

**IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION**

Criminal Case No: 26 - 2015

**STATE**

-v-

**MM**

For Prosecution : Inspector Lenaitasi S. [ Police Prosecution ]  
Accused : Ms Henao G [ Legal Aid Commission ]  
Date of Sentence : 9<sup>th</sup> day of April 2019

**SENTENCE**

1. I have redacted the name of the parties and generalised some of the information to protect the identity of the victim who was a child at the material time.
2. **MM**, your trial was fixed for the 12<sup>th</sup> of March 2019. You were charged with one count of indecent assault and a second count of defilement. The victim is the same in both counts.
3. On that trial date, the prosecution offered no evidence in relation to the defilement count and I have acquitted you of the same.
4. You had pleaded not guilty to both counts as early as the 19<sup>th</sup> of October 2015.
5. The prosecution intended to rely on your statement made to police during the course of investigations which is encapsulated in a police caution interview record.
6. There was a *voir dire* held but the ruling regarding the admissibility of the impugned statement was not given and when I presided over the case, I ordered a trial *denovo*.
7. That culminated with your case being fixed for trial for the 12<sup>th</sup> of March 2019 and where you have been acquitted of the count of defilement.
8. On that trial date you changed your plea and pleaded guilty to the remaining count of indecent assault which I outline as follows:

*Statement of Offence*

**INDECENT ASSAULT:** Contrary to section 212 ( 1 ) of the *Crimes Act 2009*.

*Particulars of Offence*

**MM** in between the 1<sup>st</sup> day of March 2013 to the 31<sup>st</sup> day of March 2013 at Vatukoula, in the Western Division unlawfully and indecently assaulted the female victim.

9. Your guilty plea to the remaining count is supported by the facts which you admitted and your answers to my questions in court. I also found that you understand the consequence of your plea. I convict you guilty accordingly.
10. The victim who is your cousin, was under 16 years old at the time. You knew she was under 16 years old. You requested her to go to the river to bathe with you. She was afraid of you. She went anyways. At the river, you fondled her breast and touched her vagina. She had her clothes on at the time. There were rumours circulating that you two were having a relationship and that is when the victim told her aunty of what had happened.
11. You are 60 years old. You are diabetic. You have high blood pressure. You seek forgiveness of the court. You have children but they are all adults now. You are a farmer.
12. You have spent 19 days in remand.
13. You are not a first offender. You have previous convictions such as for assault occasioning actual bodily harm in 1996 and robbery with violence as early as 1982.
14. I will not consider your convictions spent or consider you as a person of good history despite these offences being more than 10 years prior to 2013. Time elapsed is not the only factor.

**MAXIMUM SENTENCE**

15. The maximum sentence that can be imposed for indecent assault is up to 5 years imprisonment.

## **SENTENCING RANGE or SENTENCING TARIFF**

16. The sentencing tariff for this type of offence is between 12 months to 4 years imprisonment [ Rokota v The State [2002] FJHC 168; HAA0068J.2002S ( 23 August 2002 ) ].

### **Starting Point**

17. The circumstance of the case persuades me to select a starting point of 1 year and 3 months imprisonment.

### **Aggravating Factor**

18. The victim was young at the time.
19. You would have been over 50 years old at the time. The age gap is considerable. Despite being cousins, she would have looked up to you.
20. Some restraint and trust is required from you.
21. You also touched her vagina.
22. Your sentence is increased to 2 years imprisonment.

### **Mitigating Factors**

23. I don't accept that this was a virtuous relationship. You exploited the naivety of a child.
24. This case has been looming over you since January 2015.
25. I don't see any other mitigating factor in favour, not even your age or your minimal health concern.
26. I reduce your sentence to 1 year 6 months imprisonment.

### **GUILTY PLEA**

27. Your guilty plea is not early but some discount will be given to you for pleading guilty nonetheless.
28. Your sentence is reduced to 1 year and 2 months imprisonment.

### **DISCRETION**

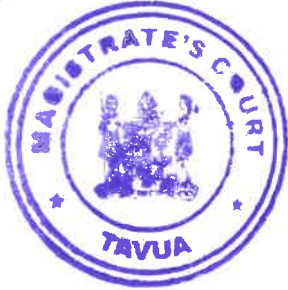
29. I can suspend your sentence whether in whole or in part pursuant to section 26 ( 1 ) and ( 2 ) ( b ) of the **Sentencing and Penalties Act 2009** if your sentence is below 2 years imprisonment.
30. I am also mindful of section 4 of the **Sentencing and Penalties Act 2009** when considering your sentence in this case.
31. Denunciation of this type of offending, deterrence and punishing you adequately is key here.
32. I will not order or impose any domestic violence restraining order on you as the victim is now an adult and is capable of making decisions for herself and she can apply to the court for a domestic violence restraining order if she wishes.

### **SUMMARY**

33. Your final sentence is 1 year 2 months imprisonment.
34. You have spent 19 days in remand which I approximate to 3 weeks. I will consider this as time served.
35. You have 1 year 1 month and 1 week imprisonment remaining.
36. I am inclined to suspend it only in part.
37. 8 months imprisonment is suspended for the next 2 years. Commit another offence punishable with imprisonment in the next 2 years and this 8 month imprisonment held in waiting maybe activated.
38. You are to serve the remaining 5 months and 1 week imprisonment immediately.

39. I will not impose any DVRO for the reasons explained earlier.

28 days to appeal.



Dated at TAVUA this 9<sup>th</sup> of April 2019

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Lisiate T.V. Fotofili

**Resident Magistrate**