

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 324 of 2020

STATE

vs.

MOSESE NAULU

Counsel: Ms. J. Fatiaki for the State
Ms. T. Kean for the Accused

Date of Hearing: 16th to 18th May 2022

Date of Closing Submission: 18th May 2022

Date of Judgment: 20th May 2022

Date of Sentence/Mitigation Submission: 24th May 2022

Date of Sentence: 26th May 2022

SENTENCE

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

Introduction

1. Mosese Naulu, you have been found guilty and stand convicted for two offences of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, 2009 which carries a maximum sentence of 10 years imprisonment. First being for licking P.T's vulva on the 10th October 2020 and the second for touching the breasts of P.T on the 11th October 2020.

Circumstances of the offending

2. As for the said offences of Sexual Assault, the occasion on which you licked P.T's vulva on 10th of October 2020 and you touched her breasts on the 11th of October you were 39 years and the girl was 16 years of age. On the 10th night you went to Michael's house and joined the drinking party where P.T your step-niece was also drinking. P.T, was soon drunk, intoxicated and knocked out. Then you removed her trousers and panty and licked her private parts despite the protest by Michael and Richy. You were thus not able to fully satisfy and achieve your lustful desires that night. The following morning around 6 a.m., shortly thereafter P.T went to her cousin Ana's house to sleep and you throwing all decency to the woods go into this room, then approaching the girl in solitude, touched her breast and over her trousers. When she resisted you said to her, '*I will eat your vagina once again in the night*'. This clearly shows and establishes that you had certainly entertained a great sexual desire over this young niece of yours and was of the mind to pursue whether she liked it or not.

Sentencing regime

3. In the case of **State v Laca** - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012) Justice Paul Madigan considering the tariff for the offence of sexual assault stated thus,

*"6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in **Abdul Kaiyum** HAC 160 of 2010 that the range of sentences should be between two to eight 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.*

7. A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

- (i) *Contact between the naked genitalia of the offender and another part of the victim's body;*
- (ii) *Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;*
- (iii) *Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.*

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)".

4. The maximum penalty for the offence of sexual assault under Section 210 (1) (a) is ten years imprisonment. As the law stands now the tariff for sexual assault is between 2 - 8 years' imprisonment and Count No. 1 licking of the vulva will be category 1 and count No 2 offending of touching the breast over the clothes will be in the bottom range category 3.

Aggregate sentence of imprisonment

5. Section 17 of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), reads thus;

"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."

6. The offences of sexual assault for which you have been convicted are offences founded on the same facts and are of similar character. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence for both offences.

Objective seriousness, capability and harm of the offending

7. This is a case of sexual exploitation of an adolescent child by a known elder from her own family and neighbourhood. You were in a position of trust. The culture and the rich traditions of the Fijian society does expects you to protect young children in the community and the elders enjoy the respect and of the children in the community. You taking advantage of this rich culture sexually exploited P.T the victim. Sexual exploitation of children within their own family and the neighbourhood by known elders has become quite a social menace as I see. You take advantage of her state of intoxication on the 10th night and lick her vulva in the presence and seeing of two others. Therefore, I find this offending is serious.
8. Sexual assault is an unwelcome physical invasion committed on the victim under a certain coercive circumstance. Therefore, the degree of invasion of the victim's bodily integrity and sexual autonomy is an indispensable factor in determining the gravity and impact of the crime on the victim. The degree of invasion should be ascertained based on the level of harm and culpability.
9. The victim impact report states that this crime has adversely affected the Complainant emotionally and psychologically. According to the Victim Impact Report, the victim states that his incident has affected her relationship with others such as her family and friends especially the relationship between her aunty Lusiana who is now not talking to her and it hurts a embarrass to face her in town. The parents of her friends won't allow them to hang around with her and they don't talk much they ignore her when they see her in town, at home or walking on the street. She states that she does not mingle well with my two half-sister's Sera and Talei don't talk much and they always talk about bad stories about her to family cousin's and their friends about the incident and her past. Further needs a friend to accompany her.
10. Hence this crime has caused mental and psychological trauma and affected her self-confidence. Thus, the level of harm of this offence is significantly high. I also observe that at page 7 of the Victim impact Assessment Report the victim has addressed a letter to the Accused which is relevant in considering the psychological effect on her.

11. In view of the serious nature and the prevalence of crimes of this nature, the primary purpose of this sentence is founded on the principle of deterrence. It is the responsibility of this Court to deter offenders or other persons from committing offences of the same or similar nature and protect the community especially the children from offenders of this nature. A harsh and long custodial sentence is inevitable for offences of this nature to demonstrate the gravity of the offence and reflect that civilised society denounces such crimes without any reservation.

The aggravating circumstances

12. (i) You, acknowledged that your role was one of step uncle to an adolescent child *vis-à-vis* the victim and now it is proved that you sexually assaulted her twice. You occupied a position of power and trust in relation to your step-niece. Such a position of power over the other who is an adolescent child renders such sexual activity morally wrong and punishable within the realms of the criminal law. P.T was vulnerable to your seniority in age and the familial standing due to your affinity with her aunt Luciana who is her father's sister. You were in a position of trust. The culture and the rich traditions of the Fijian society expects you to protect the children in the community and the elders enjoy the respect and veneration of the young. You taking advantage of this rich culture sexually exploited P.T an adolescent child. As echoed in many a Judicial pronouncement, sexual exploitation of children within their own home by known elders has become a social menace. Therefore, I find this offending is a serious crime as you have exploited the position of power which you held over her. The second act of sexual assault is committed in the safety of aunts home so to say, by a person from whom she was entitled to expect protection. You have violated and abused that position of trust which the complainant and her mother placed in you.

- (ii) There was a considerable disparity in age between you and the complainant. The complainant was 16 years old at the time you committed these offences on her and you were 39 years and so you were 23 year her senior in age. You sexually abused twice and threatened to do so again. Your offending involves some scheming and premeditation. You took advantage of the complainant's vulnerability, helplessness and naivety. You have exposed the mind of an adolescent child to sexual activity and you had no regards as to her

right as a child, her right as a human being and her right to live a happy unmolested and peaceful life. You had caused misery to her family.

The mitigating factors

13. The mitigating factors in your favour are as follows. Mosese, you are now 42 years of age and married with 6 children. You are now unemployed. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances. As per the Antecedent Report filed, it is noted that you have a clear record to your credit with no previous convictions or pending cases. Therefore, Court considers you as a person of previous good character.

Sentence

14. The least possible aggregate sentence I can impose, having regard to the aggravating and mitigating factors of the case, will be as follows. I pick and start with the aggregate sentence of 4 years imprisonment. I add a modest 2 years for the aggravating factors, making the total aggregate sentence 6 years imprisonment. For the mitigating factors I deduct 1 year, leaving a balance of 5 years imprisonment.
15. In view of the reasons discussed above, I impose on you an aggregate sentence five (5) year's imprisonment for the two offences of sexual assault for which you stand convicted.
16. Having considered the seriousness of this crime, the purpose of this sentence, and opportunities for rehabilitation, I find that three (03) year non-parole period would serve the purpose of this sentence. Hence, you are not eligible for parole for three (03) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Head Sentence

17. Accordingly, I sentence you to a period of five (05) years imprisonment being an aggregate sentence for the two offences of sexual assault for which you were found guilty and

convicted. However, you are not entitled to parole for three (03) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

Actual Period of the Sentence

18. You were in arrested for this case on 08th November 2020 and had been in remand until you were granted bail on 16th February 2021. You have been in custody for a period of 100 days which is a few days more than 3 months. In terms of the provisions of Section 24 of the Sentencing and Penalties Act I hold that the said period of 3 months be considered as imprisonment that you have already served.
19. Accordingly, the actual sentencing period of your aggregate sentence is four (04) years and nine (09) months imprisonment with a non-parole period of two (02) years and nine (09) months.
20. Pursuant to section 4 (1) of the Sentencing and Penalties Act 2009, the above sentence is meted out to punish you in a manner that is just in all the circumstances, to protect the community, deter like-minded offenders and to manifest that the court and the community denounce what you did to the 16 years adolescent complainant P.T.
21. The complainant's name is permanently suppressed to protect her privacy.
22. You have thirty (30) days to appeal to the Fiji Court of Appeal if you so desire



At Suva
26th May 2022


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Justice K.M.G.H.Kulatunga

Solicitors
Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the Accused