

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. HAC 12 of 2022

BETWEEN: THE STATE

AND: APENISA VUNIBOLA

Counsel: Ms. E. Thaggard - for the State
Ms. R. Raj and Mr. I. Rusaqoli - for the Accused

Date of the Trial: 17th August 2023

Date of Sentence: 8th September 2023

SENTENCE

1. The Accused was charged with the following offences on the following Information: -

[COUNT 1]

Statement of Offence

INDECENT ASSAULT: contrary to section 212 (1) of the Crimes Act 2009.

Particulars of Offence

APENISA VUNIBOLA between the 21st day of December 2021 and the 27th day of December 2022 at Vuo village in Labasa in the Northern

Division, unlawfully and indecently assaulted **ALUMECI SERAITABUA** by touching her breasts.

[COUNT 2]

Statement of Offence

INDECENT ASSAULT: contrary to section 212 (1) of the Crimes Act 2009

Particulars of Offence

APENISA VUNIBOLA on an occasion other than that referred to in count 1 between the 21st day of December 2021, to the 27th day of December 2021, at Vuo village, in Labasa in the Northern Division, unlawfully and indecently assaulted **ALUMECI SERAITABUA** by hugging her.

[COUNT 3]

Statement of Offence

RAPE Contrary to section 207 (1) and (2) of the Crimes Act 2009

Particulars of Offence

APENISA VUNIBOLA on the 27th day of December 2021, at Labasa in the Northern Division, penetrated the vulva of **ALUMECI SERAITABUA** a child under 13 years, with his fingers.

2. The Accused was first produced in the High Court on the 17th of February 2022 and on the 6th of July 2022 he entered a not guilty plea to the three counts on the Information.
3. Thereafter the matter was adjourned from time to time for the parties to finalise the Agreed Facts and pretrial conference checklist.
4. The matter was then fixed for Trial from 14th to 18th August 2023

The Trial

5. At the Trial the State called two witnesses, the child victim, and the investigating officer.

6. In her testimony, the victim failed to give any evidence with respect to counts 1 and 2. Her entire evidence was only with respect to count 3 and her testimony confirmed that on the day in question the Accused touched the victim's "mimi" or genital while she lay sleeping inside their home at Vulovi.
7. He touched the top part of her naked genitals and she saw him clearly as it was in the afternoon and her view of him was unobstructed. He only stopped when her mother came into the house and saw what he was doing, and she shouted at him and chased him away. Later the matter was reported to the police.
8. At the end of the State's case, counsel for the Accused made an application for no case to answer with respect to counts 1 and 2 and he also accepted that the evidence of the victim did not support the charge of Rape however it did support the lesser charge of Sexual Assault. In his caution interview, the Accused had admitted to Sexual Assault although he denied the charge of Rape.
9. After accepting the same, the Court made the following orders: -
 - (i) **The State has failed to provide any evidence supporting any of the elements for Counts 1 and 2 on the Information, the charge of Indecent Assault. That being the case, the Accused is acquitted on Counts 1 and 2.**
 - (ii) **The evidence led by the State does not support the charged offence of Rape on the 3rd count, however the evidence supports the lesser offence of Sexual Assault. Applying section 160 (2) of the Criminal Procedure Act, the Accused is convicted of the lesser offence of Sexual Assault.**
10. Time was then given for the Accused to prepare mitigation on his behalf and for the State to prepare sentencing submissions.

Mitigation

11. Counsel offers the following plea in mitigation: -
 - (i) The Accused is 32 years of age.
 - (ii) Prior to being remanded he was a diver, looking after his family and he earned \$300 per week.

- (iii) He is the sole breadwinner in the family, and he has 5 children whom he is financially supporting.
- (iv) His wife is a domestic worker and there is no one to look after the children.
- (v) His 5th child who is below 1 year suffers from a liver problem.
- (vi) He has been remanded from 30/12/21 to 21/02/22 and also from 17/08/23 till 8/9/23.
- (vii) The sentence for the offence of Sexual Assault is a maximum of 10 years imprisonment and the tariff was set by the case of State -v- Abdul Khaiyum HAC 160 of 2010, and State -v- Laca [2012] FJCA 1414.
- (viii) Counsel concedes that there is a breach of trust as the Accused is the stepfather of the victim.
- (ix) The Accused is a first offender and a person of previous good conduct. Counsel submits that as the only recorded offence in his name is for Breach of Bail, for violating his conditions for bail set in this case, he should still be considered as a first offender.
- (x) The Accused is remorseful, and he has accepted responsibility for his actions that day.
- (xi) He has spent time in remand, and he submits that the same should be deducted from his sentence.
- (xii) He respectfully submits that an appropriate sentence would be a minimum term of 4 years, which would be proportionate to the offending in this case.

