

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 20 of 2024

STATE

V

JALE PATRICK O'BRIEN

Counsel : Mr. E. Kotoilakeba for the State
: Ms. K. Marama for the Accused

Date of Trial : 6 – 7 January 2025
Date of Judgment : 31 January 2025
Date of Sentencing Hearing: 21 February 2025
Date of Sentence : 7 March 2025

SENTENCE

1. Mr. O'Brien, on 31 January 2025, after trial before this Court, you were convicted of six counts of serious sexual offending against a 13-year-old girl who you had raised as your daughter since birth. I shall refer to her in these sentencing remarks as "the complainant".
2. The factual basis upon which I sentence you today is set out in my Judgment dated 31 January 2025. For present purposes, it is sufficient to set out those facts in brief summary.
3. On 16 January 2024, you indecently assaulted the complainant by kissing her on her lips (count 1), sexually assaulted her by squeezing her naked breasts (count 2), and sexually assaulted her by sucking her breasts (count 3).

4. On 18 January 2024, you raped the complainant by digitally penetrating her vagina (count 5), and sexually assaulted her by sucking her vulva (count 6).
5. On the morning of 19 January 2024, you raped the complainant by penetrating her vagina with your penis.
6. I must now proceed to impose a just and proportionate sentence for the totality of your offending.

Prosecution sentencing submissions

7. The prosecution has filed helpful written submissions, and Mr Kotoilakeba also addressed the Court at your sentencing hearing. The prosecution has drawn my attention to the relevant guideline judgments, and have also urged upon me four factors which they say makes your offending more serious.
8. Firstly, the complainant, as a 13 year old child, was especially vulnerable.
9. Secondly, there was a wide disparity in age between you and the complainant. You were 42 years old at the time of your offending against the complainant.
10. Thirdly, since you had raised the complainant as your daughter, you were in a position of trust. You abused that trust by assaulting and raping her.
11. Finally, your offending has caused the complainant continuing emotional and psychological harm. I have read a victim impact form in which a counsellor describes how the offending has affected the complainant. This was read aloud by the prosecutor at your sentencing hearing, and it is appropriate that I reproduce that statement in full in these sentencing remarks:

“During our counselling session, the survivor was finding it hard to share what she had gone through on the 18th and 19th January, 2024. She was brutality traumatized by the cruel act that was done to her by someone very close to her (her step-

dad). The person she trusted had betrayed her. She has lived in fear from the time the incident happened till date.

She isolated herself and stopped going to families and friends because she feels that everyone knows what happened to her and are blaming her for the incident. After the incident, she has to change her school from Nagigi SDA Primary School to Nasinu Muslim College.

She felt hurt, disgusted, heart-broken, used, humiliated, degraded and betrayed. She was shocked at the behaviour of the offender those days. It is very hard for her to accept the fact that her step-dad raped her. She is no longer able to trust people and she feels violated when touched.

She had difficulty in explaining to people what she had gone through and how this person had sexually abused her. She felt blamed and victimized. She wants the accused to be punished for what he has done to her.”

12. On your behalf, Ms. Marama has told me something about your background. You are 43 years old. You have been the sole breadwinner for your family, and have worked as a fisherman, farmer and construction worker. Your wife, with whom you have six children, sadly passed away a few years ago, and you are now in a de-facto relationship, residing together in Vatudamu Village.
13. Ms. Marama submits that your offending is less serious because you are a first offender.

Discussion

14. The maximum sentence for indecent assault is 5 years' imprisonment, and the maximum sentence for sexual assault is 10 years' imprisonment.

