

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 46 of 2020

STATE

V

ILIESA LAGAVAKATINI

Counsel : Ms. P. Lata for the State.
: Ms. U. Baleilevuka for the Accused.

Dates of Hearing : 01, 02, 03, 04 August, 2022
Closing Speeches : 09 August, 2022
Date of Judgment : 10 August, 2022
Date of Sentence : 30 August, 2022

SENTENCE

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

1. In a judgment delivered on 10th August, 2022 this court found the accused guilty for one count of rape, one count of lesser offence of indecent assault and one count of abduction of person under 18 years of age with intent to have carnal knowledge and convicted him accordingly.
2. The brief facts were as follows:
In the year 2020 the victim was 16 years of age and a year 12 student. On 28th February, 2020 at 6 pm she left home to attend a youth service. At

around 10 pm she came to Nadi Town end with her two friends to look for a transport to go home.

3. It was about 11pm a car driven by the accused came which was going in the direction the victim wanted to go. As soon as the victim boarded the car she told the accused that she will be getting off at Korovuto opposite the school. In the car she saw an Itaukei boy sitting in the front passenger's seat. At this time the victim's friends messaged the accused car registration number to the victim's mother.
4. After a while the victim fell asleep when she woke up the vehicle had gone past Korovuto. The victim asked the accused where he was taking her, he said to Sonaisali to have some fresh air. The victim refused and said her mum will be looking for her she got afraid and continued telling the accused to go back.
5. After the other passenger got off at Sonaisali the accused drove further and stopped the car at Sonaisali Beach, after a while the victim's mother came in a car since the victim was inside the car the accused locked the car door and put up all the tinted windows and warned her not to talk. When the victim did not come home the victim's mother went to look for the victim in a car. After the accused car was located the victim's mother asked the accused where her daughter was, the accused replied that the victim was not in his car. At this time he got in the car and drove away with the victim.
6. The victim's mother reported the matter at the Nawaicoba Police Post since she had not permitted the accused to take her daughter out of her care and possession.
7. By this time it was around midnight the accused drove into the bushes of Malamala. After parking the car at an isolated spot the accused came to

the back seat where the victim was sitting. He started to touch her breast and kiss her neck and then he forcefully removed her clothes. The victim felt uncomfortable she told the accused not to touch her but he continued. In the process the accused removed the victim's panty and skirt and then removed his pants and underwear.

8. The victim was pushing the accused and telling him not to do anything to her and was crying. The accused did not stop he had forceful sexual intercourse with the victim for about three minutes.
9. After the accused stopped and went outside the car, the victim wore her pants and underwear and went to the driver's seat to drive the car so that she could escape. The victim did not consent to what the accused had done to her. The accused drove the car towards Nadi town at the Nawaicoba Police Post the car was stopped by police officers.
10. The victim was taken to Nadi Police Station, and then to the hospital for a medical check-up. The accused was arrested, caution interviewed and charged.
11. The state counsel filed written submissions and victim impact statement whereas the defence counsel filed mitigation for which this court is grateful.
12. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused is 37 years old;
 - b) Is a widower with five young children;
 - c) Director of a Tour Company;
 - d) Looks after his children and elderly parents;
 - e) Father is in a wheel chair and mother is sickly.

13. 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

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

a) Breach of Trust

The victim trusted the accused that is why she boarded the car driven by the accused to be dropped at Korovuto. The accused grossly breached the trust of the victim by his actions.

b) Victim was vulnerable

The victim was vulnerable and unsuspecting the accused took advantage of this and sexually abused the victim in the darkness of night. The accused over powered the helpless victim. The victim was 16 years whereas the accused was 33 years. The accused was a mature adult who should have known better. The age difference is substantial.

c) Planning

There is some degree of planning by the accused he knew the victim was alone and sleeping in the car he did not wake her at the Korovuto junction but proceeded to a secluded place in the middle of the night.

d) Victim Impact Statement

In the victim impact statement the victim states that she has lost trust in people, lack of concentration in school work and also avoided her friends. To date the victim gets flashback causing lack of sleep, panic attack and anxiety.

e) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victim by mature adults. The accused was bold and undeterred in what he did to the victim that night and early morning.

TARIFF

15. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in the judgment of *Gordon Aitcheson 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.
16. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (*Rokota vs. The State, criminal appeal no. HAA 0068 of 2002*).
17. The maximum penalty for the offence of abduction of person under 18 years of age with intent to have carnal knowledge is 5 years imprisonment. The tariff for the offence is from 12 months to 36 months with a suspended sentence reserved for exceptional cases.
18. Section 17 of the Sentencing and Penalties Act states:

“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.”

19. I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the three offences.
20. Bearing in mind the objective seriousness of the offences committed I take 11 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, for mitigation it is noted that the accused has one previous conviction in the year 2019 for the offence of assault causing actual bodily harm which was suspended for three years. In exercise of my discretion I disregard this unrelated previous conviction and consider the accused as a first offender hence the breach of suspended sentence in the previous conviction cannot be activated.
21. The personal circumstances and family background of the accused has little mitigatory value, however, his good character being a first offender has substantive mitigating value. The sentence is reduced to reflect good character and other mitigation.
22. I note from the court file the accused was remanded for 4 months and 17 days. In exercise of my discretion I reduce the sentence by 4 months and 20 days in accordance with section 24 of the Sentencing and Penalties Act

as a period of imprisonment already served. The final aggregate sentence for one count of rape, indecent assault and abduction of person under 18 years of age with intent to have carnal knowledge is 14 years 7 months and 10 days imprisonment.

23. It is the duty of the court to protect children from sexual abuse or exploitation of any kind that is the reason why the law has imposed life imprisonment for the offence of rape as the maximum penalty.
24. There has been an increase in sexual offences involving offenders who are matured adults.
25. 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 offender sexually abuses a child, he or she should expect condign punishment to mark the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
26. 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 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.”*

27. 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.”

28. 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.*

29. Mr. Lagavakatini, you have committed serious offences against an unsuspecting and vulnerable victim by forcefully taking her to an isolated place in the middle of the night. You cannot be forgiven for what you have done to this victim.
30. Exposing a child to sexual activities at a time when they are in transition to maturity has a negative impact upon a child's development. Your conduct on the victim is unthinkable and deplorable a long term imprisonment is the only answer. Being a matured adult you should have known better. Furthermore, you committed these offences without any fear or second thoughts. You have scarred the life of the victim.
31. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim of 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 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 (as amended), I impose 13 years imprisonment 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 to meet community expectations which is just in the circumstances of this case.
33. I am satisfied that the term of 14 years, 7 months and 10 days 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.
34. In summary I pass an aggregate sentence of 14 years, 7 months and 10 days imprisonment with a non-parole period of 13 years to be served before the accused is eligible for parole.
35. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka
30 August, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Baleilevuka & Associates, Nadi for the Accused.