Sentencing submissions

- 12. The maximum penalty for the offence is 10 years imprisonment.
- 13. The tariff ranges from 2 to 8 years imprisonment as set out in the case of State -v- Epeli Ratabacaca Laca [2012] FJHC 1414; HAC 252/2011 (14th November 2012).
- 14. The State submits the following as aggravating factors: -
 - (a) The victim was 12 years old at the time of the offence and given her young age and innocence, she was especially vulnerable. There is a 17-year age difference between the Accused and the victim.
 - (b) The Accused is the stepfather of the victim, and he was in a position of trust and his actions constituted a severe breach of trust.
 - (c) The actions of the Accused exposed the victim at a young age to sexual acts.
 - (d) The Accused spent a total 27 days in remand.
 - (e) The Accused has one conviction for breach of bail conditions granted in this case.
 - (f) The State submits that a custodial sentence under the current sentencing guidelines will best reflect the culpability of the Accused and the harm caused to the victim.
 - (g) The Court must impose a non-parole period.

(h) The State therefore submits that this Court ought to adopt the tariff set out in the case of State -v- Epeli Ratabacaca Laca [2012] FJHC 1414; HAC 252 of 2011 (14th November 2012).

15. In sentencing you the Court notes that the maximum sentence for this offence is 10 years imprisonment. The tariff for this offence was set out by Justice Madigan in State –v- Khaiyum [2012] FJHC1274, Criminal Case 160 of 2010 (10th August 2012). His Lordship states as follows: -

“[8] The offence of sexual assault has a maximum term of ten years. No tariff has yet been set for this new offence, but given that the summary offence of indecent assault has a maximum penalty of five years with a tariff of one to four years (Ratu Penioni Rakoto HAA 68 of 2002), the tariff for this more serious offence with double the penalty should be in the range of two to eight years.

[9] Any sexual assault which is invasive will be either aggravated sexual assault under Section 210 (2) and 210(3) or it will be rapes, so the most serious sexual assaults *simpliciter* will involve contact with genitalia by hand or mouth, and less serious assaults perhaps a "brushing" of breasts, genitalia or buttocks by hand, when the victim is clothed.”

16. In the case of State v. Epeli Ratabacaca Laca [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.

17. It was held in State v Laca (supra) “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.”

“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).”

- 18. This is a domestic violence offence and in sentencing you the Court is also required to consider the provisions of section 4 (3) of the Sentencing and Penalties Act 2009.
- 19. The victim was very young and vulnerable and treated you as her father. Your actions have shattered her trust in you and your actions have also resulted in ongoing effects on your family who relied on you as the breadwinner.
- 20. Your subsequent actions indicate that you have taken responsibility for your wrongful actions and are being accountable. You made admissions to the police to this offence, although you denied the offence of Rape and once the Court found that Rape was not established you agreed that you committed Sexual Assault.
- 21. In commencing your sentence, the Court finds that the offending in this case falls into Category 2 of sexual offenders, so the Court adopts a starting point of 3 years imprisonment.
- 22. The aggravating factors include the breach of trust and the fact that this offending occurred in a domestic relationship.
- 23. For the aggravating factors above your sentence is enhanced by 1 year.
- 24. The major mitigating factor in this case is the fact that you readily admitted the lesser offence of Sexual Assault after the State failed to establish the offence of Rape.


25. For your guilty plea I deduct 1 year from your sentence, leaving you with an interim sentence of 3 years imprisonment.
26. For this case you have been remanded a total of 27 days, which will be rounded off to one month therefore your final sentence is 35 months' imprisonment.
27. There will be no further deductions from the sentence for previous good behaviour since you have one conviction in your name. It makes no difference that this conviction arose within these proceedings.
28. While the final sentence is under 3 years and may be suspended in the appropriate circumstances, pursuant to section 26 of the Sentencing and Penalties Act.
29. From the circumstances of this case, the Court finds that it is not appropriate to suspend the sentence for the reasons set out at paragraphs 18 and 19 above.

Apenisa Vunibola, this is your sentence: -

1. **On the remaining count on the Information, the lesser offence of Sexual Assault, you are sentenced to 2 years 11 months' (35 months) imprisonment.**
2. **You will serve a non-parole period of 20 months' imprisonment.**
3. **There will be a final Domestic Violence Restraining Order – Standard Non-Molestation Conditions, protecting the victim Alumeci Seraitabua. You are warned that any breach of this Order is a criminal offence and you may be subject to further prosecution for the same.**

30 days to appeal.




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Mr. Justice U. Ratuveli
Acting Puisne Judge

Solicitors:

Office of the Director of Public Prosecution for the State
Officer of the Legal Aid Commission for the Accused