

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 38 of 2020

STATE

V

IMTIAZ ALI

Counsel : Ms. S. Naibe and Ms. S. Prakash for the State.
: Mr. S. Nand and Mr. J. Reuben for the Accused.

Dates of Hearing : 21, 22, 23, 24, 27 February, 2023

Closing Speeches : 01 March, 2023

Date of Judgment : 02 March, 2023

Date of Sentence : 20 March, 2023

SENTENCE

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

1. In a judgment delivered on 2nd March, 2023 this court found the accused guilty of one count of rape and one count of defilement and convicted him accordingly.
2. The brief facts were as follows:

3. The victim in 2020 was 15 years of age and a year 11 student who used to travel to school in the bus driven by the accused from Sabeto junction to Nadi town.
4. On Saturday 8th February, 2020 the victim went to Nadi town to top up her e-transport card when she went to the bus stand she boarded the bus driven by the accused. The accused knew the victim so he started asking her personal questions such as her name, age and school. The victim volunteered all the above information, during the conversation the accused asked the victim to go with him to Lautoka and he will drop her at the Sabeto junction upon return.
5. The victim refused and when the bus was near the Sabeto junction the victim pressed the buzzer in order to get off the bus, however, the accused did not stop the bus. Upon reaching Lautoka the accused at Shirley Park bus stop stopped the bus and told the passengers to get off.
6. Before the victim could get off the bus the accused closed the door and forcefully took the victim to the rear end of the bus. On the back seat the accused forcefully removed the victim's clothes. The victim was shouting and telling the accused to stop. The accused did not stop but had forceful sexual intercourse with her. After the accused had finished he threatened the victim not to tell anyone about what he had done to her otherwise he will kill her and her family. The victim did not consent for the accused to have sexual intercourse with her.
7. At home the victim did not tell her grandmother or her sisters about what the accused had done to her because she was scared of what had happened to her and also she was threatened by the accused not to tell anyone about what he had done.

8. The following Saturday 15th February the victim went to Nadi town to meet a friend when she returned to the bus stand she boarded the bus which was going to Lautoka so that she would get off at the Sabeto junction and go home. When the victim entered the bus she saw the driver was the accused.
9. At the Sabeto junction the victim pressed the bus buzzer for the accused to stop the bus but the accused did not. Upon entering Lautoka City the accused once again stopped the bus at Shirley Park bus stop and told the passengers to get off the bus. The passengers did not like this and some of them swore at the accused.
10. The victim also wanted to get off the bus but the accused told her to stay back so that he could talk to her. After all the passengers left the accused closed the door of the bus forcefully took the victim to the rear end of the bus removed her clothes and had sexual intercourse with her on the back seat. The accused also made a love bite on the neck of the victim.
11. After this the accused threatened the victim not to tell anyone about what he had done to her and if anyone asks to make up a story that the love bite was made by a drunkard in one of the restaurants. The victim was scared so she did not tell anyone about what the accused had done to her. On 16th February the victim's aunt came from Ba to attend a pooja ceremony when she saw the love bite on the neck of the victim. The victim told her aunt about what the accused had done to her on two occasions.
12. The aunt with the victim reported the matter to the police the same day. The victim was medically examined and according to the examining doctor the injuries seen during vaginal examination was consistent with forceful penetration.

13. The accused was arrested, caution interviewed and charged.
14. The state counsel filed written sentence submissions including the victim impact statement and the defence counsel filed mitigation for which this court is grateful.
15. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused was 30 years old at the time of the offending;
 - b) First offender;
 - c) Is married and has 2 young children;
 - d) Employed by brother at family car wash;
 - e) Earns \$180 per week;
 - f) Sole bread winner of the family;
 - g) Is an active member of the community and neighbourhood.
16. 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

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

a) Breach of Trust

The victim and the accused knew each other as bus driver and passenger. She trusted the accused that is why she had boarded the bus driven by the accused. The accused grossly breached the trust of the victim by his actions. The accused owed a duty of care to the victim as a public service vehicle driver. The offences were committed on a public transport which is contrary to the expectations of the travelling public and will most certainly cause fear to bus passengers who look forward to a safe environment.

b) Victim was vulnerable

The victim was vulnerable, alone and unsuspecting the accused took advantage of this and sexually abused the victim in the bus on two occasions. The accused overpowered the helpless victim. The victim was 15 years whereas the accused was 30 years. The accused was a mature adult who should have known better. The age difference is also substantial.

c) Planning

There is some degree of planning by the accused he knew the victim was alone so he did not stop the bus at the Sabeto junction. The accused stopped the bus at a bus stop in Lautoka and he quickly closed the door to prevent the victim from leaving. Furthermore, the accused did not stop the bus when the victim had pressed the bus buzzer to get off at the Sabeto junction. The accused was bold and undeterred in what he did with the victim on two occasions.

d) Prevalence of the offending

There has been an increase in sexual offence cases on juvenile victims by mature adults known to the victim. The accused being the mature of the two did not give a second thought about what he was doing to the victim.

e) Exposing children to sexual abuse

The accused had exposed the victim to sexual abuse on two occasions one week apart. He basically robbed her of her innocence and exposed her to an unexpected experience which she will not be able to forget easily.

f) Victim Impact Statement

According to the victim impact statement the victim has suffered psychological and emotional harm as follows:

- a) Was scared to go to school;
- b) Had to leave school since school work was affected;
- c) Is scared of meeting men.

TARIFF

18. 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.

19. The maximum penalty for the offence of defilement is 10 years imprisonment. The current sentencing tariff for the offence of defilement is from a suspended sentence to 4 years imprisonment (*Elia Donumainasava v State [2001] HAA 32/01S, 18 May 2001*). In *State v Pita Vetaukula Criminal Case No. HAC 46 of 2013 (8 July 2014)*, this Court stated that suspended sentences are appropriate in cases of non-exploitive relationship between persons of similar age, while a custodial sentence is appropriate in cases of sexual exploitation of younger girls by older men who hold a position of authority over the girls.
20. In *Vetaukula* (supra), the offender was sentenced to 18 months imprisonment after he pleaded guilty to a charge of defilement. The offender was the headman of the village. He was 22 years old when he defiled a 15 year old from his village. In sentencing the offender the court said:

The courts have a duty to protect young girls from any form of sexual exploitation. In cases of sexual exploitation of young girls, the primary purpose of the sentence is general deterrence. Rehabilitation of the offender is a secondary purpose.

21. 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.”

22. I am satisfied that the two 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 two offences.
23. Bearing in mind the objective seriousness of the offence committed I take 11 years imprisonment (lower range of the scale) as the starting point of the sentence. The sentence is increased for the aggravating factors, for mitigation it is noted that the accused is a first offender hence a person of good character. In his mitigation the defence counsel had stated that he had attached eight character references unfortunately this was not attached to the mitigation. Nevertheless, I have given appropriate reduction for the fact that the accused is a person of good character.
24. 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.
25. I note from the court file the accused was remanded for 13 days. In exercise of my discretion I reduce the sentence by 1 month 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 and one count of defilement is 14 years and 11 months imprisonment.
26. 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.

27. There has been an increase in sexual offences involving offenders who are known to the victim and matured adults.
28. 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.
29. 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."

30. 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.”

31. 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.*

32. Mr. Ali, you have committed serious offences against the victim who was unsuspecting, alone and vulnerable by forcefully taking her to Lautoka City in the bus driven by you and having forceful sexual intercourse with her. You cannot be forgiven for what you have done to this victim.
33. 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.
34. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim of 15 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.
35. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 12 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 all the circumstances of this case.

36. In summary I pass an aggregate sentence of 14 years and 11 months imprisonment with a non-parole period of 12 years to be served before the accused is eligible for parole.

37. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

20 March, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs S. Nand Lawyers for the Accused.