

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 166 of 2017

STATE

V

KAMAL KAPOOR

Counsel : Mr. A. Kumar with Mr. S. Seruvatu for the State.
: Mr. M. Yunus with Ms. S. Shafique for the Accused.

Dates of Hearing : 18, 19, 22 and 23 June, 2020
Closing Speeches : 24 June, 2020
Date of Summing Up : 25 June, 2020
Date of Judgment : 26 June, 2020
Date of Sentence : 08 July, 2020

SENTENCE

(The name of the victim is suppressed she will be referred to as "A.N")

1. In a judgment delivered on 26 June, 2020 this court found the accused guilty and convicted him for one count of rape as per the following information:

Statement of Offence

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

Particulars of Offence

KAMAL KAPOOR, on the 13th day of July, 2017 at Yalalevu, Ba in the Western Division, penetrated the mouth of “**A.N**” with his penis, without the said “**A.N’s**” consent.

2. The brief facts were as follows:

On 13 July, 2017 the victim who was a Cleaner at the construction site of the new hospital in Ba was called by the accused to come and clean his office during the lunch hour.

3. When the victim was in the office of the accused she was told to clean the tables, as she turned around the accused locked the office door.
4. At this time the accused asked the victim to have sex with him when she refused he then told the victim to suck his penis, at this time he pushed his pants down and told her to suck his penis. When the victim refused he forcefully pushed her down from her head and then forcefully pushed his penis inside her mouth.
5. The accused also told the victim that if she did not suck his penis he will terminate her from her employment. The accused was forceful in what he was doing the victim tried to struggle with him but she couldn't. The accused also ejaculated inside her mouth. The victim tried to close her mouth but couldn't since the accused was forcefully penetrating her mouth.
6. The victim did not consent to what the accused had done to her. After covering her mouth with a tissue paper the victim left the accused office and went to her room.

7. The victim was crying, she told her friends about what the accused had done to her, on the same day the matter was reported to the police.
8. Both counsel filed sentence submissions including the victim impact statement and mitigation for which this court is grateful.
9. The counsel for the accused provided the following personal details and mitigation on behalf of the accused:
 - a) The accused is 50 years of age;
 - b) First offender;
 - c) Married with one child;
 - d) Project Officer for Ministry of Health and Medical Services;
 - e) Sole bread winner of the family;
 - f) Supports elderly parents who are 80 and 70 years respectively;
 - g) No physical violence was used on the victim;
 - h) Seeks the leniency of the court.
10. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs. the State, CAV 0003 of 2014* that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

11. The following aggravating factors are obvious:
 - a) Breach of Trust
The victim was a cleaner at the construction site where the accused was a senior officer as a representative of the Ministry of Health and Medical Services. The victim had gone to the office of the accused

upon his request and had trusted him. The accused breached the trust of the victim by what he had done to her.

b) Victim was alone and vulnerable

The accused had locked the door of the office after the victim was inside, she was alone and vulnerable. The accused was undeterred and bold he used force to overpower the victim.

c) Planning

There is some degree of planning by the accused. He called the victim into his office on the pretext that there was some cleaning to be done during lunch hour. As she turned away he locked the door closing the victim's escape route. The accused had used lunch hour to his advantage when all the workers were on their lunch break.

d) Victim Impact Statement

In the victim impact statement the victim mentions that she is fearful of the accused she still gets flashbacks of what had happened to her. The victim was already having problems with her in laws and this incident aggravated the situation whereby she had to leave her matrimonial home. The victim now fears joining the workforce. After the victim reported the matter to the police she was terminated from her employment.

12. The maximum penalty for the offence of rape is life imprisonment the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.

13. 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.”

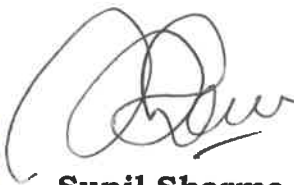
14. Bearing in mind the objective seriousness of the offence committed I take 7 years imprisonment (lower end of the tariff) as the starting point of the sentence. I add 5 years for the aggravating factors, bringing an interim total of 12 years imprisonment. Although the personal circumstances and family background of the accused has little mitigatory value, however, I accept his good character has substantive mitigating value. I further reduce the sentence by 1 year for mitigation. The sentence is now 11 years imprisonment.
15. I note the accused has been in remand for about 12 days. I exercise my discretion to further reduce the sentence for the remand period by 15 days in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence of imprisonment is 10 years 11 months and 15 days.
16. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence 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.

17. Under section 18 (1) of the Sentencing and Penalties Act (as amended), 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.
18. Rape not only affects the integrity of a victim, but violates the human dignity, leaving lifelong scars of psychological devastation bringing about a sense of self blame and hopelessness which does not heal easily even long after the physical injuries have healed.
19. Mr. Kapoor you have committed a serious offence against the victim. I am sure it will be difficult for her to forget what you had done to her. You have not only brought shame to yourself, but also to your family, your actions can best be described as selfish and lustful, for your personal gratification you had no regard for the victim. You cannot be forgiven for what you have done to the victim.
20. In your mitigation at paragraph 18 it is stated:

“The accused further submits that he shall not seek remorse, since he knows that the acts were consensual, however, he pleads for leniency of this court whilst sentencing him.”
21. It is unfortunate that the accused has embarked into making such incongruous comments knowing very well that the court has already convicted him. It is the duty of counsel to file submissions in court that are appropriate in its contents. In any event the comments made shall not be taken against the accused. It should also be noted that any remorse is a matter for an individual to express which will be assessed for its genuineness or otherwise. It is not for an accused to seek remorse from the court but to express it to the court.

22. During the hearing I noticed that you were smiling when your counsel was vigorously cross examining the victim which did not suggest any regret or remorse on your part.
23. This court will be failing in its duty if a long term deterrent custodial sentence was not imposed. The victim was known to you and you had made arrangements for her employment at the site she obliged to your request to clean your office during her lunch hour, she was alone and vulnerable and you took advantage of this. According to the victim impact statement the victim continues to be emotionally and psychologically affected by the incident.
24. In summary, I pass a sentence of 10 years 11 months and 15 days imprisonment for one count of rape the accused has been convicted with a non-parole period of 9 years to be served before he is eligible for parole.
25. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka
08 July, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. M.Y. Law, Ba for the Accused.