

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 202 of 2019

STATE

V

SAILOSI JOE TABUALEVU OSBORNE

Counsel : Mr. J. Nasa for the State.
: Mr. K. Maisamoa for the Accused.

Dates of Hearing : 18, 19, 20, 22 July, 2022
Closing Speeches : 22 July, 2022
Date of Judgment : 25 July, 2022
Date of Sentence : 16 August, 2022

SENTENCE

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

1. In a judgment delivered on 25th July, 2022 this court acquitted the accused for one count of rape but found him guilty and convicted him of the lesser offence of sexual assault. The accused was also found guilty and convicted of one count of indecent assault as charged.
2. The brief facts were as follows:

3. The victim (19 years) and the accused (21 years) were flatmates living in a rental two bedroom flat at Nawaka, Nadi with some others. On 28th October, 2019 at about 5.30 pm the victim came home from work since she was tired she went to her bedroom changed her work clothes and went to sleep on a mattress. The door of the bedroom was open, whilst sleeping she felt someone touch her vagina by moving aside her loose shorts and panty this lasted less than a minute. She opened her eyes and saw the accused, by this time he was on top of her.
4. The victim wanted to shout but the accused blocked her mouth with his left hand. She tried to turn but could not because the accused was heavy and strong. At this time, one of the victim's flatmate broke the bedroom door and came in. The accused ran to the corner of the bedroom.
5. The next day at about 6 am the victim went to the sink outside the flat to brush her teeth. After brushing as she was going into the flat the accused touched her buttocks with his hand. The victim screamed and ran inside the house and told her flatmates about what the accused had done.
6. The victim did not consent to what the accused had done on both occasions. The matter was reported to the police the accused was arrested, caution interviewed and charged.
7. The state counsel filed written submissions and victim impact statement whereas the defence counsel filed mitigation and response to the victim impact statement for which this court is grateful.
8. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused is 24 years old;

- b) Is a first offender;
 - c) Married with one child, wife is currently pregnant;
 - d) Is unemployed and looks after their child when his wife goes to work;
 - e) Regrets his actions and is very sorry;
 - f) Seeks forgiveness of the court and 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 (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 are known to each other and they were flatmates. The accused grossly breached the trust of the victim by his actions.

Victim was vulnerable

The victim was vulnerable, unsuspecting and sleeping in her bedroom when the accused entered and took advantage of the situation and sexually abused her.

Victim Impact Statement

In the victim impact statement the victim states that after the incidents she has lost trust in men. She cannot forget what the

accused has done and has been so mentally disturbed that she feels ashamed of herself.

b) Prevalence of offending

There has been a notable increase in sexual offence cases by individuals known to the victim.

c) Safety at the flat

The victim was supposed to be safe in her bedroom but this was not to be due to the actions of the accused.

11. In respect of the victim impact statement the accused is objecting to its admissibility on the grounds that no expert evidence was called to substantiate the harm caused to the victim. There is no need for an expert to be called the contents of the victim impact statement signed by the victim cannot be ignored in light of the evidence given by her. The harm caused to the victim is a direct result of what the accused had done to her (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).

TARIFF

12. The maximum penalty for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epeli Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012)*). At paragraphs 6 to 8 Madigan J. had stated the following:

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).

8. These very sensible categories of offending are adopted by this Court and they provide a very useful guide to sentencing within the tariff of two to eight years.

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 (*Rokota vs. The State, criminal appeal no. HAA 0068 of 2002*).

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 two 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 for the two offences. It is to be noted that for the offence of sexual assault which is serious of the two offences category 2 (ii) of *Laca’s* case (supra) applies.

16. Bearing in mind the objective seriousness of the offences committed I take 2 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, the personal circumstances and family background of the accused has little mitigatory value, however, the accused good character and other mitigation are substantive factors. The sentence is further reduced for mitigation and good character.

17. I note the accused has been in remand for about 1 month and 20 days, in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced as a period of imprisonment already served.
18. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final aggregate sentence of imprisonment for one count of sexual assault and one count of indecent assault is 3 years, 4 months and 10 days.
19. I am satisfied that the term of 3 years, 4 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.
20. 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. Since the final aggregate sentence exceeds 3 years imprisonment this court has no powers to suspend the term of imprisonment.
21. 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.

22. Mr. Osborne you have committed serious offences against the victim who was your flatmate. She trusted you that is why she did not lock the door of her bedroom. I am sure it will be difficult for the victim to forget what you had done. Your actions towards the victim were self-centered, you did not care about her feelings. You only stopped after another flatmate came into the bedroom after breaking the door. The victim was asleep when you entered her bedroom this court will be failing in its duty if a deterrent custodial sentence was not imposed. According to the victim impact statement the victim is emotionally and psychologically affected by the incidents.
23. In summary, I pass an aggregate sentence of 3 years, 4 months and 10 days imprisonment for one count of sexual assault and one count of indecent assault that the accused has been convicted of with a non-parole period of 2 years to be served before he is eligible for parole.
24. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

16 August, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Maisamoa and Associates, Rakiraki for the Accused.