15. The applicable tariff for the offence of Indecent Assault is 12 months' to 4 years' imprisonment, and the tariff for sexual assault is between 2 years' to 8 years' imprisonment.
16. The maximum sentence for rape is life imprisonment. The Supreme Court has given a guideline judgment that the tariff for rape of a child is 11 years' to 20 years' imprisonment.
17. Whilst sentences imposed by other sentencing courts provide broad guidance, there is a limit to the assistance that any sentencing court may glean from sentences imposed in other cases for similar offending. Every sentencing exercise is heavily fact specific, and must be approached as such.
18. It is also noteworthy that the accepted tariffs for the offences you have committed are wide. My task is to determine a just and proportionate sentence that properly reflects the totality of your offending across all six counts.
19. Turning my attention to the purposes of sentencing as set out in section 4 of the Sentencing and Penalties Act, I have had regard to a combination of the statutory purposes.
20. Sentencing courts often remark that serious sexual offending against children warrants a deterrent sentence. Whilst this is undoubtedly so, it is difficult to measure the effectiveness of particular deterrent sentences. For my part, I am doubtful that those who would contemplate raping children would be deterred from doing so based on a calculation of the potential harsh penalties involved. Certainly, it has not been the experience of the courts that the harsher sentencing regime ushered in by the Supreme Court has brought about a reduction in abhorrent sexual offending against children.
21. Having said that, it seems to me that condign punishment of those who offend against children serves an important function. By denouncing sexual offending against children in the strongest terms, sentencing courts help to shape societal values. Education through denunciation reinforces law-abiding and decent citizens' rejection of sexual abuse of children.

22. My principal focus in determining the just and proportionate sentence in this case is to ensure that the sentence I impose adequately signifies that the court and the community denounce the commission of sexual offending against children.
23. I have decided that the best way to achieve a just and proportionate sentence reflecting the totality of your offending against the complainant is to take the rape on the morning of 19 January 2024 (count 7) as the lead offence, to treat the other serious offending as serious aggravating factors, and to impose concurrent aggregate sentences on the other counts.
24. I have concluded that in all the circumstances of this case, including the complainant's vulnerability, the abuse of your authority and position of trust as the complainant's father, and the serious enduring harm you have caused to the complainant, I consider that the appropriate sentence on count 7 is one of 15 years' imprisonment. This must be uplifted to reflect the further serious offending on 18 January 2024 and 16 January 2024. Were I sentencing you for the offending on 18 January alone (counts 5 and 6) the appropriate aggregate sentence would be 16 years' imprisonment. Were I sentencing you for your offending on 16 January alone, the appropriate aggregate sentence would be 5 years' imprisonment.
25. Should I order that you must serve all sentences consecutively, that would result in an overall term of 36 years' imprisonment. Clearly, that would be a crushing sentence. Sentencing principles require that I step back and make an appropriate adjustment to reflect the totality of your offending behaviour across all six counts.
26. In my assessment, an overall sentence of 20 years' imprisonment would be appropriate. I reduce that to 18 years' imprisonment to reflect the limited mitigation of your clear record.
27. Accordingly, I sentence you as follows:

Count 7 – 18 years' imprisonment.

Counts 1, 2, 3 – 5 years' imprisonment concurrent.

Counts 5, 6 – 16 years' imprisonment concurrent.

28. I am required to fix a period before which you may not be considered for parole. In practical terms this will be of far more concern to you than the head sentence I impose.
29. The guideline judgment for rape of a child does not assist me in this task. Indeed, I can discern no settled practice in the decided cases. In order to avoid the impression of arbitrariness, therefore, I must adopt a principled approach.
30. Parole and remission are two different and distinct concepts.
31. Remission is dealt with in Sections 27 and 28 of the Corrections Service Act 2006. Section 27(2) provides that: *“For the purposes of the initial classification a date of release for each prisoner shall be determined which shall be calculated on the basis of a remission of one third of the sentence for any term of imprisonment exceeding one month.”*
32. In *Timo v State* [2019] FJSC 22; CAV0022.2018 (30 August 2019) the Supreme Court observed, at [27]:

“The Sentencing and Penalties Act 2009 also gives no guidance to a Court as to when and in which category of cases a non-parole period should be fixed or not fixed. Therefore, a question arises: What should be the procedure, in accordance with the requirements of justice, that a Court should adopt for awarding (if at all) a non-parole period to a convict?”
33. At the time *Timo* was decided, sentencing courts had a wide discretion whether or not to impose a non-parole period. That discretion was removed by legislative amendment of the Sentencing and Penalties Act 2009. Sentencing Courts are now required to fix a non-parole period when imposing a term of imprisonment of two years or more. It remains the case that the

Sentencing and Penalties Act provides no guidance on how non-parole periods are to be calculated.

