

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 62 of 2022

STATE

V

NIKO RADIVA

Counsel : Mr. M.I. Rafiq for the State.
: Ms. S. Singh for the Accused.

Dates of Hearing : 16, 17 November, 2023
Closing Speeches : 20 November, 2023
Date of Judgment : 20 November, 2023
Date of Sentence : 30 November, 2023

SENTENCE

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

1. In a judgment delivered on 20th November, 2023 this court found the accused guilty and convicted him for one count of rape and one count of sexual assault as charged.
2. The brief summary of facts were as follows:

- a) On 16th April, 2022 at about 5 to 6 am the victim and her defacto partner were sleeping in a corrugated iron house of her brother at Nanuku Settlement, Natabua.
 - b) The accused entered the house and put his hand inside her panty and inserted his finger into her vagina. The accused also sucked the victim's breasts after lifting her top and bra.
 - c) The victim was also dragged from her mattress by the accused and it was only when the accused spoke that she realized it was not her defacto.
 - d) The victim did not consent for the accused to do what he had done to her. The victim recognized the accused and with her defacto partner they gave chase and saw the accused at his aunt's house in the same settlement where he was staying. The incident was immediately reported to the police. The accused was arrested, caution interviewed and charged.
3. The state counsel filed written sentence submissions, victim impact statement and the defence counsel filed mitigation for which this court is grateful.
 4. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused was 20 years of age at the time of the offending;
 - b) First offender;
 - c) Is in a defacto relationship and they have one son;
 - d) Currently his defacto partner is 6 months pregnant;
 - e) Is a Farmer;

- f) Sole breadwinner of the family;
 - g) Seeks forgiveness of the court;
 - h) Prays for leniency.
5. 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

6. The following aggravating factors are obvious in this case:
- a) Breach of Trust
The victim and the accused were from the same settlement and she knew the accused from his primary school days. The accused grossly breached the trust of the victim by what he did to the victim.
 - b) Victim was vulnerable
The victim was vulnerable and sleeping the accused took advantage of this and sexually abused the victim in her brother's house.
 - c) Prevalence of the offending
There has been an increase in sexual offence cases by people known to the victim. The accused was bold and undeterred in what he did.
 - d) Safety of the victim
The victim was supposed to be safe at her brother's house but this was not to be due to the actions of the accused.

e) Victim Impact Statement

According to the victim impact statement the victim has suffered psychological and emotional harm as follows:

- a) Is scared after what happened to her;
- b) Did not feel safe in the settlement;
- c) Had moved to her grandmother's house for a few months;
- d) Frightened to leave her house during night time.

TARIFF

7. The maximum penalty for the offence of rape is life imprisonment and the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.

8. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”

9. 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 and 7 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.

10. 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.”

11. 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.

12. Bearing in mind the objective seriousness of the offences committed I take 7 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, and reduced for mitigation and good character. Although the personal circumstances and family background of the accused has little mitigatory value, however, his good character and other mitigation has substantive value.

13. I also note the accused has been in remand for about 5 months and 2 days, in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 5 months and 5 days as a period of imprisonment already served. The final aggregate sentence of imprisonment for one count of rape and one count of sexual assault is 7 years, 6 months and 25 days imprisonment.
14. 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.
15. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 7 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. This court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
16. This court is satisfied that the term of 7 years, 6 months and 25 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.

17. Mr. Radiva you have committed serious offences against the victim. She was living in the same settlement as you. I am sure it will be difficult for the victim to forget what you had done to her. Due to your lust you did not care about the consequences of your actions.
18. You were bold and undeterred in what you did to the victim. This court will be failing in its duty if a long term deterrent custodial sentence is not imposed.
19. In summary, I pass an aggregate sentence of 7 years, 6 months and 25 days imprisonment for one count of rape and one count of sexual assault the accused has been convicted of with a non-parole period of 7 years to be served before he is eligible for parole.
20. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

30 November, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.