

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 332 of 2012

BETWEEN: **THE STATE**

A N D: **ALIFERETI KAVURUNALASE**

Counsel: Mr. M. Vosawale with Ms. L Latu for the State
 Mr. Savou for Accused (Legal Aid Commission)

Sentencing: 11th February 2014

SENTENCE

[It was ordered to suppress the name and the identity of the complainant pursuant to section 12 of the Juveniles Act.]

1. Alifereti Kavurunalse, the accused, stands convicted for one count of 'Indecent Assault' contrary to section 212 of the Crimes Decree No. 44 of 2009. He was initially charged with two (2) counts of 'Rape' contrary to section 207 of the Crimes Decree and the trial commenced before the assessors on 3rd of February 2014. Before the commencement of the trial, the learned defence counsel informed court that in terms of section 218 of the Criminal Procedure Decree the accused wishes to tender a plea of guilty to a charge of 'Indecent Assault' and maintains his plea of 'Not Guilty' to the two counts of 'Rape'.
2. At the end of the evidence of Ms. A.M., the complainant, prosecution was left out only with the alternative of amending the charge to 'Indecent Assault'. The accused pleaded guilty to the amended charge on 4th of February 2014 itself and admitted the Summary of Facts to be correct. The amended charge and the particulars of the offence are as follows.

ALIFERETI KAVURUNALASE is charged with the following offence:

COUNT ONE

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ALIFERETI KAVURUNALASE on the 19th day of September 2012 at Mau Village, Namosi in the Central Division, unlawfully and indecently assault **A.M.**

3. It was revealed with the Summary of Facts that the accused on 19th of September 2012 at about 3pm in the afternoon did chase the friend of Ms. A. M. from the kitchen and told Ms. A.M., to 'do some bad things' after pulling her pants down to the knees. Then he had pressed and rubbed the complainant's vagina with his hands. The friend who was chased away by the accused had started screaming whilst the accused was engaged with this act with the complainant. The screaming had resulted accused running away from the kitchen.
4. Justice Shameem in the case of *Penioni Rakota v. The State Cr.App. No. HAA0068 of 2002S* made the following remarks:

"Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflected on the gravity of the offence."

5. In **State v. Anand Abhay Raj HAC 009 of 2010**, Justice Fernando selected a starting point of 3 years imprisonment and ended up with a sentence of 3 years imprisonment for a count of 'Indecent Assault'.
6. After having considered the 'offending' background, I take a starting point of 36 months imprisonment in this particular instance.
7. The complainant was just 6 years of age whilst the accused was 38, at the time of the commission of the offence. The age gap between the accused and the victim was 32 years. On the other hand, the accused stood as an 'uncle' of the victim, who lives in the same settlement. That is the sole reason for the accused could enter to the kitchen of victim's house without any disturbance. The accused took the advantage of his position and physically abused his niece. This amounts to a gross breach of trust. The accused had deployed certain amount of aggression to surrender the complainant when her friend was chased away from the kitchen. Finally, the Medical Examination Form reflects that several lacerations were visible around the genitalia. These factors undoubtedly can be identified as aggravating features.
8. The accused pleaded guilty to the charge of 'Indecent Assault' at the very first moment the Information was amended from 'Rape' to 'Indecent Assault'. Even before the commencement of the trial, the learned defence counsel informed court that the accused wishes to plead guilty to the offence of 'Indecent Assault'. The defence did not cross examine the complainant after her evidence in chief. In this context, this court views the approach of the accused would almost have the effect of pleading 'guilty' to the charge at the earliest possible opportunity.
9. The accused is a first offender. He claims that he was not in a proper frame of mind at the time of offending and thus seeks mercy of this court. His father and the clan had sought the traditional apology from the victim's family and they had readily accepted the same.
10. In this context, I add 24 months imprisonment to the starting point for all the aggravating factors stated in paragraph 7. Then I reduce 12 months imprisonment for the mitigating factors in paragraph 9. Now the interim sentence stands at 48 months imprisonment. For the reasons mentioned in

paragraph 8, the accused is eligible for a reduction of a fourth from the interim sentence for his 'early' plea of guilty. Then the final sentence rests at 36 months imprisonment.

11. Since the final sentence does not exceed 3 years imprisonment, court wishes to pursue whether it should be suspended or not as provided by section 26 (2) (a) of the Sentencing and Penalties No. 42 of 2009.
12. This court is more concerned about the psychological trauma that the complainant underwent from the point of this indecent assault until she gave evidence in court. This court witnessed the pain of a 8 year old girl when she described her 'sexual' experience with the accused. It is a 'pain' which will be with her for the rest of her life. It is a pain which will devastate her social relationships with shame, guilt, embarrassment and frustration. Matter gets worse, when the perpetrator is a close relative whom she was taught to trust and love. This background does not warrant the final sentence of 3 years to be suspended. The accused will receive an immediate custodial term.
13. According to the case record, the accused had been first produced before the Magistrate's Court on 21st of September 2012 and granted bail by the High Court on 26th of February 2013. This court ordered the accused to be kept in remand custody since 4th of February 2014, pending his sentence. Therefore, the total period that the accused spent in custody in relation to this matter is about 6 months. In terms of section 24 of the Sentencing and Penalties Decree No. 42 of 2009, it is ordered to reduce the said period from the final sentence of 36 months (3 years).
14. The remaining sentence of 30 months imprisonment to be commenced from today with a non-parole period of 24 months.

Janaka Bandara
Judge

Solicitors

1. Office of the Director of Public Prosecutions for the State
2. Office of the Legal Aid Commission for the Accused

