

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

CRIMINAL CASE NO: HAC 286 of 2016

STATE

V

VINEETA DEVI

ASHISH PRASAD

Counsel	:	Mr. Taitusi Tuenuku for the State Mr. Mohammed Yunus for the 1 st Accused
Sentence Hearing	:	19 June 2018
Sentence	:	7 August 2018

SENTENCE

[1] Vineeta Devi, as per the Consolidated Information filed, you were charged, along with the 2nd accused, with the following offences:

COUNT ONE

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (a) (b) of the Crimes Act 2009.

Particulars of Offence

VINEETA DEVI, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Eastern Division, unlawfully performed an abortion on **PAYAL PRITIKA DEVI**.

COUNT TWO

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (b) of the Crimes Act 2009.

Particulars of Offence

ASHISH PRASAD, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Central Division, committed certain acts with intent to procure the abortion of **PAYAL PRITIKA DEVI**.

- [2] This matter was first called before the High Court on 12 August 2016. On 2 September 2016, the Director of Public Prosecutions (DPP) filed Information and Disclosures, relevant to the case. Subsequently, on 13 February 2017, the State filed Consolidated Information and Disclosures, as referred to above.
- [3] When this matter was called before me on 14 May 2018, you pleaded guilty to Count One in the Consolidated Information. Court was satisfied that you fully understood the nature of the charge against you and the consequences of your plea. Court found that you pleaded guilty on your own free will and free from any influence.
- [4] Thereafter, the State filed the Summary of Facts on 19 June 2018. The Summary of Facts were read out and explained to you and you agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of Count One in the Consolidated Information, and found the said Count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and convicted you of Count One as charged.
- [5] I now proceed to sentence you.

[6] The Summary of Facts filed by the State was that:

"On the 20th day of July 2016, the victim Payal Pritika Devi, 22 years old, Domestic Duties of Naiyalayala, Taveuni went to Sawani with Saleshni Watl, 36 years old, Domestic Duties of Naduru, Nausori and met the first accused Vineeta Devi, 56 years old, Domestic Duties of Samron Farm Road, Nausori at her house. The victim was one month pregnant at that particular time.

The first accused then took the victim into one of the rooms of her house at Sawani. The first accused told the victim to lie on the bed and take off her panty. When the victim took off her panty, the first accused then massaged the stomach of the victim in a forceful manner that was painful to the victim.

Moreover, after massaging the victim's stomach, the first accused brought about five sharpened cassava sticks and told the victim to spread her legs. When the victim spread her legs, the first accused then forcefully inserted the five cassava sticks individually inside the vagina of the victim. The procedure was very painful to the victim. The victim noticed that blood was coming out of her private part.

After the procedure was carried out, the victim was shocked and called her parents about what was done to her. The victim was later picked up by her parents from Sawani Bus Stop. The victim was then admitted at CWM Hospital on the 23rd of July 2016. According to the medical report of the victim (attached), she was noted to be pregnant but it was also found that she had a miscarriage. The matter was then reported to Police.

The first accused was arrested on 29th July 2016 and Caution Interviewed at Nausori Police Station on the same day. The first accused was charged for unlawfully performing an Abortion on the victim contrary Section 234 (1) of the Crimes Act 2009, on 30th July 2016, at Nausori Police Station. The first accused admitted in question numbers 37 to 39 of her Caution Interview

(attached) that she had inserted five cassava sticks into the vagina of the victim in order to abort the victim's baby.

Furthermore, the first accused is not a medically qualified practitioner or a certified midwife. The first accused also knew that what she had done to the victim to abort the victim's baby was unlawful and wrong. The first accused admitted this in her answer to question number 65 of her Caution Interview.

Moreover, in her answer to question 89 of her Caution Interview, the first accused admitted that she heard another telling the victim that if she does this abortion, then his first wife will sign on the property papers. Moreover, the first accused admitted in her answer to question 27 that another will give her \$200.00 to massage the victim's stomach since they do not want the baby. Moreover, the first accused further admitted in her answer to question 29 that she was not that smart but she was told by another just to massage so that the victim will have a miscarriage."

