

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 162 of 2022**

**STATE**

**V**

**SAVENACA TAKOLEVU BATIBASAGA**

**Counsel** : Mr. J. Nasa for the State.  
: Mr. F. Daveta for the Accused.

**Dates of Hearing** : 23 and 24 April, 2024  
**Closing Speeches** : 25 April, 2024  
**Date of Judgment** : 26 April, 2024  
**Date of Sentence** : 10 May, 2024

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**SENTENCE**

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*(The name of the victim is suppressed she will be referred to as "H.L")*

1. In a judgment delivered on 26<sup>th</sup> April, 2024 this court found the accused guilty and convicted him for one count of rape as charged.
2. The brief facts were as follows:
  - a) The victim and the accused are cousins who were living in the same house. In the year 2022 the victim was 11 years of age. On a Sunday

in July, 2022 the victim was sleeping in the living room face up when she suddenly woke up after she felt something on her.

- b) When she opened her eyes she saw from the light in the kitchen the accused on top of her. She also noticed that her skirt and panty were missing. The victim at this time felt the accused penis was going in and out of her vagina, she tried to shout but was threatened by the accused that if she shouted he will kill her and her grandmother.
- c) At this time, the victim got unconscious when she regained consciousness she wanted to go to her grandmother the accused once again threatened her that if she told her grandmother he will kill them both. When the victim went to Suva she told her mother about what the accused had done and the matter was reported to the police.
- d) The accused was arrested, caution interviewed and charged.

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

4. The following personal details and mitigation was presented on behalf of the accused:

- a) The accused is 24 years of age;
- b) First offender;
- c) Never Married and eldest in the family;
- d) Farmer and part time Tile Layer.

5. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v 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**

6. The aggravating factors are:

a) Breach of Trust

The accused is the cousin of the victim the accused grossly breached the trust of the victim by what he did to her. There is a notable increase in cases involving breach of trust by persons known to the victim. This type of offending is very much prevalent in our society.

b) Age Difference

The victim was 11 years of age at the time of the offending whereas the accused was 22 years. The age difference is substantial and the accused should have exercised restraint.

c) Planning

There is some degree of planning by the accused he knew the victim was sleeping alone in the living room. He took advantage of the situation.

d) Vulnerable Victim

The victim was vulnerable and unsuspecting in the comfort of the living room but this was not to be due to the actions of the accused. The accused was bold and undeterred in what he was doing to the victim.

e) Exposing children to sexual abuse

The accused had exposed the victim to sexual abuse. Due to the closeness of the relationship between the accused and the victim the accused was supposed to care and protect the victim. 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:

- (i) Felt bad after the incident;
- (ii) Had to attend counseling for two months;
- (iii) Had to relocate to Suva with her family to start over in new school and new environment.

## **TARIFF**

7. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in *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.
8. 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 family members sexually abuse children violating the Domestic Violence Act, they

should not expect any mercy from this court. The punishment ought to be such that it takes into account the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.

9. There has been an increase in sexual offences involving offenders who are known to the victims and are mature adults. It is shocking to note the manner in which the accused had committed the offence on the victim.
10. 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.”*”

11. 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.”*

12. 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 pre sent;*
- (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.*

13. After assessing 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. The personal circumstances and family background of the accused has little mitigatory value, however, I note that the accused is a first offender who has come to court with a clean record. In this regard, I reduce the sentence for good character and his other mitigation.
14. I note from court file that the accused was remanded for 1 month and 25 days, in accordance with my discretion the sentence is further reduced by 2 months in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence is 15 years and 10 months imprisonment.
15. Mr. Batibasaga you have committed a serious offence against your cousin who you were supposed to protect and care. The victim was unsuspecting and vulnerable. You cannot be forgiven for what you have done to this victim. Whatever you did to the victim is abhorrent and a callous exploitation for your sexual gratification.
16. The continued increase in sexual offence cases seen nowadays is a sad indictment on the society. It is so shocking and very soon if not already it would undermine one's faith in humanity. Children are supposed to be living a life free from fear or abuse by anyone but sadly such is not the case for the victim here.

17. Rape is not only a physical act, it not only destroys the very soul of the victims, but also brings about a sense of hopelessness and anxiety which cannot be measured or repaired by anyone.
18. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the 11 year old victim who was the accused's cousin 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.
19. 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.
20. In imposing a non-parole period I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State*, AAU0063.2011 (27 February 2015) at paragraph 2, Calanchini P (as he was) said:

*[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should*



*not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.*

21. The Supreme Court in accepting the above principle in *Akuila Navuda v The State* [2023] FJSC 45; CAV0013.2022 (26 October 2023)] stated the following:

*Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.*

22. Considering the above, I impose 13 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.

23. In summary I pass a sentence of 15 years and 10 months imprisonment with a non-parole period of 13 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.
24. 30 days to appeal to the Court of Appeal.



**Sunil Sharma**  
Judge



**At Lautoka**  
10 May, 2024

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Daveta Advocates, Lautoka for the Accused.**