

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 143 of 2017

STATE

V

MOTUISELA TAWAKE

Counsel : Ms. P. Lata for the State.
: Ms. L. Volau for the Accused.

Dates of Hearing : 18, 19 and 20 November, 2020
Closing Speeches : 23 November, 2020
Date of Summing Up : 23 November, 2020
Date of Judgment : 27 November, 2020
Date of Sentence : 15 December, 2020

SENTENCE

(The name of the victim is suppressed he will be referred to as "PS").

1. In a judgment delivered on 27th November, 2020 this court found the accused guilty and convicted him for one count of assault with intent to commit rape, one count of indecent assault and one count of rape.

2. The brief facts were as follows:

On 9th July, 2017 the victim was drinking alcohol with the accused and a few others at various places in Nadi. The drinking ended the next day near Sikituru Village, by this time the others had left. The accused told the victim he will take him to the place where the others were drinking when they were approaching a cassava patch the accused told the victim that he wanted to have anal intercourse with the victim. When the victim refused, the accused threatened him and punched him three times on his face which made the victim fall.

3. After the victim had fallen the accused lifted the victim's legs, put them on his shoulders and after removing the victim's underwear inserted his penis into the victim's anus.
4. The accused did this repeatedly, the victim felt pain he wanted to shout but the accused was biting his lips and threatened to kill him if he shouted. At this time, the accused also bit the victim's neck and chest as well.
5. The accused stopped when he ejaculated, when the accused was penetrating his penis into the anus of the victim he felt pain, was injured and also his stool came out.
6. The matter was reported to the police, the victim was medically examined which revealed that there were lacerations on the anal area of the victim and brutal bite marks were seen on the victim's body.
7. Both counsel filed their sentence submissions including the victim impact statement and mitigation for which this court is grateful.
8. The following personal details and mitigation have been submitted by the counsel for the accused:
 - a) The accused was 24 years of age at the time of the offending;
 - b) First offender;
 - c) He does farming which contributes to the livelihood of the family;

- d) He assists his parents and his siblings and is also in a defacto relationship;
 - e) Apologizes to the victim and the court;
 - f) He regrets what he has done;
 - g) Seeks the mercy and leniency of the court.
9. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj -vs.- 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

10. The following aggravating factors are obvious in this case:

a) Breach of Trust

The victim and the accused had met during a grog drinking session and then they started drinking alcohol together basically becoming an acquaintance. The accused breached the trust of the victim when he told the victim he will take him to the place where the others were drinking but on the way committed the offences.

b) Victim was alone and vulnerable

The victim was alone, vulnerable, and helpless after the three punches and became weak after what the accused had done. The accused took advantage of the victim's situation.

c) Victim Impact Statement

In the victim impact statement the victim states that after the incidents he has become short tempered, wishes to be alone and tends to isolate himself from people. His university studies were affected as a result.

TARIFF



11. The maximum penalty for the offence of rape is life imprisonment and the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.
12. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”
13. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment. The maximum penalty for the offence of assault with intent to commit rape is 10 years imprisonment. The accepted tariff for this offence is 1 year to 4 years imprisonment (*Jone Tabaka vs. State, Criminal Appeal No. HAA 05 of 2013*)
14. 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.”

15. I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for all the three offences.
16. Bearing in mind the seriousness of the offences committed I take 8 years imprisonment (lower range of the scale) as the starting point of your aggregate sentence. I add 5 years for the aggravating factors, bringing an interim total of 13 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, I find your good character has substantive mitigating value. I therefore reduce the sentence by 1 year. The aggregate sentence now is 12 years imprisonment.
17. I note the accused has been in remand for about 2 months and 20 days the sentence is further reduced in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served.
18. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of assault with intent to commit rape, one count of indecent assault and one count of rape is 11 years and 9 months and 10 days imprisonment.
19. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim 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.
20. Under section 18 (1) of the Sentencing and Penalties Act, I impose 9 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 which is just in the circumstances of this case.

21. Mr. Tawake you have committed serious offences against the victim who you had met some hours before what you did to him. The victim trusted you in that he was drinking with you after the others left. I am sure it will be difficult for the victim to forget what you had done to him. Your actions towards the victim were deplorable and selfish. This court will be failing in its duty if a long term deterrent custodial sentence was not imposed. The victim was alone and vulnerable and you took advantage of this. According to the victim impact statement the victim is emotionally and psychologically affected after the incident.
22. I am satisfied that the term of 11 years and 9 months and 10 days imprisonment 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 offence.
23. In summary I pass an aggregate sentence of 11 years and 9 months and 10 days imprisonment for the one count of assault with intent to commit rape, one count of indecent assault and one count of rape that the accused have been convicted of with a non-parole period of 9 years to be served before the accused is eligible for parole.
24. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
15th December 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.