- [7] Vineeta Devi you have admitted to the above Summary of Facts and taken full responsibility for your actions.
- [8] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.
- [9] In terms of Section 234 (1) of the Crimes Act No. 44 of 2009 (Crimes Act), "A person commits an indictable offence if he or she unlawfully performs an abortion". The offence carries a maximum penalty of 14 years imprisonment.
- [10] Sections 234 (2), (3) and (4) are re-produced below:

(2) The performance of an abortion by a medical practitioner is not unlawful for the purposes of this section if —

(a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and

(b) the pregnancy is the result of sexual intercourse between—

(i) a parent and child; or

(ii) a brother and sister (whether of the whole blood or half-blood); or

(iii) a grandparent and grandchild; or

(c) the pregnancy is the result of sexual intercourse that constitutes the offence of rape under this Decree.

(3) In this section—

"medical practitioner" means any person lawfully registered under a law of Fiji to practice as a medical practitioner.

(4) A reference in this section to performing an abortion includes a reference to—

(a) attempting to perform an abortion; and

(b) doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant.

[Emphasis is mine].

[11] There is no set or settled tariff for the offence of Abortion contrary to Section 234 of the Crimes Act.

[12] The Court of Appeal in *Devi v. State* [1992] 38 FLR 94 (3 June 1992); held:

The Appellant was on the 14 November 1990, sentenced to two years imprisonment on a charge of manslaughter. She had been charged with murder but that charge was reduced to manslaughter and she pleaded guilty to that charge. The crime in respect of which she was charged, was performing an illegal abortion, as a result of which the person on whom the abortion was performed lost her life. It is unnecessary to recount in detail the facts of that particular activity but we have no hesitation in stating that the sentence which was imposed by the learned trial judge was perfectly proper in all the circumstances.

[13] In this case, the Appellant had spent a total of 13 months in custody by the time her appeal against sentence was heard. Considering all the circumstances of the case the

Court adjudged her to have been sufficiently punished and varied the sentence to allow her release.

[14] In the case of *State v. Mudaliar* [2006] FJHC 47; HAC 15.2005S (17 May 2006); His Lordship Justice A.H.C.T. Gates (as he then was) ordered a sentence of 3 years imprisonment for a specialist obstetrician and gynaecologist who carried out an abortion which led to the death of a 20 year old USP undergraduate.

[15] In this case, His Lordship Gates made the following observations:

[1] The Accused has been found guilty after trial of one count of manslaughter contrary to sections 198 and 201 of the Penal Code. The maximum term of imprisonment provided by the Code for such an offence is one of life.

[2] A 20 year old USP undergraduate consulted the Accused, who is a specialist obstetrician and gynaecologist in private practice, seeking an abortion. The Accused agreed to do it and charged \$950.

[3] The student was already 20 weeks into her term of pregnancy. At that term the procedure for abortion presents a greater risk than for a person who is 13 weeks or less into her pregnancy.

[4] Unfortunately the operation performed in the Accused's surgery was not performed successfully. In the process the uterus was torn. This injury damaged the blood supply and led to massive bleeding. The bleeding caused shock from which the patient died.

[5] The first basis to be considered for the sentence is that an unlawful act had been carried out on the patient, namely the abortion, which act was a serious offence in itself. The patient's life was not in danger prior to the abortion. This was not a case where such a medical procedure was necessary or justified. Nor did the Accused maintain that it was. He denied having carried out such an act.

[6] The second basis for sentence is the allegation of gross negligence in not treating his patient, once she was seriously ill and in peril, with sufficient

regard for her health and safety. This comprised the failure to remove her to the intensive care unit at the CWM Hospital, the abandonment of her unattended in the locked surgery overnight whilst in this state, and the unprofessional manner in which she was handled. This included the complete absence of history, notes, and records, which would be required by a receiving hospital upon emergency removal.

[16] However, this conviction and sentence was later set aside by the Supreme Court and a re-trial was ordered.

[17] In *State v. Sivoinatoto* [2014] FJHC 208; HAC207.2011 (27 March 2014); His Lordship Justice Sudharshana De Silva sentenced the accused to 2 years imprisonment consequent to him pleading guilty to the offence of Abortion contrary to Section 234 (1) and 4 (b) of the Crimes Act.

[18] The brief summary of facts of the said case are as follows:

Sometimes in March 2011, the complainant (MN) was not having her menses. At the time, she was staying with the accused (Mr Oteti Sivoinatoto) at Bandila Crescent, Rifle Range in Lautoka. The complainant then told the accused (Mr Oteti Sivoinatoto) sometimes in April 2011 and August 2011 that her menses were not coming and she thought that she was pregnant. The accused then gave the complainant rum which was mixed with milk for the complainant to drink to abort the baby. The complainant drank and nothing happened.

On the following day, the complainant after returning from school, the accused mixed her a strong tea to drink to abort the baby but it was again unsuccessful. On another occasion sometimes in April 2011 and August 2011, the accused gave the complainant two (2) raw eggs to drink to abort the baby.

The matter was reported to the Police and he was charged for Abortion contrary to Section 234 (1) (4) (b) of the Crimes Decree 2009. The accused was then cautioned interviewed by the Police and he admits to giving various

things to the complainant to drink in order to abort the baby, but those attempts failed.

[19] Section 6 of the Sentencing and Penalties Act provides the circumstances under which Guideline Judgments may be issued by Courts. The Section reads as follows:

(1) On hearing and considering an appeal against sentence the Court of Appeal and the Supreme Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment, or to review a guideline judgment that has already been given.

(2) A guideline judgment given by the Court of Appeal or the Supreme Court shall be taken into account and applied by the High Court and the Magistrates Court when considering cases to which the guideline judgment applies.

(3) On hearing an appeal from a sentence given by a Magistrate, a judge of the High Court may, on its own initiative or on an application made by a party to the appeal, consider whether to give a guideline judgment, or to review a guideline judgment that has already been made under this sub-section.

(4) A guideline judgment given under sub-section (3) shall be taken into account by all Magistrates when sentencing offenders for offences to which the guideline judgment applies.

[20] Therefore, although there is no set tariff for the offence of Abortion contrary to Section 234 of the Crimes Act, this is not an appropriate case for this Court to issue a guideline judgment or to set a tariff for the offence of Abortion.

[21] Vineeta Devi, the offence you have been found guilty and convicted for is a serious offence. You are not a medically qualified practitioner nor a certified mid-wife. However, you had illegally carried out an abortion on the complainant in this case, Payal Pritikia Devi, who was 22 years of age and one month pregnant at the time.

[22] When the complainant was brought before you, you had asked her to take off her panty and then massaged her stomach in a forceful manner that was painful to her. After massaging the complainant's stomach, you had brought about five sharpened

cassava sticks and told her to spread her legs. When the complainant spread her legs, you then forcefully inserted the five cassava sticks individually inside her vagina. The procedure was very painful and the complainant had noticed that blood was coming out of her private part. Later the complainant was hospitalized at the CWM Hospital and had a miscarriage.

[23] 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 an early stage of these proceedings.

[24] Taking into consideration all factors of this case, including the maximum penalty prescribed for the offence (14 years imprisonment), the nature and gravity of the offence, your culpability and degree of responsibility for the offence, the impact of the offence on the complainant, and the mitigating factors stated above, I sentence you to 5 years imprisonment for Count One.

[25] I accept that you entered a guilty plea at an early stage of these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a discount of 2 years from your sentence. Accordingly, your sentence will be 3 years imprisonment.

[26] The next issue for consideration is whether your sentence should be suspended.

[27] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[28] Vineeta Devi, you are now 58 years of age and living in Sawani in Nausori. You are said to be self-employed selling roti parcels, earning approximately \$70.00 weekly. You are married and have adopted a son, who is schooling in primary school. You are said to be a heart patient and suffering from short breath. You are said to be a person of good character and a well-respected person in the community.

[29] You have admitted that what you did was wrong, and taken full responsibility for your actions. You are a person of previous good character. 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. You have also promised that you would lead a crime free life if you are granted a non-custodial punishment.

[30] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:


"...However, as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse....."

[31] Considering all the facts and circumstances of this case, I deem it appropriate to suspend your sentence. However, to deter other persons from committing offences of the same or similar nature, and also to protect the community, I suspend your sentence for a period of 5 years.

[32] In the result, your final sentence would be 3 years imprisonment, which term of imprisonment is suspended for a period of 5 years.

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




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 7th Day of August 2018

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