

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 98 OF 2013

STATE

-v-

1. JOSAI A NABOU
2. WAISALE NAMOKONINO
3. DANIEL VARO SMITH

Counsels : Mr. J. B. Niudamu for the prosecution
Ms. L. Jiuta for the 1st accused
Mr. Anil J. Singh for the 2nd and 3rd accused

Date of Sentence : 25 July 2014

SENTENCE

1. You are charged as follows:

COUNT 1
Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) and (b) of the Crimes Decree 44 of 2009.

Particulars of Offence

JOSAI A NABOU, WAISALE NAMOKONINO and DANIEL VARO SMITH in company of each other, on the 26th day of April 2013, at Nadi in the Western Division, being armed with an offensive weapon namely a knife, stole cash monies of \$10, one Samsung mobile phone valued at \$299 and one Cannon camera valued at \$600, all to the total value of \$909, the property of **ELENOA SAURARA GREEN**.

COUNT 2
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

JOSAIA NABOU on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

COUNT 3
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WISALE NAMOKONINO on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

COUNT 4
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

DANIEL VARO SMITH on the 26th day of April 2013 at Nadi in the Western Division had carnal knowledge of **ESG** without her consent.

2. All three accused pleaded Not Guilty to above charges on 22nd August 2013 when the plea was taken from them. After the Voir Dire inquiry was commenced on 7th July 2014 on the second day all three accused changed their plea pleaded Guilty for the 1st Count against them. However, each accused pleaded Not Guilty for the charge of Rape against each one of them. The three accused admitted the summary of facts in respect of the 1st charge on 9th July 2013.
3. The Summary of Facts submitted by the State Counsel states as follows:

The complainant in this matter was one **ESG**, 27 years, hotel worker of 18 Cooperative Road, Waqadra in Nadi.

On Friday, 26th April 2013 at about 1.30 am, the complainant was returning to her residence after coming back from work. The complainant got off at Natally Shop in Namaka and followed the track behind the shop to go to her place at Cooperative Road which was about 100 metres away. The complainant was carrying a small ladies handbag on her way home.

As the complainant was going through the track, she was punched by accused 1 (Josaia Nabou) and the complainant fell on the ground. Whilst the complainant was on the ground accused 1 then grabbed her handbag and the content of the bag was scattered beside where the complainant was lying. Accused 2 (Waisale Naimokonino) then threatened the complainant with a knife on her neck and told the complainant to keep quiet whilst accused 3 (Daniel Varo Smith) was standing as a watchman.

The accused persons then stole the following items from the complainant \$10.00 cash, 1 x Samsun mobile phone valued at \$299.00, 1 x cannon camera valued at \$600.00. The total value of property stolen from the complainant was \$909.00. All accused after committing robbery to the complainant they fled from the scene.

The complainant then later reported the matter at Namaka Police Station and upon police investigations the three accused were arrested and charged.

All accused are first offenders.

4. After carefully considering the Plea of each accused to be unequivocal, this Court found each accused guilty for one count of Aggravated Robbery contrary to Section 311 (1) (a) of the Crimes Decree.
5. All three accused stand convicted for one count of Aggravated Robbery.
6. The maximum sentence for Aggravated Robbery is 20 years.
7. The tariff for Aggravated Robbery is well settled now.
8. In **State v Rokonabete** [2008] FJHC 226; HAC 118.2007 (15 September 2008) it was held by Hon. Mr. Justice D. Goundar that:

"The dominant factor in assessing seriousness for any types of robbery is the degree of force used or threatened. The degree of injury to the victim

or the nature of and duration of threats are also relevant in assessing the seriousness of an offence of robbery with violence. If a weapon is involved in the use or treat of force that will always be an important aggravating feature. Group offending will aggravate an offence because the level of intimidation and fear caused to the victim will be greater. It may also indicate planning and gang activity. Being the ring leader in a group is an aggravating factor. If the victims are vulnerable, such as elderly people and person providing public transport, that will be an aggravating factor. Other aggravating factors may include the volume of items taken and the fact that an offence was committed whilst the offender was on bail.

The seriousness of an offence of robbery is mitigated by factors such as a timely guilty plea, clear evidence of remorse, ready co-operation with the police, response to previous sentence, personal circumstances of offender, first offence of violence, voluntary of property taken, a minor part, and lack of planning involved."

