

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 196 of 2019

STATE

V

MALELI NAIBE

Counsel	:	Mr. A. Kumar and Ms. L. Latu for the State.
	:	Ms. A. Bilivalu for the Accused.
Dates of Hearing	:	25 and 26 January, 2021
Closing Speeches	:	27 January, 2021
Date of Summing Up	:	27 January, 2021
Date of Judgment	:	28 January, 2021
Date of Sentence	:	11 February, 2021

SENTENCE

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

1. In a judgment delivered on 28th January, 2021 this court acquitted the accused for the offence of rape but convicted him for the lesser offence of sexual assault.

2. The brief facts were as follows:

On Friday 25th October, 2019 the victim who was 16 years of age went to her home in Ba to spend her weekend. When she arrived home from Suva she saw the accused for the first time who was staying with her family. At about 11pm the victim and her family went to sleep.

3. At around 4 am when the victim was sleeping she felt someone was touching her vagina in a rough manner, she woke up when she felt pain. At this time the victim screamed by saying “oye”.

4. After the victim screamed she turned and looked up and recognized the accused from the light outside the house. The victim was shocked when she saw this, however, the accused continued to have his hand inside her undergarments.

5. As a result of what had happened the victim jumped on her sleeping mother, when her mother woke up she told her mother the accused had touched her private part.

6. The victim did not consent to what the accused had done to her since she would never allow anyone to touch her body. In the morning the matter was reported to the police the accused was arrested and charged.

7. Both counsel filed sentence and mitigation submissions for which this court is grateful.

8. The learned counsel for the accused provided the following personal details and mitigation on behalf of the accused:

a) The accused is a first offender;

- b) He was 52 years at the time of the offending;
- c) He is single, was a labourer;
- d) Cooperated with police;
- e) Promises not to reoffend.

9. 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

10. The following aggravating factors are obvious:

a) Breach of Trust

The accused was staying at the house of the victim who was like a family member, he grossly breached the trust of the victim and her family by what he did to the victim.

b) Victim was supposed to be safe

Since it was the victim's house the victim was expected to be safe and secure but this was not to be.

c) Planning

There is some degree of planning by the accused he knew the victim was fast asleep and he did what he wanted to do.

d) Victim was unsuspecting and vulnerable


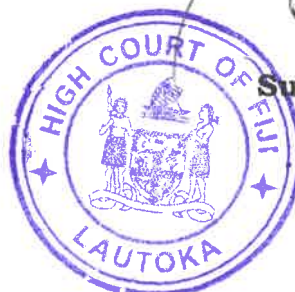
The victim was unsuspecting and vulnerable the accused took advantage of this.

TARIFF

11. The maximum penalty for the offence of sexual assault is 10 years imprisonment the tariff is a sentence between 2 years to 8 years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks (see *State vs. Laca, HAC 252 of 2011 (14 November, 2012)*).
12. Bearing in mind the objective seriousness of the offence committed I take 3 years imprisonment (lower range of the scale) as the starting point of the sentence. I add 3 ½ years for the aggravating factors bringing the interim total to 6 ½ years imprisonment. The personal circumstances and family background of the accused has little mitigating value in cases of sexual nature. However, the accused comes to court as a person of good character without any previous conviction.
13. In view of the above, the accused receives a discount for good character as well as for other mitigating factors, the sentence is reduced by 2 years. The interim sentence now stands at 4 ½ years imprisonment.
14. I note from the court file that the accused has been remanded for 1 year 3 months and 13 days in accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence as a period of sentence already served.
15. The final sentence of imprisonment is now 3 years 2 months and 17 days.
- 16.. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 16 years of age 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 2 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. Mr. Naibe you have committed a serious offence against the victim whose family had accommodated you in their house. I am sure it will be difficult for the victim to forget what you had done to her. You are a selfish person who does not deserve any mercy from this court this is not the way to repay for the kindness of a family who trusted you.
19. In summary, I pass a sentence of 3 years 2 months and 17 days imprisonment for one count of sexual assault with a non-parole period of 2 years to be served before the accused is eligible for parole.
20. 30 days to appeal to the Court of Appeal.


**Sunil Sharma**
Judge

At Lautoka

11 February, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.