

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 286 of 2016

STATE

V

VINEETA DEVI

ASHISH PRASAD

Counsel : Mr. Yogesh Prasad with Mr. Setefano Komaibaba and Ms.
Sheenal Swastika for the State
Mr. Mohammed Yunus for the Accused

Dates of Trial : 17-19 June 2019

Summing Up : 20 June 2019

Judgment : 3 July 2019

Sentence Hearing : 10 July 2019

Sentence : 18 July 2019

[The First Accused, Vineeta Devi, had pleaded guilty to Count One in the Consolidated Information and was sentenced by this Court on 7 August 2018. Therefore, whatever reference is made in this case to an accused would be a reference to the Second Accused, Ashish Prasad, who is charged with Count Two in the Consolidated Information].

SENTENCE

- [1] Ashish Prasad, as per the Consolidated Information filed by the Director of Public Prosecutions (DPP), you were charged, along with Vineeta Devi, with the following offences:

COUNT ONE

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (a) (b) of the Crimes Act 2009.

Particulars of Offence

VINEETA DEVI, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Eastern Division, unlawfully performed an abortion on **PAYAL PRITIKA DEVI**.

COUNT TWO

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (b) of the Crimes Act 2009.

Particulars of Offence

ASHISH PRASAD, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Central Division, committed certain acts with intent to procure the abortion of **PAYAL PRITIKA DEVI**.

- [2] You pleaded not guilty to the charge against you and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found you guilty of the charge of Abortion (Procuring an Abortion) (Count Two).
- [4] Having reviewed all the evidence, this Court agreed with the unanimous opinion of the Assessors finding you guilty of the charge. Accordingly, you were found guilty and

convicted of Abortion, contrary to Section 234 (1) and (4) (b) of the Crimes Act No. 44 of 2009 (Crimes Act).

- [5] In support of their case, the prosecution called the complainant, Payal Pritika Devi. You exercised your right to remain silent.
- [6] It has been proved beyond reasonable doubt that between the 20 July 2016 and 23 July 2016, at Nausori, you had given \$200.00 to Vineeta Devi with intent to procure the abortion of the complainant.
- [7] As per the Victim Impact Statement tendered to Court by the State it is revealed that the complainant has been emotionally and psychologically affected as a result of the abortion performed on her.
- [8] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [9] In terms of Section 234 (1) of the Crimes Act, “A person commits an indictable offence if he or she unlawfully performs an abortion”. The offence carries a maximum penalty of 14 years imprisonment.
- [10] Sections 234 (2), (3) and (4) are re-produced below:

(2) The performance of an abortion by a medical practitioner is not unlawful for the purposes of this section if —

(a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and

(b) the pregnancy is the result of sexual intercourse between—

(i) a parent and child; or

(ii) a brother and sister (whether of the whole blood or half-blood); or

(iii) a grandparent and grandchild; or

(c) the pregnancy is the result of sexual intercourse that constitutes the offence of rape under this Decree.

(3) In this section—

"medical practitioner" means any person lawfully registered under a law of Fiji to practice as a medical practitioner.

(4) A reference in this section to performing an abortion includes a reference to—

(a) attempting to perform an abortion; and

(b) doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant.

[Emphasis is mine].

[11] There is no set or settled tariff for the offence of Abortion contrary to Section 234 of the Crimes Act.

[12] The Court of Appeal in ***Devi v. State*** [1992] 38 FLR 94 (3 June 1992); held:

The Appellant was on the 14 November 1990, sentenced to two years imprisonment on a charge of manslaughter. She had been charged with murder but that charge was reduced to manslaughter and she pleaded guilty to that charge. The crime in respect of which she was charged, was performing an illegal abortion, as a result of which the person on whom the abortion was performed lost her life. It is unnecessary to recount in detail the facts of that particular activity but we have no hesitation in stating that the sentence which was imposed by the learned trial judge was perfectly proper in all the circumstances.

[13] In this case, the Appellant had spent a total of 13 months in custody by the time her appeal against sentence was heard. Considering all the circumstances of the case the Court adjudged her to have been sufficiently punished and varied the sentence to allow her release.

[14] In the case of ***State v. Mudaliar*** [2006] FJHC 47; HAC 15.2005S (17 May 2006); His Lordship Justice A.H.C.T. Gates (as he then was) ordered a sentence of 3 years imprisonment for a specialist obstetrician and gynecologist who carried out an abortion which led to the death of a 20 year old USP undergraduate.

[15] In this case, His Lordship Gates made the following observations:

[1] The Accused has been found guilty after trial of one count of manslaughter contrary to sections 198 and 201 of the Penal Code. The maximum term of imprisonment provided by the Code for such an offence is one of life.

[2] A 20 year old USP undergraduate consulted the Accused, who is a specialist obstetrician and gynecologist in private practice, seeking an abortion. The Accused agreed to do it and charged \$950.

[3] The student was already 20 weeks into her term of pregnancy. At that term the procedure for abortion presents a greater risk than for a person who is 13 weeks or less into her pregnancy.

[4] Unfortunately the operation performed in the Accused's surgery was not performed successfully. In the process the uterus was torn. This injury damaged the blood supply and led to massive bleeding. The bleeding caused shock from which the patient died.

[5] The first basis to be considered for the sentence is that an unlawful act had been carried out on the patient, namely the abortion, which act was a serious offence in itself. The patient's life was not in danger prior to the abortion. This was not a case where such a medical procedure was necessary or justified. Nor did the Accused maintain that it was. He denied having carried out such an act.

[6] The second basis for sentence is the allegation of gross negligence in not treating his patient, once she was seriously ill and in peril, with sufficient regard for her health and safety. This comprised the failure to remove her to the intensive care unit at the CWM Hospital, the abandonment of her unattended in the locked surgery overnight whilst in this state, and the unprofessional manner in which she was handled. This included the complete absence of history, notes, and records, which would be required by a receiving hospital upon emergency removal.

[16] However, this conviction and sentence was later set aside by the Supreme Court and a re-trial was ordered [**Mudaliar v State** [2008] FJSC 25; CAV0001.2007 (17 October 2008)].

[17] In **State v. Sivoinatoto** [2014] FJHC 208; HAC207.2011 (27 March 2014); His Lordship Justice Sudharshana De Silva sentenced the accused to 2 years imprisonment consequent to him pleading guilty to the offence of Abortion contrary to Section 234 (1) and 4 (b) of the Crimes Act.

[18] The brief summary of facts of the said case are as follows:

Sometimes in March 2011, the complainant (MN) was not having her menses. At the time, she was staying with the accused (Mr Oteti Sivoinatoto) at Bandila Crescent, Rifle Range in Lautoka. The complainant then told the accused (Mr Oteti Sivoinatoto) sometimes in April 2011 and August 2011 that her menses were not coming and she thought that she was pregnant. The accused then gave the complainant rum which was mixed with milk for the complainant to drink to abort the baby. The complainant drank and nothing happened.

On the following day, the complainant after returning from school, the accused mixed her a strong tea to drink to abort the baby but it was again unsuccessful. On another occasion sometimes in April 2011 and August 2011, the accused gave the complainant two (2) raw eggs to drink to abort the baby.

The matter was reported to the Police and he was charged for Abortion contrary to Section 234 (1) (4) (b) of the Crimes Decree 2009. The accused was then cautioned interviewed by the Police and he admits to giving various things to the complainant to drink in order to abort the baby, but those attempts failed.

[19] Section 6 of the Sentencing and Penalties Act provides the circumstances under which Guideline Judgments may be issued by Courts. The Section reads as follows:

(1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment, or to review a guideline judgment that has already been given.

(2) A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies.

(3) On hearing an appeal from a sentence given by a Magistrate, a judge of the High Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment, or to review a guideline judgment that has already been made under this sub-section.

(4) A guideline judgment given under sub-section (3) shall be taken into account by all Magistrates when sentencing offenders for offences to which the guideline judgment applies.

