

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 191 of 2023

STATE

V

SAINIVALATI TUBUNA

Counsel : Mr. L. Baleilevuka for the State.
: Mr. F. Singh and Ms. S. Pillay for the Accused.

Dates of Hearing : 04, 05, 06 February, 2025
Closing Speeches : 11 February, 2025
Date of Judgment : 12 February, 2025
Date of Sentence : 27 February, 2025

SENTENCE

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

1. In a judgment delivered on 12th February, 2025 this court found the accused guilty of one count of sexual assault and convicted him accordingly. The accused was acquitted of one count of sexual assault, one count of rape, lesser offence of indecent assault and one count of theft.
2. The brief facts were as follows:

- a. The 10 year old victim went to Nalidi Village with her family to attend a “soli” function. On the night of 11th November, 2023, the victim was sleeping on the floor beside the bed in the house of her uncle Inoke Turaga with her siblings and other cousins.
 - b. At about 1am the next day the accused knocked on the door of the house. Miriama, the only child awake, allowed the accused into the house. The accused went to sleep on the floor near the complainant.
 - c. After a while, the victim felt the accused touching her breasts over her clothes and then he moved his hand inside her singlet, touching her breasts.
 - d. Miriama, who was in the same room, shone a phone torchlight on the accused and saw the accused’s hand under the victim’s singlet. Upon seeing Miriama, the accused stopped what he was doing and left the house. The matter was reported to the police. The accused was arrested, interviewed under caution and charged.
3. The state counsel filed sentence submissions and the defence counsel filed mitigation submissions for which this court is grateful.
 4. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused was 40 years old at the time of the offending;
 - b) Is a first offender;
 - c) Married with 5 children (1 year to 15 years of age);
 - d) Is a construction worker earning \$100.00 per week;
 - e) Cooperated with police during investigations;
 - f) Promises not to reoffend.

5. 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

6. 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 grossly breached the trust of the victim by his actions.

b) Victim was vulnerable

The victim was vulnerable, unsuspecting and helpless the accused took advantage of the situation and abused her.

c) Prevalence of offending

There has been a notable increase in sexual offence cases by individuals known to the victim. The victim was 10 years and the accused was 40 years. The age difference is substantial.

d) Safety of the victim

The victim was supposed to be safe in her uncle's house but this was not to be due to the actions of the accused.

TARIFF

7. 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.

8. It is to be noted that this offence falls under category 3 of *Laca's* case (supra).
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 sentence. The sentence is increased by 1 ½ years for the aggravating factors. The interim sentence is 3 ½ years imprisonment, the personal circumstances and family background of the accused has little mitigatory value. The accused has a conviction for criminal trespass in the year 2018 which I disregard as an unrelated offence. I therefore, consider the accused as a first offender, his good character and other mitigation are substantive factors. The sentence is further reduced by 1 year for mitigation and good character. The sentence is now 2 ½ years imprisonment.
10. I note the accused has been in remand for about 5 months and 10 days, in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced as a period of imprisonment already served.
11. The final sentence of imprisonment for one count of sexual assault is 2 years and 20 days. Under section 26 (2) (a) of the Sentencing and Penalties Act, this court has a discretion to suspend the final sentence since it does

not exceed 3 years imprisonment. Considering the culpability of the accused and the circumstances of the offending a suspended sentence will not meet the ends of justice.

12. In this case, the accused was a 40 year old adult and the victim was 10 year old child. The substantial age difference indicates that the accused should have known better. The accused was bold and undeterred in what he did to the victim by taking advantage of the darkness and the sleeping condition of the victim. He only stopped when seen by Miriama. It is important to stress that a non-custodial sentence or a partially suspended sentence is only appropriate in cases where the victim and the accused were in a virtuous relationship or of a similar age, or there was not a significant age difference.
13. In respect of assault, whether it was opportunistic, non-penetrative, the duration, manner and circumstances, are crucial considerations in deciding the final sentence for the offence of sexual assault.
14. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence committed on the victim who was 10 years at the time 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.
15. 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.

16. 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 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 re-habilitation 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.


17. 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:

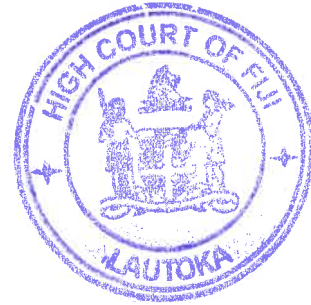
Neither the legislature nor the courts have said otherwise since then despite the scrutiny to which the non-parole period has been subjected. The principle that the gap between the non-parole period and the head sentence must be

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.

18. Considering the above, I impose 1 year 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.
19. Mr. Tubuna you have committed a serious offence against the 10-year-old victim, who was known to you. She was enjoying herself with her other cousins by attending a village function at her mother's village. You came and turned a joyous occasion into sadness.
20. I am sure it will be difficult for the victim to forget what you have done. Your actions towards the victim were senseless and self-centered. You did not care about her feelings and safety. After what you had done, you pretended to be concerned by calling out, *"this girl is crying, what happened?"* to confuse the other children and divert attention away from yourself.
21. In summary, I pass a sentence of 2 years and 20 days imprisonment for one count of sexual assault the accused has been convicted of with a non-parole period of 1 year to be served before he is eligible for parole.

22. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka

27 February, 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.