the

safety of her own home so to say, by a person from whom she was entitled to expect protection and care. You violated the trust which the complainant and her mother placed in you and abused that position of trust.

- (ii) There was a considerable disparity in age between you and the complainant. The complainant was between 15 and 17 years old at the time you committed these offences and you were around 61 years so you were approximately 45 years her senior in age.
- (iii) You sexually abused her and raped her multiple times during 2018 and 2020
- (iv) This involved planning, long term scheming and premeditation.
- (v) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (vi) You have exposed the innocent mind of a child to sexual activity at such a tender age you had no regard to her right as a child, her right as a human being and her right to live a happy unmolested and peaceful life.
- (vii) You have caused misery to her mother and family.

The mitigating factors

15. The mitigating factors in your favour are;

- (i) That you were married to P.T.N's late mother and looked after the children. Now you have a child in class 2. You have been a construction worker by profession earning \$220 per week. Unfortunately, these are all personal circumstances which are usually not considered as mitigating circumstances,
- (ii). as per the Antecedent Report filed, it is noted that neither do you have any previous conviction nor pending cases. Therefore, Court considers you as a person of previous good character,
- (iii). you are around 62 years of age now.

Aggregate sentence of imprisonment

16. Section 17 of the Sentencing and Penalties Act 2009 (“Sentencing and Penalties Act”), reads thus;

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that 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 of them.”

17. The offence of sexual assault and the representative offence of rape for which you have been convicted are offences founded on the same facts and are of similar character. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence for both counts having the representative Rape count as the base sentence as it is the most serious of the two offences.

Sentence

18. The least possible aggregate sentence I can impose, having regard to the aggravating and mitigating factors of the case, will be as follows. Tariff for rape is 11-20 years. I pick and start with the aggregate sentence of 14 years imprisonment. I add 5 years for the aggravating factors, making the total aggregate sentence 19 years imprisonment. For the grounds in mitigation, you should receive a discount of the sentence thus, I deduct 2 years which *inter alia* is for your previous good character. I also took into consideration that you are around 62 years of age now. This will leave a balance of 17 years imprisonment.
19. In view of the reasons discussed above, I impose on you an aggregate sentence of seventeen (17) year’s imprisonment for the offence of sexual assault and the offence of rape for which you stand convicted.
20. Having considered the seriousness of this crime, the purpose of this sentence, and opportunities for rehabilitation, I find that a twelve (12) year non-parole period would serve

the purpose of this sentence. Hence, you are not eligible for parole for twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

21. Accordingly, I sentence you to a period of seventeen (17) years imprisonment being an aggregate sentence for the offence of sexual assault and the offence of rape for which you were found guilty and convicted. However, you are not entitled to parole for twelve (12) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

22. You were arrested for this case on or about 26th January 2021 and since then have been in remand as bail had not been granted. You have been in custody for a period of 1 year 5 months and 20 days. In terms of the provisions of Section 24 of the Sentencing and Penalties Act I hold that a period of 1 year and 6 months be considered as imprisonment that you have already served.
23. Accordingly, the actual sentencing period of your aggregate sentence is fifteen (15) years and six (06) months imprisonment with a non-parole period of ten (10) years and six (06) months.
24. Pursuant to section 4 (1) of the Sentencing and Penalties Act 2009, the above sentence is meted out to punish you in a manner that is just in all the circumstances, to protect the community, deter like-minded offenders and to manifest that the court and the community denounce what you did to the minor complainant P.T.N.
25. Since this incident involves domestic violence, I am satisfied that there are sufficient grounds to consider making an order under the Domestic Violence Act. I accordingly make a permanent Domestic Violence Restraining Order against you with standard non-molestation conditions and no contact conditions pursuant to Section 24 and 28 of the Domestic Violence Act. The above Domestic Violence Restraining Order will be in force until it is varied or suspended by this Court or any other competent Court. Furthermore, if you breach this

restraining order, you will be charged and prosecuted for an offence pursuant to section 77 of the Domestic Violence Act.

26. The complainant's name is permanently suppressed to protect her privacy.

27. You have thirty (30) days to appeal to the Fiji Court of Appeal if you so desire.



At Suva

15th July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused