

**IN THE MAGISTRATE'S COURT, SUVA**  
**CRIMINAL JURISDICTION**

**Criminal Case No: 174 of 2020**

**STATE -v- MOHAMMED NOUZAB FAREED**

**For the State: Ms. Shameem and Mr. Nasa**

**For the Accused: Mr. Nagin and Mr. Singh**

**SENTENCE**

Mohammed Nouzab Fareed you were found guilty by this Court on the 1<sup>st</sup> of November 2021 of the offence of Indecent Assault contrary to section 212 (1) of the Crimes Act. The delay between the end of the trial and the date of the verdict being handed down was due to the drastically reduced Court Operations as a result of the Covid 19 pandemic affecting the whole country.

After the verdict was handed down the parties sought time to have a sentencing hearing as the complainant had filled out a Victim Impact Statement Form and counsel for the Accused wished to cross examine her on the same.

You are a first offender and your counsel has offered the following plea in mitigation: -

- You are a first offender and you first came to Fiji in 2004 to work for Fijian Holdings and through your hard work and leadership made the company into a large and successful public company
- You have never committed a criminal offence and you are not a threat to the community at large.
- You were the sole breadwinner in the family, your wife stays home and looks after the family and home.
- You have 3 sons all students

- You lost your job as CEO of Fijian Holdings as a result of this case – resigning from that position on the 19<sup>th</sup> December 2016
- You are currently in serious financial strife due to Covid 19 as your main source of income was through consulting works for small businesses. As these businesses were closed during this period you have lost a source of income
- You are in serious financial strife and you are having difficulty in respect of your mortgage payments
- You have no extended family here in Fiji whom you can turn to for help
- The offending in this case lies at the very low end for these types of offences – non penetrating and no touching of private parts
- Hugging is a very common feature in diplomatic circles and the complainant had not objected to you hugging her at any time prior to the night in question

As part of the plea in mitigation your counsel also lists out your community work and the various institutions both in the private and public sector that you have donated your time, money and with whom you have shared your knowledge and expertise with.

#### Non – Conviction

Counsel invites the Court to invoke its discretion under section 16 (1) of the Sentencing and Penalties Act and not enter a conviction against you. Counsel relies on the case of The Queen –v- Harris Lang [2020] NZDC 16389. The facts in this case were that the Accused had grabbed the buttocks of the complainant, a flight attendant inside a flight he was on. He had pleaded guilty and had also underwent a process of restorative justice with the complainant first after which his counsel sought for name suppression and a discharge without conviction. The Court ultimately granted name suppression and discharged the Accused without conviction.

Counsel submits that such a discharge is appropriate in light of your many contributions to the community as listed above also due to your personal circumstances. You submit that any conviction will make securing any job difficult in the future and the adverse publicity that has been generated from this case will affect your chances of securing employment here in Fiji. There are prospective opportunities in Papua New Guinea however this will be jeopardised if a conviction is entered against you.

Counsel also objects to the Impact Statement filed by the State together with the sentencing submissions and this will be addressed later in this sentence.

Finally counsel submits that this whole case has impacted you in the following ways: -

- Your blood pressure has slowly and steadily increased and you have now been prescribed permanent blood pressure medicine by Dr. Joji Malani
- Your sleep pattern has been disrupted and you cannot sleep for long hours and you wake up daily after 2- 3 hours
- You are also suffering from degenerative osteoarthritis and you have to work standing up
- You are currently suffering from stress, and you also suffer from tinnitus (ringing in the ear) which severely affects your work and causes further stress. You are also receiving medication for thyroid, cholesterol, blood pressure and blood thinners.
- You have suffered mental agony due to the exposure brought by this case in the media and especially in social media with the continuous attacks and negative comments on you and your family.
- Your counsel submits that you have been punished enough therefore your case is appropriate for an absolute discharge pursuant to section 16 of the Sentencing and Penalties Act.

#### The State's Sentencing Submission

The State has filed sentencing recommendations and submits that the maximum sentence for the offence of Indecent Assault is 5 years imprisonment. Learned State counsel refers to the case of Ratu Penioni Rokota –v- State [2002] FJHC 168 where the High Court held that the tariff for Indecent Assault ranges from 12 months to 4 years.

In her remarks, Justice Shameem stated as follows: -

“Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.”

State counsel also referred to section 4 of the Sentencing and Penalties Act and the purposes for sentencing that the sentencing Court is required to have regard to. Counsel contends that for some cases the Court may need to go outside the tariff to ensure that justice is done.

The State relies on the recent case of State –v- Luvu [2018] FJMC 9; Criminal Case No. 24 of 2017 (15<sup>th</sup> February 2018) where a police officer committed the indecent acts in the complainant’s house after she let him in as he was in uniform. The Court saw this as an aggravating factor.

The State identifies the following aggravating factors: -

- Severe breach of trust and gross abuse of position and power – there was a severe imbalance of power between the Accused and the complainant. The State submits that the Court should not impose a lenient or suspended sentence on the Accused as to do so would undermine the Justice system in Fiji
- A degree of pre planning – the Accused kept on following up with the complainant until she agreed to meet him after 8pm in his office. The State submits that this is irregular for a CEO to persistently try and recruit an employee especially when they have chosen to decline the offer.
- The complainant has suffered emotionally and psychologically. She has recurring nightmares and she has lost confidence in most areas of her life as a result of the Accused’s actions. This has been outlined in the Victim Impact Form that she has filled out.

#### Mitigating Factors

There are no previous convictions therefore he is a person of previous good character.

The State submits that the sentence must reflect the criminality displayed by the Accused in this case. His actions warrants a sentence of imprisonment.

### Analysis

The purposes of sentencing are set out at section 4 (1) of the Sentencing and Penalties Act 2009 as follows: -

“4.-(1) The only purposes for which sentencing may be imposed by a court are–

- (a) to punish offenders to an extent and in a manner which is just in all the circumstances;
- (b) to protect the community from offenders;
- (c) to deter offenders or other persons from committing offences of the same or similar nature;
- (d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;
- (e) to signify that the court and the community denounce the commission of such offences; or
- (f) any combination of these purposes.”

In preparing a sentence section 4 (2) of the same Act then set out the issues that the sentencing Court must have regard to as follows: -

“(2) In sentencing offenders a court must have regard to–

- (a) the maximum penalty prescribed for the offence;
- (b) current sentencing practice and the terms of any applicable guideline judgment;
- (c) the nature and gravity of the particular offence;
- (d) the offender’s culpability and degree of responsibility for the offence;
- (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
- (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;



- (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
- (h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this [Act];
- (i) the offender's previous character;
- (j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence;"

The charge before this Court – Indecent Assault attracts a maximum sentence under the Crimes Act of 5 years imprisonment.

The tariff ranges from 12 months to 4 years imprisonment as per the tariff set under the Penal Code in State –v- Rokota [2002] FJHC 168. This was affirmed in State –v- Ravuama Vunivalu Vuibau HAC 291 of 2017 and State –v- Mohammed Zubair [2017] FJHC 895 – recent High Court sentences.

#### Non Conviction

Mohammed Nouzab Fareed, you through counsel have asked that I not enter a conviction and discharge you.

This is a discretionary power vested in the sentencing Court however the exercise of that discretion is guided by the provisions of section 16 (1) of the Sentencing and Penalties Act which provides: -

#### “Conviction or non-conviction

16.-(1) In exercising its discretion whether or not to record a conviction, a court shall have regard to all the circumstances of the case, including–

- (a) the nature of the offence;
- (b) the character and past history of the offender; and
- (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects”

The exercise of that discretion was discussed in the case of Botaki –v- The State HAA 0015/12B where the High Court sitting on appeal from sentence stated: -

“Just because an offender will lose his job, and just because he will be affected economically does not mean that it is mandatory for a Magistrate to invoke s16 (1) (c) of Sentencing and Penalties Decree. Where a Magistrate has exercised his discretion, within the bounds of his power, it would be in very exceptional circumstances that an appellate court would interfere with that exercise”

The New Zealand case relied on by counsel – The Queen –v- Harris Lang – is distinguished on the facts. In that case the Accused pleaded guilty and expressed severe remorse and took responsibility for his actions. Here there was a finding of guilt after trial and there has been no expression of remorse or acknowledgment of any kind that you did anything wrong.

The nature of the offence on the cold hard facts may not be at the highest extreme of such cases, however the Court has found that there was an imbalance of power that enabled you to carry out the offending. You are a first offender and a person of previous good character as well however that very fact placed you in a position to be able to commit the offence.

After weighing up the above factors I find that it is not appropriate to discharge you without conviction. Mohammed Nouzab Fareed your actions merit a conviction being entered in your name.

#### Victim Impact Form

The State relies on the Victim Impact Form that has been filed together with the sentencing recommendations. The complainant has also been cross examined on the same. She has testified on the ongoing effects of this event on her – she states that she has suffered and continues to suffer psychologically and she has recurring nightmares about what has happened.

She has conceded on cross examination that she never lost any days off work, that she continued working throughout the intervening months and years. She also conceded that she has not received counselling nor has she seen a psychiatrist.

In light of the evidence that was led at the sentencing hearing the Court finds that it will place less weight on the issues canvassed in the Victim Impact Statement as the same would have been bolstered by corroboration by an independent third party such as a counsellor or a mental health expert.

### Sentencing Remarks

As the Court has entered the conviction the Court is of the view that in light of all that has been canvassed above, the only appropriate sanction would be a sentence of imprisonment. This would send a deterrent message generally to any other like-minded offender and specifically for you Mohammed Fareed.

The only mitigating factor in your favour is your previous good conduct as a first offender. All the other factors that learned counsel has set out are your personal circumstances and do not tend towards mitigation for the offending in this case.

The factors that aggravate the offending are the breach of trust and the lack of remorse on your part or any acknowledgment that you have done anything wrong. The evidence led does not support the State's contention of prior planning and the offending in this instance can be said to be opportunistic.

Your personal culpability is high and the level of offending here lies at the lower to medium level for such offences. I say this only because of the apparent abuse of authority and breach of trust by you in committing the offence.

In sentencing you I adopt a starting point of 12 months and I add 6 months for the aggravating factors identified above. For your previous good character as a first offender I deduct 4 months from your sentence. You were never remanded in this matter therefore there will be no further deductions from your sentence for any time spent in remand.

Mohammed Nouzab Fareed your sentence is 14 months imprisonment. This is a sentence under 2 years therefore it may be suspended in the appropriate circumstances pursuant to section 26 of the Sentencing and Penalties Act.



The only requirement under section 26 is that the Court make a finding that to suspend a sentence is appropriate in the circumstances.

In this instance you have lost your previous highly prestigious positions and no doubt this conviction will impact your future prospects. The Court finds that a sentence of imprisonment in itself for the offending of this nature carries its own deterrence.

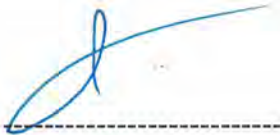
Is it then necessary in the interest of justice to make it a custodial sentence? The Court finds that when looking at the facts established from the trial and applying the totality principle, it is not in the interest of justice to do so.

Your sentence is therefore suspended

**Mohammed Nouzab Fared this is your sentence: -**

1. For the offence of Indecent Assault – I sentence you to 14 months imprisonment – suspended for 2 years.

28 days to appeal



Usaia Ratuveli

• **Chief Magistrate**



3<sup>rd</sup> December 2021