[20] Therefore, although there is no set tariff for the offence of Abortion contrary to Section 234 of the Crimes Act, in my opinion, this is not an appropriate case for this Court to issue a guideline judgment or to set a tariff for the offence of Abortion.

[21] Ashish Prasad, the offence you have been found guilty and convicted for is a serious offence. You admit to being in a de-facto relationship with the complainant, Payal Pritika Devi, who was 22 years of age at the time. You were a married man. After having impregnated the complainant, you wanted her to abort the baby. Thus, you had given \$200.00 to Vineeta Devi (The First Accused) with the intention to procure the abortion of the complainant. At the time this abortion was carried out on the complainant she was over 2 months pregnant. Vineeta Devi was not even a medically qualified practitioner nor a certified mid-wife. However, she had illegally carried out an abortion on the complainant.

[22] The aggravating factors in this case are the following:

- (i) You were in a de-facto relationship with the complainant at the time of the offending.
- (ii) Being in a de-facto relationship with the complainant you should have protected her. Instead you have breached the trust expected from you and the breach was serious.
- (iii) Impact of the offence on the victim. Although, I concede that the prosecution has not led any evidence to establish that the complainant in fact miscarried, the complainant testified that she suffered serious pain and distress as a result of the acts performed on her by the First Accused.
- (iv) In the opinion of Court, the acts of the accused to procure the abortion on the complainant were premeditated.

[23] In mitigation you have submitted as follows:

- (i) That you are said to be of recent good character. There is one previous conviction recorded against you for disorderly behaviour, which was imposed on 6 February 1995. Thus you have been of good character for over 20 years.
- (ii) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.

(iii) You have sought forgiveness from this Court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.

[24] Taking into consideration all factors of this case, including the maximum penalty prescribed for the offence (14 years imprisonment), the nature and gravity of the offence, your culpability and degree of responsibility for the offence, the impact of the offence on the complainant, and the aggravating and mitigating factors stated above, I sentence you to 3 years imprisonment for Count Two.

[25] The next issue for consideration is whether your sentence should be suspended.

[26] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[27] Ashish Prasad, you are now 48 years of age. You are married and have a son who is 7 years of age. You are said to be owning a business known as Auto Line Motor Spares and food canteen in Nalele, Taveuni. You are said to be the sole breadwinner of your family. You are also said to have leased a land to do yaqona plantation.

[28] You are a person of recent good character. You have fully cooperated with the Police in this matter. You have sought forgiveness from this Court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions. You submit that being charged with this offence has tarnished your name in the community. However, this has also taught you a bitter lesson. You have promised that you would lead a crime free life if you are granted a second chance by way of a non-custodial sentence.

[29] Furthermore, you have agreed to pay compensation to the complainant for any expenses she may have incurred.

[30] You have been in remand custody for this case since 3 July 2019, the date on which this Court delivered its Judgment.

[31] Accordingly, it is my opinion that the chances for your rehabilitation is high. Therefore, considering all the facts and circumstances of this case, I deem it appropriate to suspend your sentence. However, to deter other persons from committing offences of the same or similar nature, and also to protect the community, I suspend your sentence for a period of 7 years. You will be explained the consequences that may follow if you commit another offence punishable by imprisonment during the operational period of this suspended sentence.

[32] In the result, your final sentence would be 3 years imprisonment, which term of imprisonment is suspended for a period of 7 years.

[33] In addition to the above, in terms of the provisions of Section 51 of the Sentencing and Penalties Act, you are ordered to pay compensation to the complainant in this case, Payal Pritika Devi, in the sum of FJ\$1,500.00. This fine is to be paid at the High Court Registry in Suva, on or before 20 September 2019. If you fail to pay the said compensation prior to 20 September 2019, it will be recovered from you as a fine. In default of the payment of fine, you will have to serve a term of imprisonment of 150 days.

[34] You have 30 days to appeal to the Court of Appeal if you so wish.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 18th Day of July 2018

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Messrs MYLAW, Barristers & Solicitors, Suva.**