

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 96 of 2018

THE STATE

vs.

MUSTAQ ALI

Counsel : Mr. Mohammed Rafiq with Mr. Singh with for State
Mr. Roneel Kumar for the Defence

Date of Judgment : 25 January 2023

Date of Sentence : 27 January 2023

SENTENCE

1. Mr. Mustaq Ali, you stand convicted after trial of one count 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. The victim was a child of 16 and had turned 17 years of age during the period of the offence. You are her stepfather. When she came under your roof you stopped her education and confined her to home. When your wife went to New Zealand for a short stay, leaving the victim under your care, you took that opportunity to satisfy your lustful demands. Between April and June 2011, you forcefully penetrated her vagina with your penis six to seven times without her consent. As a result of which she became pregnant when she was a still a child. You, convinced your wife to believe that the victim was impregnated by your son. You then with your wife conspired to sweep your wrongdoings under the carpet and did various things with complete disregard of victim's safety and wellbeing. You made a failed attempt

to get her embryo aborted. When that attempt failed, you sent her to a relative's place to hide her pregnancy from the world. To escape liability, you blamed your own son and made another failed attempt to attribute the paternity of your child to him. You assigned the fatherhood of your child to one of your relatives and convinced him to marry the victim. You made your wife to give evidence against her own daughter despite the presence of strong DNA evidence that you are the father of victim's child.

3. 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)).
4. 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.
5. 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.
6. The courts have emphasised 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.

7. Having taken into consideration the seriousness of the offence and the harm caused to the victim, I select a starting point of 12 years from the lower range of the tariff as the first step in the sentencing process.
8. In the light of the Supreme Court decision in *Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015), the submissions of the Counsel, and the Victim Impact Statement, I have identified the following aggravating and mitigation factors:

Aggravating factors:

- (a). The victim regarded you as her 'Abba' or the father and she respected you as an adult. You committed this offence when the victim was under your care. You are in gross breach of trust.
- (b) You were 48 years old at the time of the offending when your victim was only 16 years old. There is a huge age difference between you and the victim.
- (c) You impregnated a child and made her a mother when her body was still growing into an adult.
- (d) You conspired with your wife to suppress your wrongdoings and blamed the victim and your own son to escape criminal liability. You put the victim in a situation where she could not complain to anyone else about the incidents as you had already convinced her mother to disbelieve her.
- (e) You exploited the vulnerability of a child when her mother was abroad.
- (f) The offence was repetitive. You invaded her body six to seven times during the period of offending
- (g) You punched her ribs and head and created fear psychosis in the victim.
- (h) The trauma caused to the child victim scarred her rest of her life. The psychological impact on the victim is enormous and your offence made her life miserable.

Mitigating Factors:

- (a). You are now 59 years of age. You are a farmer by profession. Your Counsel has informed that you are suffering from asthma gastritis and diabetes. However, there is no evidence that you cannot take treatments in incarceration. Personal circumstances

are of little mitigatory value. *Raj v The State* [2014] FJSC 12 CAV0003.2014 (20th August 2014)

(b). You do not have any previous convictions. You have maintained a clear record. However, your clear record is of little mitigatory value in this case because you committed this crime in gross breach of trust. *Senilokula v State* [2018] FJSC 5; CAV0017.2017 (26 April 2018)

9. 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.

10. You have never been in remand for this matter.

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

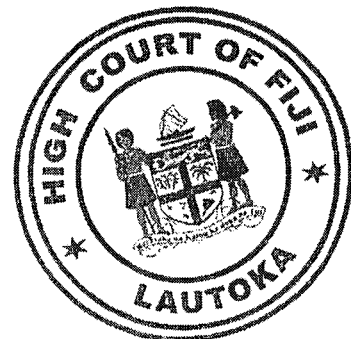
12. Summary.

MR. Mustaq Ali, you are sentenced to an imprisonment term of 15 years with a non-parole period of 12 years. A Domestic Violence Restraining Order is issued to protect the victim.

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



Aruna Aluthge
Judge



27 January 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- Roneel Kumar Lawyers for Defence