

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 203 of 2023

STATE

V

JEKOPE BAU

Counsel : Mr. U. Lal for the State.
Mr. B. Makanjee for the Accused.
Date of Submissions : 09 May, 2024
Date of Sentence : 10 May, 2024

SENTENCE

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

1. The accused is charged with the following offence as per the information filed by the Director of Public Prosecutions dated 29th February, 2024:

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

Jekope Bau on the 10th day of August, 2023 at Sigatoka in the Western Division, had penetrated the vagina of “V.T” with his fingers, without her consent.

2. This file was first called in the High Court on 8th December, 2023 and after the filing and service of the information and disclosures the accused on 4th April, 2024 pleaded guilty to one count of rape in the presence of his counsel.
3. On 12th April, 2024 the summary of facts was read and explained to the accused in the Itaukei language who admitted the same in the presence of his counsel.
4. After considering the summary of facts read by the state counsel this court was satisfied that the accused had entered an unequivocal plea of guilty on his freewill. This court was also satisfied that the accused had fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted by the accused satisfied all the elements of the offence of rape as charged.
5. In view of the above, this court on 12th April found the accused guilty as charged and he was convicted accordingly.
6. The brief summary of facts was as follows:
 - a) The accused is the victim’s brother in law. He used to massage the 60 year old victim’s body since she was sick. When the accused would massage the victim, she would normally be semi naked. This had been going on for some time.

- b) On 10th August, 2023 between 6pm to 7pm, while the accused was massaging the victim's body inside her house he slid his hands under the victim's 'sulu' and inserted his finger inside the victim's vagina. The victim did not consent for the accused to insert his finger into her vagina.
 - c) At this time, the victim's husband was not at home when the victim's husband returned home the victim informed him about what the accused had done. The matter was reported to the police.
 - d) The accused was arrested, caution interviewed and charged.
7. The state counsel filed sentence submissions and the defence counsel filed mitigation submissions for which this court is grateful.
8. The accused counsel presented the following mitigation:
 - a) The accused is 'a first offender;
 - b) He is 60 years of age;
 - c) Is a subsistence Farmer;
 - d) Is a widower and a Social Welfare recipient;
 - e) Pleaded guilty at the earliest opportunity;
 - f) Seeks forgiveness from the court;
 - g) Apologizes to the victim and her family.
9. 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

10. The aggravating factors are:

(a) Breach of Trust

The victim and the accused are known to each other. The accused is the brother in law of the victim. The victim trusted the accused to the extent that she was semi naked and she had allowed the accused to massage her. The accused grossly breached the trust of the victim by his action.

(b) Victim was vulnerable

The victim was vulnerable and naive. The accused took advantage of the situation that the victim was alone and he was massaging her. The accused was bold in what he did to the victim.

(c) Safety of the victim

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

(d) Prevalence of offending

There has been a notable increase in sexual offence cases by mature individuals known to the victim.

TARIFF

11. The maximum penalty for the offence of rape is life imprisonment. The accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.
12. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”

GUILTY PLEA

13. The accused pleaded guilty at the earliest opportunity. In *Gordon Aitcheson vs. The State, criminal petition no. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

*[14]. In **Rainima -v- The State [2015] FJCA 17; AAU 22 of 2012 (27 February 2015)** Madigan JA observed:*

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

*In **Mataunitoga -v- The State** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:*

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

*[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.*

14. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty

plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).

15. This court accepts that the accused has shown genuine remorse when he pleaded guilty. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se* (*see Gordon Aitcheson vs. The State, (supra)*). In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc. There is no doubt the timing of the guilty plea is at the first available opportunity.
16. After assessing the objective seriousness of the offence committed I take 7 years imprisonment (lower range of the scale) as the starting point of the sentence. I increase the sentence for aggravating factors, the accused gets a reduction for mitigation and good character (although the personal circumstances and family background of the accused has little mitigatory value).
17. This court accepts that the accused has shown genuine remorse when he pleaded guilty at the first available opportunity. Since the allegation is of a sexual nature, the accused by pleading guilty has not only saved the court's time but also prevented the victim from reliving her experience in court. The sentence is further reduced for guilty plea.
18. Furthermore, the accused has been in remand for 4 months and 4 days in exercise of my discretion I reduce the sentence by 4 months and 10 days in accordance with section 24 of the Sentencing and Penalties Act as a

period of imprisonment already served. The final sentence is 7 years, 8 months and 20 days imprisonment.

19. Mr. Bau you have committed a serious offence against your sister in law who was sick. The victim trusted you, was unsuspecting and vulnerable being a matured adult you should have known better.
20. 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.
21. Under section 18 (1) of the Sentencing and Penalties Act (as amended), a non-parole period will be imposed to act as a deterrent to the others and for the protection of the community as well. On the other hand, this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation. A non-parole period too close to the final sentence will not be justified for this reason.
22. In this regard I have taken into consideration the principle stated by the Court of Appeal in *Paula Tora v The State AAU0063.2011 (27 February 2015)* at paragraph 2 where Calanchini P (as he was) said:

[2] The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to rehabilitation on the one hand and deterrence on the other. As a result the

non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served.

23. The Supreme Court in accepting the above principle in *Akuila Navuda v The State [2023] FJSC 45; CAV0013.2022 (26 October 2023)* stated the following:

Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be a meaningful one is obviously right. Otherwise there will be little incentive for prisoners to behave themselves in prison, and the advantages of incentivising good behaviour in prison by the granting of remission will be lost. The difference of only one year in this case was insufficient. I would increase the difference to two years. I would therefore reduce the non-parole period in this case to 12 years.

24. Considering the above, I impose 7 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 and also meet the expectations of the community which is just in the circumstances of this case.
25. In summary, I pass a sentence of 7 years, 8 months and 20 days imprisonment for one count of rape with a non-parole period of 7 years to

be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.

26. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

10 May, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.