

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 106 OF 2022

STATE

V

A.R.P [Juvenile]

Counsel : Mr. J. Nasa for the State.
: Mr. E. Dass for the Juvenile.

Date of Punishment : 14 June, 2024

PUNISHMENT

(The names of the victim and the juvenile are suppressed they will be referred to as L.R and A.R.P respectively)

1. The juvenile is charged by virtue of the following amended information filed by the Director of Public Prosecutions dated 28th May, 2024:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

A.R.P, between the 1st day of January, 2018 and the 31st day of December, 2018, at Nadi in the Western Division, unlawfully and indecently assaulted “L.R” by rubbing the surface of her vagina.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act 2009.

Particulars of Offence

A.R.P, between the 1st day of January, 2018 and the 31st day of December, 2018, at Nadi in the Western Division, had carnal knowledge of “L.R” a child under the age of 13 years.

2. On 28th May, 2024 this matter was scheduled for trial proper when the state counsel informed the court that Mr. Pillay was a juvenile at the time of the allegation and not an accused as previously indicated. Counsel also indicated to court that he will be filing an amended information which was done the same day.
3. The juvenile pleaded guilty to both the above counts in the presence of his counsel, thereafter on 29th May (next day) the juvenile understood and admitted the amended summary of facts read by the state counsel.
4. The brief summary of facts is as follows:
 - a) In the year 2018, the victim was 10 years of age and a class 5 student. On an occasion between the 1st day of January, 2018 and the 31st day of December, 2018, the victim was at home when Shayal the younger sister of the juvenile (17 years at the time) called the victim to come over and watch television at their house. The victim and the juvenile were neighbours.

- b) Whilst the victim and Shayal were watching television the juvenile called the victim from the kitchen she adhered to this call and went to the juvenile.
- c) In the kitchen, the juvenile told the victim to go into his bedroom when the victim refused the juvenile pulled her into his bedroom. The juvenile removed the victim's pants and panty and started to rub the surface of her vagina with his hand.
- d) In response to the juvenile's conduct, the victim told him to stop and she further resisted him. The juvenile stopped his assault and the victim left the bedroom after putting on her clothes.
- e) A few days after the first incident, the victim was outdoors with Shayal when the juvenile again called her into the house. When the victim went inside the house the juvenile took hold of her hand and led her into his bedroom. Thereafter, the juvenile removed her pants and panty and also his clothes then he made the victim lie on the bed and penetrated her vagina with his penis.
- f) The victim was in pain and she wanted to scream for help, however, the juvenile told her to keep quiet. The victim was scared to complain to anyone about what the juvenile had done on both occasions until a year later. In 2019, the victim told her stepfather about what the juvenile had done. The matter was reported to the police.
- g) The juvenile was arrested, caution interviewed and charged.

5. After considering the summary of facts read by the state counsel which was admitted by the juvenile this court is satisfied that the juvenile has entered an unequivocal plea of guilty on his freewill.
6. This court is also satisfied that the juvenile has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted satisfies all the elements of the offences of sexual assault and rape as charged. In view of the above, this court finds the juvenile guilty as charged for both the offences.

MITIGATION

7. The learned counsel for the juvenile presented the following mitigation:
 - a) The juvenile was 17 years of age at the time of the offending;
 - b) First time in conflict with the law;
 - c) Cooperated with police during investigations;
 - d) Genuinely remorseful and regrets what he has done;
 - e) Has the responsibility of looking after his parents;
 - f) Pleaded guilty at the earliest opportunity;
 - g) Promises not to reoffend;
 - h) Has sought forgiveness from the victim's parents;
 - i) Seeks leniency of the court.

TARIFF

8. 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. Epele*

Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012).
At paragraphs 6 and 7 Madigan J. had stated the following:

6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.

7. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 *(the most serious)*

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim's body;

(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

7. *These very sensible categories of offending are adopted by this Court and they provide a very useful guide to sentencing within the tariff of two to eight years.*

9. The maximum penalty for the offence of rape is life imprisonment. According to the case of *Aitcheson vs. The State [2018] FJSC 29, CAV 0012 of 2018 (2 November, 2018)* the tariff for the rape of a juvenile is an imprisonment term between 11 years and 20 years.

10. Under section 30 (3) of the Juveniles Act the juvenile falls under a special categorization when it comes to punishment as a young person which prescribes the maximum punishment for young persons at 2 years imprisonment.

AGGRAVATING FACTORS

11. The following aggravating factors are obvious in this case:
 - a) Planning

There is some degree of planning by the juvenile. He saw the victim in his house. He forcefully took her into his bedroom and he did what he wanted to do.

b) Victim was vulnerable and helpless

The victim was vulnerable and helpless the juvenile took advantage of the situation.

c) Age difference

The victim was 10 years of age whereas the juvenile was 17 years of age, the age difference is substantial.

d) Breach of Trust

The victim and the juvenile were known to each other and they were neighbours. The victim trusted the juvenile and upon being called by the juvenile she went to him. The juvenile grossly breached the trust of the victim by his actions.

e) Prevalence of the offending

There is a prevalence of such offending involving juveniles who are known to the victims.

f) Victim Impact Statement

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

- a) Still feels bad about what has happened to her;
- b) Does not want to socialize with anyone, wants to stay alone;
- c) Has flashback of what the juvenile had done to her;

- d) After the incidents the victim had to relocate to her grandparents house away from her parents.

SOCIAL WELFARE REPORT

12. The juvenile is now an adult so no social welfare report was ordered.

DETERMINATION

13. 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."
14. Taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate punishment for both counts.
15. Considering the objective seriousness of the offences committed I select 1 year imprisonment as the starting point of the aggregate punishment. The punishment is increased for the aggravating factors and is reduced for mitigation, good character and early guilty plea. The juvenile has been in police custody for three days hence further reduction is given.
16. I consider the early guilty plea of the juvenile to be a gesture of genuine remorse. The final aggregate punishment is 2 years imprisonment for one count of sexual assault and one count of rape the juvenile is charged with.

Under section 26 (2) (a) of the Sentencing and Penalties Act this court has discretion to suspend the final punishment since it does not exceed 3 years imprisonment.

17. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to

justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

18. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment or a suspended punishment.
19. The juvenile is a young person as per the Juveniles Act, he is of good character, isolated offences were committed by him, he was 17 years of age at the time of the offending, pleaded guilty at the earliest opportunity, is genuinely remorseful, cooperated with police during investigations and he takes full responsibility for his actions. These special reasons render immediate imprisonment inappropriate.
20. The juvenile has moved on in his life with parental and family guidance, supervision and support he has a bright future ahead of him hence an imprisonment term will not augur well for his future. This court has taken into account rehabilitation over and above imprisonment term.
21. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a wholly suspended punishment is just in all the circumstances of this case.
22. The only reason why this punishment is below the tariff is because the Juveniles Act imposes a limit on the punishment for young persons.
23. In summary an aggregate punishment of 2 years imprisonment is imposed on the juvenile for the two offences he has been found guilty of which is suspended for 3 years. The effect of the suspended sentence is explained to the juvenile.

24. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

14 June, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Chetty Law and Associates, Nadi for the Juvenile.