

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 006 of 2020

STATE

V

RATU LIVAI VOLAVOLA

Counsel : Ms. P. Lata for the State.
: Ms. K. Vulimainadave and Ms. R. Nair for the Accused.

Dates of Hearing : 07, and 09 March, 2023

Closing Speeches : 10 March, 2023

Date of Judgment : 13 March, 2023

Date of Sentence : 28 March, 2023

SENTENCE

(The name of the victim is suppressed she will be referred to as "S.N")

1. In a judgment delivered on 13th March, 2023 this court acquitted the accused for one count of rape but found him guilty and convicted him of the lesser offence of sexual assault. The brief facts were as follows:
2. On 23rd December, 2019 at about 1 am the victim was asleep in her bedroom. The accused entered the bedroom of the victim climbed on the

mattress lifted the victim's skirt touched her thigh and then put his hand inside her private part. The victim did not do anything because she thought it was her boyfriend. When she turned around she recognized the accused from the outside lights.

3. The victim was shocked and scared by what had happened to her. The victim left the bed and rushed out of the bedroom into the living room crying. The incident was reported to the police. The accused was arrested, caution interviewed and charged.
4. The state counsel filed her written sentence submissions and the defence counsel filed mitigation submissions for which this court is grateful.
5. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused is now 41 years old;
 - b) Separated with two children aged 8 and 10 years respectively;
 - c) Was self-employed earning \$100.00 per week;
 - d) Has dependent parents;
 - e) Cooperated with police.
6. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj -vs.- The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

7. The following aggravating factors are obvious in this case:

a) Breach of Trust

The victim and the accused are known to each other. The accused is related to the victim's boyfriend's mother. The accused grossly breached the trust of the victim by his actions.

b) Planning

There is some degree of planning involved. The accused first went into the victim's bedroom before having his dinner thereafter he switched off the lights in the sitting room drew the door curtains and went into victim's room the second time.

c) Victim was vulnerable

The victim was vulnerable, unsuspecting and sleeping in her bedroom when the accused entered and took advantage of the situation and sexually abused her.

d) Prevalence of offending

There has been a notable increase in sexual offence cases by mature individuals known to the victim. The victim was 22 years whereas the accused was 37 years at the time. The age difference is substantial.

e) Safety of the victim

The victim was supposed to be safe in her bedroom but this was not to be due to the actions of the accused.

TARIFF

8. The maximum penalty for the offence of sexual assault is 10 years imprisonment. The tariff for this offence is from 2 years to 8 years imprisonment depending on the category of offending (*see State vs. Epeli Ratabacaca Laca criminal case no. HAC 252 of 2011 (14 November, 2012)*). At paragraphs 6 and 7 Madigan J. had stated the following:

6. The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. 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.

7. 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).

8. These very sensible categories of offending are adopted by this Court and they provide a very useful guide to sentencing within the tariff of two to eight years.

9. Bearing in mind the objective seriousness of the offence committed I take 2 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, the personal circumstances and family background of the accused has little mitigatory value, however, the accused good character and other mitigation are substantive factors. The sentence is further reduced for mitigation and good character. I have taken note of the fact that the accused has expired previous convictions for unrelated offences hence he has been considered as a first offender.
10. I note the accused has been in remand for about 6 months and 22 days, in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced by 7 months as a period of imprisonment already served.
11. The final sentence of imprisonment for one count of sexual assault is 3 years and 2 months.

12. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature. Since the final sentence exceeds 3 years imprisonment this court has no powers to suspend the term of imprisonment.
13. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 2 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.
14. Mr. Volavola you have committed a serious offence against the victim who was in a relationship with one of your relatives. I am sure it will be difficult for the victim to forget what you had done to her. Your actions towards the victim were self-centered, you did not care about her feelings. The victim was asleep when you entered her bedroom this court will be failing in its duty if a deterrent custodial sentence was not imposed.
15. In summary, I pass a sentence of 3 years and 2 months imprisonment for one count of sexual assault that the accused has been convicted of with a non-parole period of 2 years to be served before he is eligible for parole.

16. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

28 March, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal aid Commission for the Accused.