34. The rhetorical question posed in *Timo* may be appropriately re-framed as: What should be the procedure, in accordance with the requirements of justice, that a Court should adopt for fixing a just and proportionate non-parole period?”
35. This remains an important question because, as the Supreme Court highlighted, at [28]:

“This question is important because the effect of a Court directing a non-parole period on a convict is that the convict cannot be released prior to completion of the non-parole period. This could impact on the delivery and administration of justice in several ways – not only for the convict through a curtailment of his or her human right of personal liberty, but also for the Executive through a curtailment of its statutory power of granting remission and encroaching on its powers of early release of prisoners under the Corrections Service Act 2006 read with the Corrections Service Regulations 2011. It could also have an impact on society and its safety and well-being.”

36. The Court described the tension between the authority of sentencing courts to fix a non-parole period, and the exercise of power under the Corrections Service Act, at [37] as follows:

“In exercising the authority of fixing a non-parole period, the Court is, in a sense, circumscribing the exercise of power by the Parole Board and the Minister under the Corrections Service Act 2006. There may well be an extraordinary case in which the Parole Board and the Minister are of opinion that the convict is deserving of parole, but their hands would be tied because of an order of the Court fixing a non-parole

period. This could amount to encroaching or subverting the discretionary power given by law to the Parole Board and the Minister, which the Courts would be loathe to do. It is for this reason that the Courts should be cautious and circumspect. This is not to say that the Courts should not fix a non-parole period in any case, but that the Courts may do so in exceptional cases and circumstances and after following a set procedure.”

37. Adapting the reasoning of the Supreme Court to my duty to fix a non-parole period in this case, it appears to me that a principled approach would be for me to fix a non-parole period that mirrors the provisions of the Corrections Service Act which govern remission.
38. In some cases sentencing courts may consider it appropriate to circumscribe the Commissioner’s authority to grant early release, but it is beyond the scope of these sentencing remarks to consider what circumstances might warrant that approach.
39. You are a first offender, albeit the offences you have committed are of the utmost gravity. I do not consider it necessary or appropriate to ‘warehouse’ you. In my view, you should be given every opportunity to avail yourself of opportunities for rehabilitation.
40. On this basis, I consider that a non-parole period of 12 years would reflect the appropriate punitive element of your sentence, and also provide a reasonable incentive for rehabilitative efforts on your part.
41. I would encourage you to reflect at length on the inevitable harm that your offending has caused to the complainant, and to engage with any intervention programmes that may be available to you during your period of incarceration.
42. I am informed that you were in custody from 30 January 2024 to 25 April 2024. I remanded you in custody on 31 January 2025. In total, therefore, you have

served 4 months in custody pending disposal of this matter, which is to be regarded as a period of imprisonment that you have already served.

43. Accordingly, the remaining time you must serve before being eligible to be released on parole is 11 years 8 months.
44. Mr O'Brien, for the reasons I have explained, the sentence I impose is 18 years' imprisonment, less the time you have already served on remand. Your non-parole period is 11 years 8 months from today.
45. I am satisfied that it is appropriate to make a Permanent Domestic Violence Restraining Order with standard non-molestation and no contact conditions. This Order will be in force unless varied by a competent court. Should you breach this Order, you may be charged with an offence contrary to section 77 of the Domestic Violence Act.
46. You may appeal to the Court of Appeal within 30 days.



A handwritten signature in black ink, consisting of the letters "W D" followed by a long, sweeping horizontal line that extends to the right.

Hon. Mr. Justice Burney

At Labasa

7 March 2025

Solicitors

**Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused**