

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO : HAC 137 OF 2019**

**STATE**

**v**

**MOHAMMED TAHIR**

Counsel : Ms. S. Swastika with Mohammed I. Rafiq for Prosecution  
Ms S. Begum for Defence

Date of Sentencing Hearing: 16 May 2023

Date of Sentence: 16 May 2023

**SENTENCE**

1. Mr. Mohammed Tahir, you stand convicted after trial of one count of Sexual Assault contrary to Section 210 (1)(a) of the Crimes Act 2009, and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. In the information you were charged with two counts of Sexual Assault and one count of Rape. However, there was no evidence on the first count thus you are acquitted on count 1. I now proceed to sentence you for count 2 and count 3 for which you are convicted.

2. The facts of the case are that: The victim is an intellectually handicapped person. Because of that impairment, she had to stop schooling at Class 6. You are a mechanic by profession. In 2018, you parked and repaired the vehicles at the backyard of the victim's house. Between January and June 2018, you frequently visited the victim's house in her father's absence. Being a frequent visitor and a neighbor, you had reason to believe that the victim was intellectually handicapped. In one of the incidents, you entered the victim's house when her father was away at work. You pulled her to the bed and took off her clothes. You then forcefully inserted your penis in to her vagina without her consent. You did this when you had reasons to believe that the victim was not consenting. She felt pain in her private part and felt bad. You also bit her on her naked breast. You warned her not to tell what you did to anyone and threatened to assault her. You on several occasions in the said period, repeatedly had sexual intercourse without her consent. She became pregnant as a result of your conduct and gave birth to a child she never expected to have. The child had to be given up for adoption as the victim was incapable of raising her.
  
3. The maximum penalty prescribed for the offence of Sexual Assault is 10 years' imprisonment. The sentencing tariff ranges from 2 to 8 years' imprisonment, the top end being reserved for serious sexual assaults [*State v Epeli Ratabacaca Laca*, HAC 252 of 2011]. In *Laca*, depending on gravity, three (3) categories of sexual assaults were identified:

Category 1

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 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 parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

4. The act of biting the naked breast falls into category 3 above.
5. The maximum sentence for Rape is life imprisonment. The sentencing tariff for adult rape ranges from 7 years to 15 years' imprisonment. The starting point in an adult rape case generally is seven years' imprisonment. However, there are cases where the proper sentence may be substantially higher or substantially lower than that starting point, depending on the particular circumstances of the case [Kasim v State [1994] FJCA 25; Aau0021j.93s (27 May 1994) (State v Marawa [2004] FJHC 338). ].
6. In selecting a sentence that is best suited to you, I must have regard to the proportionality principle enshrined in the Constitution and the Sentencing and Penalties Act 2009 (SPA). I would also have regard to the maximum penalty prescribed for each offence, the current sentencing practice and the applicable guidelines issued by the courts. Having due regard to the seriousness of the offence and harm caused to the victim, I would select the appropriate starting point. The final sentence would be determined after making due adjustments for the aggravating and the mitigating circumstances.
7. Sexual offences are on the rise in Fiji. The courts have emphasised that the increasing prevalence of this offence in our community calls for deterrent sentences. The duty of this Court is to see that the sentences are such as to operate as a powerful deterrent factor to

prevent the commission of such offences. The offenders must receive condign punishment to mark the society's outrage and denunciation against sexual abuse.

8. When the victim is vulnerable due to his or her tender age or intellectual incapacity, she / he must receive special care and protection from the society. The children under the age of 13 years are statutorily protected because they do not have capacity to give consent to sexual activities. Although there is no such special provision to protect the adults with intellectual disability, the legislature has given the courts power to punish people who exploit the vulnerability of such persons. It is easy to say in defence that the victim consented to have sex. However, the people who deal with intellectually handicapped persons must be extremely careful before engaging in sexual activities because they do not have mental capacity to give informed consent to such activities.
9. The main purpose of your punishment is to condemn your action and to protect the public from the commission of such crimes by making it clear to you and to others with similar impulses that, if anyone yield to these crimes will meet with severe punishments.
10. The offending forms a series of offences of a similar character. According to Section 17 of the Sentencing and Penalties Act 2009, 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 has a discretion to impose an aggregate sentence of imprisonment in respect of those offences. This is a fit case to impose an aggregate sentence for both offences.
11. Having taken into consideration the seriousness of the offences and the harm caused to the victim, I select a starting point of 7 years from the bottom range of the tariff for Rape.
12. I have identified the following aggravating and mitigation factors with the help of the submissions filed by the Counsel and the Victim Impact Statement:

Aggravating factors:

- (a). The victim and her father trusted you as their neighbour. She used to call you as Johnny bhaiya. That trust led victim's father to permit you to park your vehicles and repair them at their back yard. The victim was left alone at home because her father trusted you. You have betrayed that trust.
- (b). There is a considerable age gap between you and the victim. You were 46 years old at the time of the offending when the victim was only 29 years old.
- (c). The victim was extremely vulnerable given her poor intellectual capacity. You exploited the vulnerability.
- (d). The trauma caused to the victim scarred rest of her life. As per the Victim Impact Statement, the psychological impact on the victim is enormous and your offence made her life miserable.
- (e). You made the victim pregnant when she never expected to be a mother. Because of victim's condition, her father had to bear an unnecessary burden for six months which eventually forced him to give the child up for adoption.
- (f). You did silence the victim and, by instilling fear in her, you suppressed her right to fight for justice.
- (g). The offence is repetitive with a degree of pre-panning.

Mitigating Factors:

- (a). You are now 51 years of age and a mechanic by profession. In mitigation your counsel has informed me that you are married with four children and the sole breadwinner of the family.
- (b). You have maintained a clear record over the past 51 years of your life. You do not have any previous convictions. You have engaged in community and religious services.

13. I add 3 years and 3 months to the starting point of 7 years for the above mentioned list of aggravating factors to arrive at an interim sentence of 10 years and 3 months'

imprisonment. I reduce 1 year for mitigating factors to arrive at a sentence of 9 years and 3 months' imprisonment.

14. You had been in remand for approximately 3 months. I consider your remand period as part of your sentence already served and deduct 3 months to arrive at a final aggregate sentence of 9 years' imprisonment.

15. Taking into consideration your age, potential for rehabilitation and the gravity and the impact of the offence on the society, I impose a non-parole period of 7 years.

16. Summary

Mr. Mohammed Tahir, you are sentenced to an imprisonment term of Nine (09) Years with a non-parole period of Seven (07) Years.

17. You have 30 days to appeal to the Court of Appeal.



Aruna Aluthge

Judge

16 May 2023

At Lautoka

Counsel:

Solicitors:

Office of the Director of Public Prosecutions for State  
Messrs Zoyab Shafi Mohammed Legal for Defence