

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. HAC 96 of 2022

BETWEEN: THE STATE

AND: ATIK ASHAD ALI

Counsel: Ms. M. Lomaloma for the State
Ms. R. Raj for the Accused

Date of Conviction: 30th November 2023

Date of Judgment: 16th January 2024

SENTENCE

1. The Court has directed that the victim's name be suppressed, and any identifying information in the public records of this case be removed so that she cannot be identified.
2. The Accused Atik Ashad Ali was charged on the following Information: -

COUNT ONE

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

ATIK ASHAD ALI on the 6th of August 2022 at Labasa Town in the Northern Division, assaulted **AH** by punching the said **AH** causing actual bodily harm

COUNT TWO
Statement of Offence

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

Particulars of Offence

ATIK ASHAD ALI on the 6th of August 2022 at Labasa Town in the Northern Division, had unlawful carnal knowledge of **AH**, without her consent.

3. After a full trial, the Accused was convicted on both counts on the 30th of November 2023. Time was given to the Accused to prepare his Plea in Mitigation and the State was also given time to prepare and file Sentencing Submissions.

Plea in Mitigation

4. In mitigation, counsel offers the following: -
- (i) He is 22 years of age; he is a qualified electrician with plans to pursue his career overseas.
 - (ii) He is single and he resides with his parents and siblings.
 - (iii) His father is a heart patient and sickly.
 - (iv) He is a first offender and is a person of previous good conduct.
 - (v) He was remanded for 8 days.
 - (vi) The maximum penalty for the offence of Rape is life imprisonment and the accepted tariff for the rape of a child, as in this case, is imprisonment between 11-20 years' imprisonment. This was recently laid out in the Supreme Court decision of Aitcheson v. State [2018] FJSC 29; CAVC 12 of 2018 (2 November 2018).
 - (vii) The maximum penalty for the offence of Assault Causing Actual Bodily Harm attracts a maximum sentence of 5 years imprisonment.

State vs Tugalala [2008] FJHC 78; HAC 25S of 2008S (29 April 2008); Her Ladyship Madam Justice N. Shameem said:

"The tariff for this appears to range from an absolute or conditional discharge to 12 months' imprisonment. The High Court said in Elizabeth Joseph v. The State [2004] HAA 030/04S and State v. Revita Alafi [2004] HAA073/04S. that it is the extent of the injury which determines sentence. The use of a pen knife for instance justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. in domestic violence cases, sentences of months' imprisonment have been upheld (Amasai Korovata vs The State [2006] HAA 115/06S)."

- (viii) Counsel further submits that the Accused is a first offender therefore this is a strong mitigating factor in his favour and should merit a considerable discount in his sentence.
- (ix) The Court referred to the following cases as demonstrating sentencing practice in similar cases: -

In the case of State v Simione Ravula, Criminal Case No. HAC 75 of 2021LBS (08/07/22) his Lordship Justice Kulatunga convicted the Accused after trial for three counts of sexual assault and three counts of rape. The Accused sentenced to 12 years 7 months imprisonment with non-parole of 8 years 7 months.

In the case of State v Saddam Fida Hussain: Criminal Case No. HAC 009 0/2016LAB (28 July 2017). His Lordship Justice Temo convicted the Accused after trial for one count of sexual assault and one count of rape. The Accused was sentenced to 9 years imprisonment with a non-parole of 6 years.

In the case of State v Kand Sami Criminal Case No. 63/2014 (20th February 2016) the Accused was convicted of 2 counts of rape where in the first instance the victim was 12 years old and in the second incident 13 years old. His Lordship Justice Madigan sentenced the Accused to 10 years imprisonment for both counts and the sentences were to be served concurrently with each other. His Lordship declined to set a minimum term that the Accused should serve before being eligible for parole, this was due to the Accused's considerable mitigation put forth."

- (x) The Accused therefore respectfully submits that an appropriate sentence should include a non-parole period of 8 years.

Sentencing Submissions

5. The State filed sentencing submissions. The victim in this matter AH was assaulted and raped by her then boyfriend, the Accused on the 6th of August 2022. At the time in questions, the victim was 17 years of age.
6. The Accused was found guilty of both counts on the Information – Assault Causing Actual Bodily Harm contrary to section 275 of the Crimes Act; and Rape contrary to section 207 (1) (2) of the Crimes Act.
7. The State invites the Court to consider section 4 of the Sentencing and Penalties Act 2009 and the principles set out therein.
8. The maximum penalty for the offence of Rape is life imprisonment and for child rape, the tariff ranges from 11 to 20 years imprisonment (Aitcheson vs State [2018] FJSC 29; CAV 0012 of 2008 (2nd November 2008).
9. For the offence of Assault Causing Actual Bodily Harm, the maximum penalty for the offence is 5 years imprisonment. The accepted tariff for the offence ranges from a non-custodial sentence to 9 months imprisonment. If the offence is committed in a domestic setting, then the tariff is from 6 months to 18 months' imprisonment (State vs Tugalala [2008] FJHC 78; HAC 252 of 2008 (29th April 2008) and Amasai Korovata vs The State [2006] HAA 115/2006)
10. The State offers the following as aggravating factors: -
 - (a) Breach of trust and victim's vulnerability. The victim was 17 years old at the time of the offending and she was in a relationship with the Accused at the time and she trusted him. This trust was breached, and the victim was also younger than the Accused and was vulnerable.
 - (b) The victim has submitted the Victim Impact Statement, and she has detailed the impact of the Accused's actions on her at the time of the offending and the ongoing effects of his actions on her now. The Supreme Court has confirmed that a Court may take the contents of the Statement into consideration when determining the term of imprisonment that is to be imposed on the Accused (Sharma vs State [2017] FJSC 5; CAV 031 of 2016 (20th April 2017.)

