

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

High Court Criminal Case No. HAC 28 of 2020

BETWEEN : STATE

AND : KEVUELI DELAI

Counsel : Ms Kimberly S. Semisi for the State
Ms Lavinia David for the Accused

Date of Hearing : 26, 27 & 28 October 2021

Closing Submissions: 01 November 2021

Date of Judgment : 08 November 2021

Date of Sentence : 23 November 2021

(The name of the complainant is suppressed and will be referred to as "MF")

SENTENCE

1. You, Kevueli Delai are to be sentenced upon being convicted for attempted rape contrary to Section 208 of the Crimes Act. You were originally indicted for Rape contrary to Section 207(1) and (2)(a) of the Crimes Act 2009.
2. However, at the end of the trial you were found not guilty to the offence of Rape and were convicted for attempted rape pursuant to Section 162(1) of the Criminal Procedure Act.

3. According to the evidence adduced at the trial, you were known to the Complainant, MF as a close neighbour for a considerable period of time. The Complainant stated in Court that she used to treat you like a brother. The Complainant is now 24 years old and you are 25 years old. During early hours of 01 January 2020, the Complainant was drinking alcohol with her husband and some other friends. Later you too joined them, and all of you drank alcohol from time to time leading up to lunch time. Having consumed a considerable amount of alcohol, the Complainant fell into sleep while having lunch at one of the neighbour's house. Once everyone left that house after lunch, the Complainant was sleeping in one of the rooms. After a while you returned and gained access through the main door without anyone's knowledge. The other two occupants of that house were having a shower in the bathroom. You went to the room where the Complainant was still sleeping. You removed her pants and the underwear. You climbed on top of her and positioned yourself in between the Complainant's legs whilst she was still asleep. When you were trying to erect your penis to have sexual intercourse, the Complainant's husband came looking for her. He saw through the louvres of the room that you were on top of someone, but he did not see the face of that person. When he found out that the Complainant was still sleeping in that room, he entered the room. By that time, you had put on your pants and was standing beside the door of that room. The Complainant woke up when her husband started assaulting her. You left the room. According to her evidence she did not have a clue about what took place. Although you were originally charged for rape this Court decided that penetration was not established beyond reasonable doubt and therefore you were convicted for attempted rape.

4. In a very opportunistic, but also in a predatory manner, you set upon her exploiting the Complainant's vulnerability being in a deep sleep and possibly suffering the effects of intoxication. You must have known that she was not in a state to consent to any form of sexual activity. The Complainant trusted you

as a brother. You were also her neighbour and she was your friend's wife. You exhibited gross breach of trust by committing this offence. I have also considered the victim impact statement tendered by the State. It clearly shows the extent of emotional and psychological impact on her as a result of this incident. These factors necessarily aggravate your offending.

5. Your counsel filed mitigation submissions on your behalf. You are 24 years. However, when you gave evidence you said you are 25 years. It was informed that you have two children and at times you support them when you have financial ability to do so. Also, it was informed that you support your mother too. However, I am not inclined to consider your personal circumstances as compelling mitigating factors in a case of this nature.
6. It was submitted that you are a first offender. However, it would be pertinent to note the following remarks in *State v Tilalevu* [2010] FJHC 258; HAC081.2010 (20 July 2010) by justice Nawana;

“ I might add that the imposition of suspended terms on first offenders would infect the society with a situation - which I propose to invent as '*First Offender Syndrome*' - where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule.”

7. I am of the opinion that in sexual offences being a first offender should not entail imposition of a non-custodial sentence. In this case you will only be entitled to a reasonable discount on your sentence for your previous good character.

8. While rape and attempted rape are two distinct offences according to the law, it is not an overstatement to note that they are equally serious in terms of harm caused to a victim. Any kind of sexual violation, may it be an attempt or otherwise demands firm and deterrent punishments. The maximum punishment for attempted rape is 10 years imprisonment. Under the old Penal Code it was 7 years imprisonment and in *Aunima v The State* [2001] FJHC 105; HAC0033J.2001s (27 June 2001) it was stated that the applicable tariff for the offence of attempted rape, as twelve months imprisonment to five years imprisonment. In that case Justice Shameem remarked;

“Applying all these principles, I find that the accepted tariff for Attempted Rape in the Fiji Courts ranges from 12 months imprisonment to 5 years imprisonment. A starting point should then be chosen according to the seriousness of the offending.

9. Although in the Crimes Act the sentence for attempted rape is increased to ten years imprisonment it appears that the Courts in Fiji have continued to adopt the same tariff of 12 months to 5 years. Therefore, I decide to use the same tariff in this case as well.

10. The need to deter others who might be minded to commit sexual offences on women is strong, given the rising numbers of sexual offences in Fiji. I have to be mindful of all the relevant sentencing considerations, including just punishment, general and specific deterrence, the gravity of the offence and your culpability. Further I have given due consideration to the purposes of sentencing set out in Section 4 of the Sentencing and Penalties Act.

11. In view of the above-mentioned factors, I am of the view that it would be just in all circumstances to impose a sentence of 4 years imprisonment on you.

12. You are still at young age. Having considered the prospects of rehabilitation I decide to set a non-parole period of 2 years.

13. You have been in remand custody for approximately 3 months. Pursuant to Section 24 of the Sentencing and Penalties Act the time you spent in remand custody has to be regarded as a period that you have already served.

14. Therefore, you should serve a term of 3 years and 9 months imprisonment and the non-parole period is also adjusted to be 1 year and 9 months.

30 days to appeal to the Court of Appeal.



At Suva

23 November 2021

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission