

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 206 of 2021

STATE

vs.

VICTOR HARRY

Counsel: Ms. W. Elo for the State
Ms. N. Ali for Accused

Date of Hearing: 01st May 2023
Date of Closing Submission: 02nd May 2023
Date of Judgment: 03rd May 2023
Date of Sentence/Mitigation Submission: 04th May 2023
Date of Sentence: 05th May 2023

SENTENCE

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

Introduction

1. Mr. Victor Harry, of the two counts preferred, you did plead guilty to count 1, that of Criminal Trespass and you were convicted on your own plea. As for Count No.2 that of Rape, this court after trial found you guilty and convicted you for the alternative

offence of Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act. However, it was as agreed that the sentence for count 1 will await the conclusion of the trial. Accordingly, I will now proceed with sentencing you in respect of counts 1, as well as for the alternative count of sexual assault.

Circumstances of the Offending

2. Mr. Victor Harry you were 21 years old at the time and the complainant MW was 16 years a, Student of Balabala Crescent, Newtown. You were known to each other as neighbours. During the early hours of the 21st March 2021, around 4am you entered the house through the window after removing three louvre blades. Then you walk into MW's room and seeing her on the bed put your hand into the shorts and poke your fingers to her female organ. This you have done without the girl's consent and in the cover of darkness. MW is awakened and screams for help which alerted her father who was sleeping in the living area. You then escaped through the rear door of the house.
3. You are MW's neighbour for a considerable period of time and at the point of this offending she was just a child of 16 years whereas you were a young adult of 21 years. These are the salient facts of this offending.

Sentencing Regime

4. The maximum penalty prescribed for the offence of Criminal Trespass contrary to Section 387 (1) (a) of the Crimes Act is imprisonment for 1 year. The tariff is between 1 to 9 months imprisonment. (vide - **State v Vakadranu**- sentence [2019]FJHC216; HAC276.2016(18 March 2019).
5. As for sexual assault in **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)".

6. 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.

Objective Seriousness, Culpability and Harm of the Offending

7. Sexual abuse of children certainly is a very serious offence and according to the cases transmitted to this court and the statistics made public by the office of the DPP as well as the police for the first quarter of this year I observe that sexual abuse of children is prevalent and there is an alarming increase. In a majority of these cases the perpetrator is a known adult either family or neighbor. As Psychologists have opined time and again, the effect of sexual abuse on children is long lasting, affects their development and the relations with the society and is now a social issue of concern. Children must be protected and it is the duty and obligation of the society and all organs of the state to so protect and to ensure to every child a safe and unmolested childhood and a peaceful life.

8. Sexual assault is a physical invasion committed on the victim under coercive circumstances. Therefore, the degree of invasion of the victim's bodily integrity and sexual autonomy are indispensable factors 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. You have been found guilty of intruding into the bed room of the victim in the early hours violating the privacy and safety of her own home.
10. The Victim Impact Report states that this crime has adversely affected the Complainant emotionally and psychologically. MW says that since she lives in a settlement most of her peers have heard about what Victor did to her and they have been teasing and she felt was very shameful. MW says that she has always been afraid of Victor and his family since they could do something to her when her parents were not at home as they are both working.
11. She also says that as the Accused is her father's relative this offending has affected the interaction with the family and she has not been able to visit her father's relatives due to the fear of possible victimization. She is now ashamed to go around in the village because everybody knows about this incident.
12. Certainly this crime has caused considerable mental and psychological trauma and affected her self-confidence. Thus, the level of harm of this offence is significantly high. It is clear from the victim impact statement that your offending has had a very significant and long-lasting psychological impact on this vulnerable minor child which I am required to take in to consideration in sentencing.
13. 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 civilized societies denounce such crimes without any reservation.

14. **The Aggravating Circumstances**

- (i) There is a breach of trust as a neighbour and now it is proved that you sexually abused her. As neighbour 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 children respect adults. You taking advantage of this rich culture sexually abused MW a child.
- (ii) There was a disparity in age between you and the complainant. The complainant was just 16 years old child at that time and you were an adult of 21 years and you were 5 years senior in age.
- (iii) You sexually abused her in her own home at night,
- (iv) This involved planning, scheming and premeditation.
- (v) You took advantage of the complainant's vulnerability.
- (vi) You had no regard to her rights as a child, a human being and her right to live a happy unmolested and peaceful life.
- (vii) You have caused misery to her family.

15. **The Mitigating Factors**

- (i) You were 21 years then and employed as security officer and the sole breadwinner of the family. Now you are 23 years of age. Unfortunately, these are all personal circumstances which are usually not considered as mitigating circumstances.
- (ii) Though you abused the victim you have not acted in any cruel manner nor resorted to or used extreme force or violence on the victim.
- (iii) You pleaded guilty to one of the charges at the commencement of the trial and admitted entering the house, which indicates some form of remorse and acceptance of your wrong doing to some extent.

16. The Antecedent Report filed, contains one previous conviction on 7/3/2019 for theft. Further, it was admitted that the Accused had a previous conviction for the violation of orders (curfew). Therefore, this Court is unable to consider you as a person of previous good character.

Aggregate Sentence of Imprisonment

17. 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.”

18. The offences of criminal trespass for which you have been convicted upon pleading guilty as well as the offence of sexual assault for which you have been convicted are offences founded on the same facts. In accordance with section 17 of the Sentencing and Penalties Act, I consider it just and appropriate to impose an aggregate sentence having the offence of sexual assault as the base sentence as it is the serious of the two offences.

Sentence

19. The least possible aggregate sentence I can impose, having regard to the aggravating and mitigating factors of the case, will be as follows. Tariff for sexual assault is 2-8 years. The act of the Accused appears to fall within category 2 (iii) of the tariff as stated in **State v Laca**, I pick and start with the aggregate sentence of 5 years imprisonment. I add 2 years for the aggravating factors, making the total aggregate sentence 7 years imprisonment. For all the grounds in mitigation, you should receive a considerable discount in the sentence thus, I deduct 1 year which *inter alia* is also for pleading guilty to count No.1 of criminal trespass and admitting certain facts. I also took into consideration that you are 23 years of age now. This will leave a balance of 6 years imprisonment.

20. In view of the reasons discussed above, I impose on you an aggregate sentence of six (06) year's imprisonment.
21. Having considered the seriousness of this crime, the purpose of this sentence, and opportunities for rehabilitation, I find that a four (04) year non-parole period would serve the purpose of this sentence. Hence, you are not eligible for parole for four (04) years pursuant to Section 18 (1) of the Sentencing and Penalties Act.

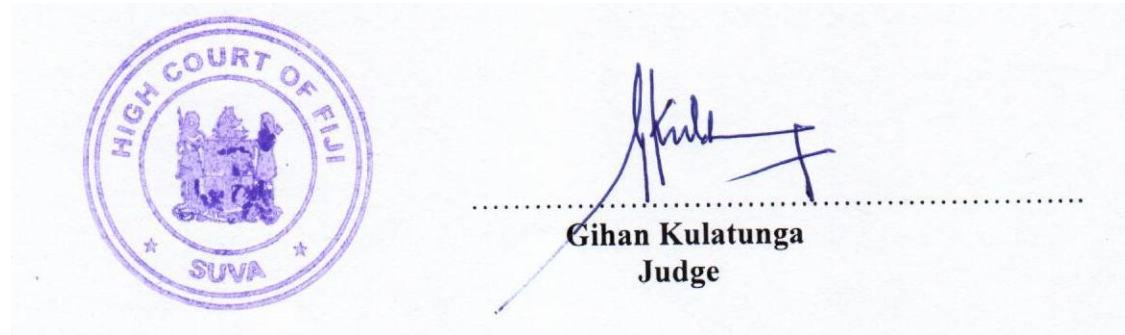
Head Sentence

22. Accordingly, I sentence you to a period of six (06) years imprisonment being an aggregate sentence for the offences of sexual assault and criminal trespass for which you were found guilty and convicted. However, you are not entitled to parole for four (04) years.

Actual Period of the Sentence

23. You were arrested for this case on 09th of July 2021 and granted bail on the 23rd of December 2021 but as he violated bail conditions was denied bail on 1st June 2022 and has been in remand since then for almost 173 days. You have been in custody for a period of almost 6 months. In terms of the provisions of Section 24 of the Sentencing and Penalties Act I hold that the said period of 6 months be considered as imprisonment that you have already served.
24. Accordingly, the actual sentencing period of your aggregate sentence is five (05) years and six (06) months imprisonment with a non-parole period of three (03) years and six (06) months.
25. 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 minor complainant MW.
26. The complainant's name is permanently suppressed to protect her privacy.

27. You have thirty (30) days to appeal to the Fiji Court of Appeal if you so desire.



At Suva

05th May 2023

Solicitors

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