- (c) The emotional and psychological harm suffered by the victim is significant and ongoing.
11. The State confirms that the Accused was remanded for 8 days, and this period should be deducted from his sentence as time already served.
 12. The Accused is a first offender and is a person of previous good conduct.
 13. The State submits that given the circumstances of the offending in this case, the purpose of sentencing in this case is to be focused on deterrence over rehabilitation. That being the case a non-parole period is appropriate in the circumstances as the Accused has exposed the victim to sexual activities at a younger age, the prevalence of these types of offences and the harm that was inflicted on the victim.
 14. The State therefore recommends an appropriate sentence to reflect the seriousness of the offending in this matter.

Sentencing Remarks

15. Atik. Ashad Ali, you have been found guilty of the two offences on the Information. It has been proven after trial that on the 6th of August 2022, you confronted your then girlfriend, the victim, speaking to another boy at the Labasa Civic Centre. You then took her forcefully to your vehicle and drove off to the riverside near the Labasa Club. Later you drove her to another spot near the Sangam Nursing School.
16. The evidence led at the trial then showed that you confronted her about the boy that she was talking to, and you were very angry. You forced her to give you her phone and unlock it, and when you read the messages there you became angrier, and you moved to the back seat where she was and started hitting her arms and legs.
17. You then forced her to remove her clothes and then you proceeded to remove your clothes as well and you had sexual intercourse with her, without her consent. Her consent was obtained by your violence and threat of violence.
18. The matter was then reported to the Police, and you were subsequently arrested and charged for the two offences and produced at the Labasa Magistrate's Court. Later the

matter was transferred to the High Court, and you were arraigned on the current Information.

19. In sentencing you the Court notes the provisions of the Sentencing and Penalties Act, particularly section 4 and, as this is a domestic violence offence, section 4 (3) is also relevant.
20. The offending lies at the higher end of seriousness for these offences and your personal culpability is high. The Court accepts that the offending was not premeditated, and you were angry that your girlfriend was talking to another boy, however that in no way absolves your actions that day.
21. The major aggravating factor in the offending is the breach of trust and the fact that this is a domestic violence offence. The victim was also compelled to recount her ordeal in Court, and this visibly affected her as she broke down several times on the stand in evidence in chief and also under cross examination.
22. The only mitigating factor in your favour is your previous good conduct as a first offender. The other factors provided by counsel are your personal antecedents and do not mitigate the offending.
23. For the more serious offence of Rape, I take a starting point of 11 years imprisonment.
24. For the aggravating factors identified above I enhance the sentence by 4 years and for the previous good conduct your sentence is reduced by 3 years, leaving you with an interim sentence of 12 years imprisonment.
25. For the offence of Assault Causing Actual Bodily Harm, I take a starting point of 12 months' imprisonment and I add 3 months for the aggravating factors set out above. I deduct 5 months for your previous good conduct, leaving you with an interim sentence of 10 months' imprisonment.
26. The two counts will be served concurrently meaning that you will serve a total period of 12 years imprisonment.
27. You were remanded for 8 days therefore this period will be deducted as time already spent therefore your final sentence is 11 years 11 months and 23 days.


28. Section 18 (1) of the Sentencing and Penalties Act 2009 makes it mandatory for the Court to fix a non-parole period for any sentence over 2 years. Section 18 (4) of the Sentencing and Penalties Act stipulates that the non-parole period must be at least 6 months less than the term of the sentence.
29. After considering the circumstances of the offending and your personal circumstances I find it appropriate to fix your non parole period at 8 years as this will serve as a deterrent specifically for you and as a general deterrence for other like-minded offenders. It will also strike the balance between imposing an appropriate sentence for the offending in this case as well as giving you an opportunity to rehabilitate yourself.

Atik Ashad Ali this is your sentence: -

1. For the offence of **Assault Causing Actual Bodily Harm** – you are sentenced to 10 months’ imprisonment.
2. For the offence of **Rape** – you are sentenced to 11 years, 11 months, and 23 days imprisonment – both counts to be served concurrently.
3. You will serve a non-parole period of 8 years.
4. I issue a final Domestic Violence Restraining Order, Standard Non-Molestation Condition for the protection of the victim.

30 days to appeal.




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Mr. Justice U. Ratuveli
Acting Puisne Judge

Solicitors:

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