

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 03 of 2018

STATE

V

JOVESA BOGIDRAU

Counsel : Mr. R. Kumar for the State
Mr. V. Tuicolo for the Accused

Sentence Hearing : 2 May 2018

Sentence : 4 May 2018

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

SENTENCE

[1] Jovesa Bogidrau you were charged with the following offences:

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOVESA BOGIDRAU, on 08 January 2018, at Vanuavou Village, Vaturova, Savusavu, in the Northern Division, unlawfully and indecently assaulted **CW** by touching her breasts.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOVESA BOGIDRAU, on 08 January 2018, at Vanuavou Village, Vaturova, Savusavu, in the Northern Division, unlawfully and indecently assaulted **CW** by touching her vagina.

THIRD COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOVESA BOGIDRAU, on 08 January 2018, at Vanuavou Village, Vaturova, Savusavu, in the Northern Division, unlawfully and indecently assaulted **CW** by licking her vagina.

- [2] This matter was first called before the High Court on 19 January 2018. The State was granted time until 28 February to file Information and Disclosures, relevant to the case, and the matter was adjourned for 1 March 2018. On the said day, the Director of Public Prosecutions (DPP) filed Information and Disclosures and the matter was adjourned for 14 March 2018 for plea.

- [3] When this matter was called next, on 14 March 2018, before His Lordship Justice Daniel Goundar, you were ready to take your plea. Accordingly, you pleaded guilty to all three Counts in the Information, and the matter was fixed for sentencing hearing.
- [4] When the matter came up before me on 2 May 2018, your plea was taken once again. You pleaded guilty to all three Counts in the Information. Court was satisfied that you fully understood the nature of the charges against you and the consequences of your plea. Court found that you pleaded guilty on your own free will and free from any influence. Accordingly, Court found the plea to be unequivocal.
- [5] Thereafter, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you agreed to the same. I found that the facts support all elements of the three counts in the Information, and found all three counts proved on the Summary of Facts agreed by you. Accordingly, you were convicted of all three counts as charged.
- [6] I now proceed to sentence you as follows.
- [7] The Summary of Facts filed by the State was that:

- "1. *The accused in this matter is Jovesa Bogidrau a 42 year old farmer of Korosi Village, Navatu, Cakaudrove, Northern Division.*
2. *The victim in this matter is CW, a 07 year old student of Vanuavou Village, Savusavu, Northern Division.*
3. *Sometime after 6 p.m. on 08 January 2018 the accused was at his family's home in Vanuavou Village, Savusavu when he called CW, who had been playing outside her home, nearby to the accused's family's house.*

Count 1

4. *After calling CW over to him to clean his eyes, the accused started to touch her stomach and then indecently and unlawfully touched her breasts.*

Count 2

5. *CW then sat beside the accused when the accused indecently and unlawfully touched the outside of her vagina.*

Count 3

6. *After touching the outside of CW's vagina, the accused then indecently and unlawfully licked the outside of her vagina.*
7. *The matter was reported to the Police as Ilisabeta Soro had seen the accused lying down with his face under CW's skirt. CW was medically examined on 09 January 2018 where the medical findings showed she had nil injuries to her vaginal area.*
8. *The accused was arrested and thereafter interviewed under caution on 10 January 2018 at the Savusavu Police Station. The accused admitted to having called CW to clean his eyes on 08 January 2018. The accused admitted to then having touched CW's stomach and breasts (Q & A 31). The accused admitted to having touched CW's vagina (Q & A 33). The accused admitted to then having licked CW's vagina (Q & A 34 – 35)."*

- [8] The complainant was only 7 years of age at the time you committed the above offences on her, and as such, she was a juvenile.
- [9] The offence of Sexual Assault in terms of Section 210 (1) of the Crimes Act (Crimes Act) carries a maximum penalty of 10 years imprisonment.
- [10] The Third Count against you is that on 8 January 2018, at Vanuavou Village, Vaturova, Savusavu, in the Northern Division, you unlawfully and indecently assaulted CW by licking her vagina. In actual fact this would be an offence punishable under Section 210 (1) (a) read with Section 210 (2) of the Crimes Act, where the maximum penalty increases to 14 years imprisonment.
- [11] However, since you were originally charged for Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act and have also pleaded guilty to the said charge, in passing this sentence, I will consider that you have committed Sexual Assault in terms of Section 210 (1) of the Crimes Act.
- [12] In the cases of *State v. Abdul Khaiyum* [2012] FJHC 1274; Criminal Case (HAC) 160 of 2010 (10 August 2012) and *State v. Epeli Ratabacaca Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8

years imprisonment for offences of Sexual Assault in terms of Section 210 (1) of the Crimes Act.

