

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 330 of 2015

STATE

V

SAILOSI KADANAVATU

Counsel : Ms. L. Bogitini for State
Ms. T. Kean for the Accused

Dates of Hearing : 17th May and 18th May 2016

Date of Summing Up: 19th May 2016

Date of Judgment : 20th May 2016

Date of Sentence : 23rd May 2016

(The name of the complainant is suppressed. The complainant will be referred to as TT)

SENTENCE

1. Sailosi Kadanavatu, you were charged with the following offences;

COUNT ONE

Statement of offence

Rape: Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SAILOSI KADANAVATU between the 1st day of July 2014 to the 31st day of December 2014 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

COUNT TWO
Statement of offence

Rape: Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SAILOSI KADANAVATU on the 27th of February, 2015 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

2. After trial, the assessors returned with a unanimous opinion that you are guilty of the two counts above. This court decided that you are not guilty for the offence of rape as charged on both counts but found you guilty for sexual assault under section 210(1)(a) of the Crimes Decree 2009 and convicted you accordingly. Now you stand convicted for two offences of sexual assault.
3. In brief, you are victim's stepfather. During the period between 1st July 2014 and 31st December 2014, you licked the vagina of the victim who was 8 years old after she returned home from school. On 27/02/2015 you again licked her vagina when she was sleeping.
4. The offence of Sexual Assault under section 210(1) of the Crimes Decree carries a maximum sentence of 10 years imprisonment. Following the case of *State v Laca* [2012] FJSC 1414, this court has been applying an imprisonment term between 2 to 8 years as the tariff for Sexual Assault.
5. Section 17 of the Sentencing and Penalties Decree 2009 ("Sentencing and Penalties Decree") reads thus;

"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."

6. The two offences you are convicted of are offences of similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Decree, I opt to impose an aggregate sentence of imprisonment for the two offences.
7. Accordingly, I take 4 years imprisonment as the starting point of your aggregate sentence. I have also considered the fact that the victim was below the age of 9 years at the time you committed the offences, when I selected the above starting point.
8. I consider the following as aggravating factors;
 - a) breach of trust;
 - b) the age gap between you and the victim which is 19 years.
9. In the victim impact statement which is prepared by the victim's aunt, under the heading '*Emotional and/or psychological effects*', it is stated thus;

"Bed wetting, and sometimes she sleepwalking / or gets frightened when woken suddenly at night [sic]"
10. As pointed out by the counsel for the defence in the Mitigation Submission filed on 20 May 2016 ("Mitigation Submission"), it was not established before this court that the above effects occurred as a result of the offences committed by you. Therefore, I decline to give any weight to the victim impact statement in deciding the appropriate sentence in this case.
11. I consider the following as mitigating factors;
 - a) your previous good character;
 - b) you are 29 years old, married with 4 children including 2 step children;
 - c) your involvement in community work.
12. I have perused the purported letter the counsel for the defence has attached with the Mitigation Submission which is referred in paragraph 2.6 of the said submission as '*a supporting letter from the community*'. Apparently, this letter is written on a paper torn out of a book. The counsel for the defence ought to have thought twice before tendering a document of this nature before a court of law considering its format and the contents.

Whereas the assessors have unanimously opined that you are guilty of the two counts of rape as charged and this court has found you guilty and convicted you for lesser offences of sexual assault allowing you to reap the maximum benefit of the adversarial trial system, the author of this letter states that “... *we surely know that he would never commit a crime such as this.*”.

13. With regard to this particular issue, I will not proceed beyond highlighting the duty of counsel in ensuring that documents they file in court are proper and appropriate both in form and in content; and I will refrain from making a finding as to whether the above conduct of the author of the aforementioned letter amounts to a contempt of court. The proper course of action would have been to call the relevant person as a witness for the purpose of mitigation if the defence counsel considered his evidence to be important. Nevertheless, I have considered the fact that you were involved in community work as stated in that letter, as a mitigating factor.
14. Considering the aggravating factors, I add 4 years to the starting point and deduct 3 years considering the mitigating factors. Without question, the offences you have committed on the victim who was a child below the age of 9 years at the time of offending should attract a sentence at the higher end of the tariff. However, this court decided to deduct 3 years of your sentence in view of your mitigating factors.
15. Accordingly, I sentence you to 5 years imprisonment. In terms of section 18 of the Sentencing and Penalties Decree 2009, I order that you are not eligible to be released on parole till you serve 4 years of that sentence.
16. Section 24 of the Sentencing and the Penalties Decree reads thus;

“If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”
17. Your counsel has submitted that the period you have been in remand is 7 months. Counsel for the prosecution has submitted that you have spent 7 months and 2 days in remand as

at 20th May 2016. I hold that you have spent a total period of 7 months and 5 days in remand pertaining to this matter. This period of 7 months and 5 days shall be regarded as a period of imprisonment already served by you in respect of the sentence imposed on you this day, pursuant to the provisions of section 24 of the Sentencing and the Penalties Decree.


18. In the result, you are sentenced to an imprisonment term of 5 years with a non-parole period of 4 years. Considering the time spent in custody, the remaining period to be served is;

Head Sentence – 04 years, 04 months and 25 days

Non-parole period – 03 years, 04 months and 25 days

19. 30 days to appeal to the Court of Appeal.




Vincent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva