

IN THE MAGISTRATES COURT
AT NADI
CRIMINAL JURISDICTION

Criminal Case No.: 988 of 2022

STATE

V

EPI TUIKAWAKAWA

FOR THE PROSECUTION: Crpl Vishal

FOR THE ACCUSED: Ms. Mario (Legal Aid Commission)

DATE OF SENTENCE: 15th November, 2024

SENTENCE

Order: The name of the victim (J.N) is suppressed to protect her identity and privacy from publication and future reference. At the time of the offending the victim was 15 years old.

1. EPI TUIKAWAKAWA, you have pleaded guilty to the following charges:

FIRST COUNT
Statement of offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Act 2009

Particulars of Offence

EPI TUIKAWAKAWA on the 29th day of November, 2022 at Nadi in the Western Division unlawfully and indecently assaulted J.N by trying to kiss her.

SECOND COUNT
Statement of offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Act 2009

Particulars of Offence

EPI TUIKAWAKAWA on the 30th day of November, 2022 at Nadi in the Western Division, intending to insult the modesty of J.N intrudes the privacy of the said J.N by peeping into the bathroom of the said J.N.

2. I am satisfied that you fully understand the charge and the legal effect/consequences of your guilty plea and that your plea was given voluntarily and without any influence.

SUMMARY OF FACTS

The summary of facts was read to you which you informed court was understood and admitted.

Count 1

3. According to the summary of facts, on 29th November, 2022 at 8pm J.N came to your house whilst your family was having dinner. After dinner you went out of the house to wash your plate at a sink located a few meters from your house. Later J.N also went to wash her plate at the same place whereby you then forced to kiss her lips. J.N then shouted and alerted the neighbors.

Count 2

On 30th November, 2022 between 2-3pm J.N was having her shower when you came in the front door of the bathroom and started to peep at her when she was naked. J.N told you to go away and you refused. J.N then covered her private part with both hands. Later she shouted and alerted the people nearby and you ran away.

4. You were arrested and interviewed under caution where you admitted committing the offence and you were then charged.
5. I am satisfied that each element of the offence has been proved beyond reasonable doubt. I therefore find you guilty as charged and convicts you accordingly for both counts.

MAXIMUM SENTENCE AND TARIFF

6. The maximum punishment that is imposable for **Indecent Assault** is up to 5 years' imprisonment.
7. The sentencing tariff for indecent assault is between 12 months to 4 years imprisonment [**Rokota v The State [2002] FJHC 168; HAA0068J.2002S (23 August 2002)**].
8. The maximum sentence for **Indecently insulting or annoying any person** is 1-year imprisonment.

In **State v Nacama [2013] FJMC 393**, for Indecently Annoying Any Person it was stated as follows:

"The tariff in my view range from between 1 month to 6 months' imprisonment depending on the circumstances of the case".

STARTING POINT

9. In reaching the appropriate sentence the court has considered Section 4(1) of the Sentencing and Penalties Act 2009 and the sentencing principles espoused in **Laisiasa Koroivuki v the State (Criminal Appeal AAU 0018 of 2010)**, in **Qurai v State [2015] FJSC 15; CAV24.2014 (20 August 2015)** and **Muskaan Balagan v State [2012] HAA 31/11S 24 April 2012**.
10. Since Indecent assault is the most serious of the counts, I will use that as the foundation when passing your aggregate sentence for both the counts
11. Taking into account the objective seriousness of the offence of Indecent Assault because of its maximum sentence, the Court takes a starting point of 12 months' imprisonment.

AGGRAVATING FACTORS

12. I find the following aggravating factors in this case:
 - a. Victim is the niece of the accused. (Domestic Relationship)
 - b. Breach of Trust
 - c. The complainant was a child when the offence was committed (15 years old) and you were 47 years old. (Age gap)
13. The court adds 12 months' imprisonment for the aggravating factors, which then comes to an interim sentence of 24 months' imprisonment.

MITIGATION SUBMISSIONS

14. You submitted the following mitigation submission:
 - a. You are 49 years old;
 - b. You are married with 5 children;
 - c. You are employed as a commercial farmer and earn \$120.00 weekly;
 - d. You are remorseful of your actions
 - e. You seek forgiveness;
 - f. You are the sole breadwinner;
 - g. You have promised not to reoffend;
 - h. You had fully cooperated with police;
 - i. You seek leniency;
 - j. You are a 1st offender as your last previous conviction was more than 10 years ago.
 - k. You apologized in court to the complainant and her mother in open court.
15. Considering all your mitigation submissions, I reduce your sentence 6 months for the mitigating factors and the interim sentence comes to 18 months' imprisonment.

Circumstances – you advised your counsel that you committed the offence for count1 because the complainant kissed you first and you were tempted. However as per the relevant section in the Crimes Act 2009.

Indecent assault

212. — (1) *A person commits a summary offence if he or she unlawfully and indecently assaults any other person.*

Penalty — Imprisonment for five years.

(2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

Therefore, any application made by defence to add these facts or consider it would be highly unacceptable and if anything could amount to aggravating factors.

GUILTY PLEA

16. You had pleaded guilty on the date of hearing. Some weight will be given for not allowing the complainant to relive the incident but not the full credit or discount will be given. For the guilty plea, 3 months will be deducted and the sentence is now 15 months' imprisonment.

REMAND PERIOD

17. Your matter was listed for first call on 2nd December, 2022 and you were granted bail on 16th December, 2022. (14 days). Your time spent in remand is time served pursuant to section 24 of the Sentencing and Penalties Act 2009 and will be deducted accordingly.

Now your sentence is 14 months and 2 weeks' imprisonment.

SUSPENSION

18. Pursuant to Section 26 of the Sentencing and Penalties Act 2009, I can suspend your imprisonment term wholly or partly if your sentence is 2 years or below. I also consider section 4(1) and (2) of the Sentencing and Penalties Act 2009 in deciding whether to suspend your sentence or not.

19. The court looks at the sentencing remarks of Goundar J in **Balagan v State [2012] HAA 31/11S 24 April 2012 at [20]** in considering to suspend a sentence:

'Whether an offender's sentence should be suspended will depend on a number of factors. These factors no doubt will overlap with some of the factors that mitigate the offence. ... The final test for an appropriate sentence is – whether punishment fits the crime committed by the offender?' (my underlining)

20. The court denounces the accused offending on the victim. The accused offending was immoral. The accused invaded the victim's privacy. The victim was traumatized and still is when she was asked questions by the court. She was a young and vulnerable victim.
21. As observed in court, both J.N and her mother are deeply affected by your actions and both cried in court when you sought their forgiveness. Additionally J.N's mother rightfully stated that as a mother she is deeply sad, with what has happened. You have daughters of your own and you were her Uncle and this is unfortunate. You were supposed to protect her but instead you did the total opposite.
22. Be that it may, considering the principle of proportionality in sentencing as a result of the mitigating factors, it would not be out of place if part of the sentence would be suspended.

SUMMARY

23. Therefore, considering Section 15(1)(d) and Section 26 (1) and (5) of the ***Sentencing and Penalties Act 2009***, a partly suspended period of imprisonment shall be imposed as follows:
- i. For count 1 and 2 the accused **EPI TUIKAWAKAWA** shall serve six (6) months and two weeks of his fourteen (14) month and two-week sentence in custody whilst the balance of seven (8) months shall be suspended for a period of three (3) years.
 - ii. The six (6) months custodial period of imprisonment shall be served immediately.
24. If you commit any other offence within the next 3 years, your sentence may be activated.
25. In addition, the Interim Domestic Violence restraining order issued on 16th December, 2022 shall be made permanent.
26. The clerk of the court shall explain the same to the accused.

28 days to appeal.


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Talei Kean
Resident Magistrate



15th November, 2024