- [13] It was held in *State v Laca* (supra) "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."

"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)."

- [14] The first count you have been convicted for is for unlawfully and indecently assaulting the complainant by touching her breasts. This is contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia), and would come under category 3 above.

[15] In determining the starting point within a tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

[16] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years for the count of Sexual Assault (First Count).

[17] The aggravating factors are as follows:

- (i) There was a large disparity in age between you and the complainant. The complainant is merely 7 years of age and you are 42 years of age, at the time of the offence.
- (ii) You took advantage of the complainant's vulnerability, helplessness and naivety.
- (iii) You have exposed the innocent mind of a child to sexual activity at such a tender age.
- (iv) You are now convicted of multiple offending.

[18] In mitigation you have submitted as follows:

- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.

- (ii) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
- (iii) You have sought forgiveness from this court and have assured that you will not re-offend. You have submitted that you are truly remorseful of your actions.
- (iv) That you entered a guilty plea at the first available opportunity.

[19] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 7 years.

[20] I accept that you are a person of previous good character and that you have cooperated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 3 years from your sentence. Now your sentence is 4 years for the first count.

[21] In the circumstances, the sentence for the first count will be 4 years imprisonment.

[22] The second count you have been convicted for is for unlawfully and indecently assaulting the complainant by touching her vagina. This is contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object, and would come under category 2(ii) as defined in *State v Laca* (supra).

[23] In the light of the guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 4 years for the count of Sexual Assault (Second Count).

[24] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 9 years. Considering the mitigating factors aforementioned, I deduct 3 years from your sentence. Now your sentence is 6 years.

[25] In the circumstances, the sentence for the second count will be 6 years imprisonment.

[26] The third count you have been convicted for is for unlawfully and indecently assaulting the complainant by licking her vagina. This is contact between the naked genitalia of

the offender and naked genitalia, face or mouth of the victim, and would come under category 1 as defined in *State v Laca* (supra).

[27] In the light of the guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 5 years for the count of Sexual Assault (Third Count).

[28] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 10 years. Considering the mitigating factors aforementioned, I deduct 3 years from your sentence. Now your sentence is 7 years.

[29] In the circumstances, your sentences are as follows:

Count 1- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 4 years imprisonment.

Count 2- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 6 years imprisonment.

Count 3- Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act – 7 years imprisonment.

I order that all three sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 7 years.

[30] I accept that you entered a guilty plea at the first available opportunity. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a discount of a further 2 years from your total sentence. Accordingly, your sentence will be 5 years imprisonment.

[31] Section 18 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) reads as follows:

“(1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3) If a court sentences an offender to be imprisoned for a term of less than 2 years but not less than one year, the court may fix a period during which the offender is not eligible to be released on parole.

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed."

[32] It is stated on your behalf that you are 42 years of age, single and a dalo and yaqona farmer. You are said to be earning \$100 per week. You are said to be supporting your 76 year old father who is dependent on you for his daily needs. Thus you are sole bread winner in your family.

[33] Considering all the above factors, I order that your non parole period would be 3 years. You are not eligible to be released on parole until you serve 3 years of your sentence.

[34] Section 24 of the Sentencing and Penalties Act 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."

[35] You have been in remand for this case since 9 January 2018, the day you were arrested for this case. Accordingly, you have been in remand custody for nearly 4 months. The period you were in remand custody shall be regarded as period of imprisonment


already served by you. I hold that the period of 4 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[36] In the result, you are sentenced to a term of 5 years imprisonment, with a non-parole period of 3 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 4 years and 8 months.

Non-parole period - 2 years and 8 months.

[37] You have 30 days to appeal to the Court of Appeal if you so wish.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LABASA

Dated this 4th Day of May 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Labasa.
Solicitors for the Accused : Office of the Legal Aid Commission, Labasa.