

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 224 of 2019

STATE

V

ILAITIA NABEWA

Counsel : Mr. M.I. Rafiq for the State.
Ms. K. Marama and Ms. A. Nisha for the
Accused.

Date of Submissions : 17 August, 2023

Date of Sentence : 18 August, 2023

SENTENCE

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

1. The accused is charged with the following offences as per the information filed by the Director of Public Prosecutions dated 23rd January, 2020:

FIRST COUNT

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ILAITIA NABEWA between the 1st of July, 2019 and the 31st of July, 2019 at Sigatoka in the Western Division, penetrated the vagina of “S.M” with his penis without her consent.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ILAITIA NABEWA between the 1st of July, 2019 and the 31st of July, 2019 at Sigatoka in the Western Division, unlawfully and indecently assaulted “S.M” by sucking the breast of the said “S.M”.

2. This file was first called in the High Court on 13th December, 2019 and after the filing and service of the information and disclosures the accused on 30th June, 2020 pleaded not guilty to both counts. After numerous adjournments, pre-trial conference hearing a trial date was assigned for 14th August, 2023.
3. On 14th August, the defence counsel informed the court that the accused wished to take a progressive approach in respect of both counts. The accused pleaded guilty to the two counts after the information was read to the accused in the Itaukei language and was understood by him. The matter was adjourned to 15th August for the summary of facts to be read.
4. On 15th August, 2023 the summary of facts was read and explained to the accused in the Itaukei language who admitted the same in the presence of his counsel.
5. After considering the summary of facts read by the state counsel this court was satisfied that the accused had entered an unequivocal plea of guilty on his freewill. This court was also satisfied that the accused had

fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused satisfied all the elements of the offences of rape and sexual assault as charged.

6. In view of the above, this court on 15th August found the accused guilty as charged and he was convicted for both counts.

7. The brief summary of facts was as follows:

a) The victim and the accused are known to each other they resided in the same village and are distantly related. In July, 2019 the victim was 13 years and 10 months whereas the accused was 51 years of age. The victim is a special needs child diagnosed as having intellectual impairment.

b) One evening between 1st July, 2019 and 31st July, 2019 the accused met the victim outside her house while he was on his way to the store. Since the accused was known to the victim, the victim called out to the accused to greet him. The accused took the victim to the community hall which was only a few meters away from the victim's house. In the hall the accused made the victim undress herself and he also undressed himself.

c) Thereafter, the accused laid the victim on the floor of the community hall and then he forcefully penetrated the victim's vagina with his erected penis and had forceful sexual intercourse until he ejaculated. At this time, the accused also sucked the victim's breast.

d) The victim felt pain in her vagina, however, she did not scream or yell because the accused had told her not to.

e) The victim did not consent for the accused to have sexual intercourse with her nor did she consent for the accused to suck her breast. The victim resisted to what the accused was doing to

her by moving her body, however, the accused did not stop but continued having forceful sexual intercourse with her. The victim was frightened of the accused so she did not tell anyone about what the accused had done to her.

f) As a result of the above the victim got pregnant since the victim was going to school her school teacher noticed some physical changes in the victim. Upon questioning the victim told her teacher about what the accused had done to her. The matter was reported to the police and the victim was medically examined. The accused was arrested, caution interviewed and charged.

8. The state counsel filed written sentence submissions and the victim impact statement, whereas the defence counsel filed mitigation submissions for which this court is grateful.

9. The accused counsel presented the following mitigation:

- a) The accused is a first offender;
- b) He is now 53 years of age;
- c) Is a Farmer;
- d) Married with 6 children from 5 years to 26 years;
- e) Earned approx. \$100.00 weekly;
- f) Is remorseful of his actions and he seeks forgiveness of the court;
- g) Pleaded guilty and takes full responsibility of his actions;
- h) Regrets the wrong he has done.

10. 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

11. The aggravating factors are:

(a) Breach of Trust

The victim and the accused are known to each other. The accused is a relative of the victim and they were living in the same village. The accused grossly breached the trust of the victim by his actions.

(b) Age difference

The victim was 13 years and 10 months of age whereas the accused was 51 years of age at the time of the offending. The age difference is substantial and the accused being a matured adult.

(c) Exposing children to sexual abuse

The accused exposed the victim to sexual activity at a very young age and he basically robbed her of her innocence.

(d) Victim was vulnerable

The victim was vulnerable, naive, helpless and a special needs child. The accused took advantage of the situation and sexually abused the victim. The accused was bold in what he did to the victim.

(e) Planning

There is a degree of planning involved the accused knew the victim was alone and he took advantage of the victim by taking her to the community hall.

(f) Prevalence of offending

There has been a notable increase in sexual offence cases by mature individuals known to the victim.

(g) Victim became pregnant

The victim got pregnant at a very young age. At this age children are playful and their “happy go lucky” life style assists in their development as they advance into teenage. The actions of the accused took away these happy moments of the victim.

(h) Victim Impact Statement

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

- a) She stopped going to school due to her pregnancy;
- b) Had to undergo counseling;
- c) Still recalls what the accused had done to her;
- d) Looking after and maintaining her baby while still a child.

TARIFF

12. The maximum penalty for the offence of rape is life imprisonment. The Supreme Court of Fiji in *Gordon Aitcheson vs. The State, Criminal Petition no. CAV 0012 of 2018 (02 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now between 11 years to 20 years imprisonment.
13. The maximum penalty for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epeli Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012)*).

GUILTY PLEA

14. The accused pleaded guilty on the day the matter was for trial proper. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

[14]. In **Rainima -v- The State** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In **Mataunitoga -v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

15. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse

can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).

16. This court does not accept that the accused has shown genuine remorse when he pleaded guilty. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se* (*see Gordon Aitcheson's case supra*). In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. There is no doubt the timing of the guilty plea is late and the prosecution had a strong case against the accused.

17. 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."

18. 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 for the two offences.

19. After assessing 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. I increase the sentence for aggravating factors, the accused gets a reduction for mitigation and good character (although the personal circumstances and family background of the accused has little mitigatory value).

20. This court does not accept that the accused has shown any genuine remorse when he pleaded guilty on the day of the hearing. However, the allegation is of sexual nature, the accused by pleading guilty has not only saved the court's time but also prevented the victim from reliving her experience in court. In this regard the accused ought to receive at least some reduction in his sentence. The sentence is reduced for guilty plea.
21. Furthermore, the accused has been in remand for 10 months and 13 days in exercise of my discretion I reduce the sentence by 11 months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final aggregate sentence is 15 years and 1 month imprisonment.
22. Mr. Nabewa you have committed serious offences against your relative and villager, a child who was 13 years and 10 months old at the time of the offending. The victim was unsuspecting, vulnerable and a special needs child you cannot be forgiven for what you have done. You were a matured adult who should have known better. You are a lustful man who should be kept away from the society for a long time you have preyed upon an innocent victim who will carry with her a lifelong scar.
23. Furthermore, there has been an increase in sexual offence cases involving offenders who are known to the victim and are mature adults. 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 offenders of sexual crimes committed against mothers, daughters*

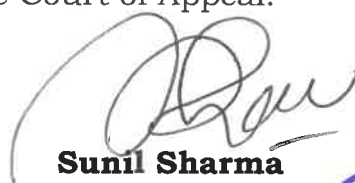
and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilised entity.”

24. More recently the Supreme Court in *Samisoni Rabaka v State [2023] FJSC 2; CAV0011.2020 (27 April 2023)* at paragraph 21 made another pertinent observation in respect of sexual offences as follows:

Every sexual assault, more particularly [sic] rape is a horrendous and pernicious violation of bodily integrity. No one, other than the survivor, can appreciate what she or he has gone through, not only in physical terms but also psychologically and socially. With social stigma attached to the incident, occasionally the survivor is discriminated against and ostracized. Therefore, an incident of sexual assault must be considered in a larger canvas and not merely as a crime.

25. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim who was 13 years and 10 months of age at the time compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
26. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
27. Considering the above, I impose 14 years 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 also meet the expectations of the community which is just in the circumstances of this case.

28. This court is satisfied that the term of 15 years and 1 month 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.
29. In summary, I pass an aggregate sentence of 15 years and 1 month imprisonment for one count of rape and one count of sexual assault with a non-parole period of 14 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act. It is also recommended that the Commissioner of Correction Services arrange for the counseling of the accused.
30. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

18 August, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.