

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 295 of 2016

[CRIMINAL JURISDICTION]

STATE

V

WAQA NAITINI

Counsel : Ms. K. Semisi for State
Mr. S. Valenitabua & Ms. B. Malimali for Accused

Hearing on : 26th – 29th June 2017

Summing up on : 03rd July 2017

Judgment on : 04th July 2017

Sentence on : 07th July 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AV".)

SENTENCE

1. Waqa Naitini, you stand convicted of one count of indecent assault under section 212(1) of the Crimes Act and one count of sexual assault under section 210(1) of the Crimes Act 2009, after trial.
2. One night in 2012 you indecently assaulted the victim by touching her buttocks while she was lying on a bed. On another occasion you sexually assaulted her where you hugged her from behind and pressed your erected penis against her buttocks. At the time you committed the two offences, the victim was 13 years

old and she was babysitting your child. You were having a relationship with the victim's aunt and therefore there was a domestic relationship between you and the victim in terms of the Domestic Violence Act. The prosecution did not consider it important to clarify whether the contact in each occasion was made over the victim's clothes or not when her evidence was led. Therefore, I agree with your counsel's submission that this court has to consider that the contact was made over her clothing on both occasions.

3. The offence of indecent assault carries a maximum penalty of 5 years imprisonment in terms of section 212(1) of the Crimes Act. The applicable tariff is 12 months to 4 years imprisonment. (see *Ratu Penioni Rokota v State* [2002] FJHC 168; HAA0068J.2002S)
4. The offence of sexual assault under section 210(1) of the Crimes Act carries a maximum sentence of 10 years imprisonment. The accepted tariff is an imprisonment term between 2 to 8 years.
5. The two offences you stand convicted are of the same or a similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act"), I consider it appropriate to impose an aggregate sentence of imprisonment in respect of the two offences. Section 17 of the 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. I take 2 years imprisonment as the starting point of your aggregate sentence.

7. I consider the following as aggravating factors;
 - a) the breach of trust;
 - b) the victim was 12 years old at the material time;
 - c) the age difference between you and the victim which is 19 years; and
 - d) the fact that you took advantage of the victims naivety and vulnerability.

8. During the hearing, your counsel disputed certain contents in the victim impact statement filed by the State though the complainant had alluded to the same facts in her evidence. However, in my view, the victim impact statement does not disclose any special impact on the victim that should be regarded as a separate aggravating factor in addition to the factors stated above.

9. Your counsel also submitted that the age of the victim should not be regarded as an aggravating factor stating that it is an element of the offence for the reason that the age is mentioned in the particulars of offence of the relevant charges. The age of the victim is not an element of the two offences, indecent assault and sexual assault. The fact that the age of the victim is mentioned in the particulars of offence does not make the age an element of the relevant offence. The elements of an offence are determined based on the definition of that offence provided under the relevant Statute and on the particulars of the offence provided by the prosecution. Moreover, the tariffs referred to above are established as general tariffs for the two offences. Therefore, the age of the victim is a factor that should be taken into account in deciding the seriousness of the offending in this case in order to decide the appropriate sentence.

10. Considering the above aggravating factors in relation to the two offences you are convicted of, I increase your sentence by 3 years. Now your sentence is 5 years imprisonment.

11. Your counsel had made extensive submissions in your mitigation. It is also submitted that you are now remorseful and regrets your actions. You also wish to apologise to the complainant and her family. Considering my observations of

your conduct during the trial I accept your counsel's submission that you are remorseful.

12. Considering the fact that you are a first offender and the indication that you are now remorseful and regret your actions, I deduct 02 years and 06 months of your sentence.
13. I hereby sentence you for a term of 02 years and 06 months imprisonment. I order that you are not eligible to be released on parole until you serve 18 months of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Act 2009.
14. Considering all the circumstances of this case, I consider it appropriate to partly suspend your sentence. Hence, I order that you serve 01 year and 06 months of the above sentence forthwith and the balance period of 01 year is suspended for 2 years.
15. 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."
16. The prosecution submits that you have been in custody since 06/08/16. The period you were in custody shall be regarded as a period of imprisonment already served. I hold that the period to be considered as served should be 11 months.
17. In the result, you are sentenced to 02 years and 06 months imprisonment with a non-parole period of 01 year and 06 months. You should serve 01 year and 06 months of the sentence forthwith and the balance period of 01 year is suspended

for 2 years. Considering the time spent in custody, the time remaining to be served forthwith before the sentence is suspended is 07 months.

18. Having considered the facts in this case, a permanent Domestic Violence Restraining Order is issued against you, identifying the victim in this case as the protected person. You are hereby ordered not to have any form of contact with the victim directly or by any other means, unless otherwise directed by this Court.
19. Suspended sentence explained.
20. 30 days to appeal to the Court of Appeal.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Toganivalu & Valenitabua, Barristers & Solicitors, Suva.