9. In **State v Manoa** [2010] FJHC 409; HAC 061.2010 (6th August 2010) it was held by Hon. Mr. Justice Paul Madigan that:

"The maximum penalty for robbery with violence under Penal Code is life imprisonment, while the maximum penalty for aggravated robbery under the Crimes Decree is 20 years imprisonment. Although the maximum sentence under the Decree has been reduced to 20 years imprisonment, in my judgment, the tariff of 8-14 years imprisonment established under the old law can continue to apply under the new law. I hold this for two reasons. Firstly, the established tariff of 8-14 years under the old law falls below the maximum sentence of 20 years under new law. Secondly, under the new law, aggravated robbery is made an indictable offence, triable only in the High Court, which means the Executive's intention is to continue to treat the offence seriously."

10. I take a starting point of 10 years for each of you for the count of Aggravated Robbery.

11. Aggravating factors;

(i) Group offending

- (ii) Use of knife
- (iii) Victim was a vulnerable person
- (iv) The injuries caused to the complainant.

12. I add 4 years for above and now your sentence is 14 years.

13. Mitigating circumstances of Josaia Nabou:

- (i) You are 19 years of age,
- (ii) Items recovered,
- (iii) First offender.

14. Considering all above, I deduct two years. Now your sentence is 12 years.

15. You pleaded Guilty to this charge at very late stage of the trial.

16. In **Basa v State** [2006] FJCA 23; AAU 0024.2005 (24 March 2006) the Court of Appeal held that:

“The appellant suggests that the reference to the fact the plea of guilty was entered late means he was not given full credit for it. Whenever an accused person admits his guilt by pleading guilty, the court will give some credit for that as a clear demonstration of remorse. However, the amount that will be given is not fixed and will depend on the offence charged and the circumstances of each case. The maximum credit is likely to be given for offences such as rape and personal violence because it saves the victim having to relive the trauma in the witness box. At the other end of the scale, little or no credit may be given if the evidence is so overwhelming that the accused has no real option but to admit it. Where, as here, the accused has admitted the offence and the receipt of his share of the money, the delay in pleading guilty must reduce the value of the plea considerably.”

17. Considering the time of the plea and circumstances under which you pleaded Guilty, this Court is of the view only token deduction could be given for the plea. I deduct 6 months for the plea. Now your sentence is 11 years and 6 months.

18. You were in remand from 11.5.2013 for a period of 1 year 2 months and 14 days. Acting under Section 24 (1) of the Sentencing and Penalties Decree, I deduct that period from the sentence. Now your sentence is 10 years 3 months and 16 days.

19. Mitigating circumstances of Waisale Namokonino;

- (i) You are 19 years of age,
- (ii) Items recovered,
- (iii) First offender.

20. Your father gave evidence in Court on mitigation. According to him you are a very good boy, who had helped the family. He was shocked when he heard the allegation. You attend Church. He is confident that you have learnt the lesson and will not commit further offences. He expressed apology on your behalf and asked for mercy.

21. Your neighbor Anil Kumar giving evidence stated that he know you since you are a baby. You are a good boy. He is confident that you have leant the lesson and your family will support when you come back.

22. Considering all above, I deduct two years. Now your sentence is 12 years.

23. You pleaded Guilty to this charge at very late stage of the trial.

24. Considering the time of the plea and circumstances under which you pleaded Guilty, this Court is of the view only token deduction could be given for the plea. I deduct 6 months for the plea. Now your sentence is 11 years and 6 months.

25. You were in remand from 11.5.2013 for a period of 1 year 2 months and 14 days. Acting under Section 24 (1) of the Sentencing and Penalties Decree I deduct that period from the sentence. Now your sentence is 10 years 3 months and 16 days.

26. Mitigating circumstances of the Daniel Varo Smith;

- (i) You are 19 years of age,
- (ii) Items recovered,
- (iii) First offender.

27. Your father gave evidence in Court on mitigation. According to him you are a very good boy, who had helped the family. He was shocked when he heard the allegation. You attend Church. He is confident that you have learnt the lesson and

will not commit further offences. He expressed apology on your behalf to the victim. He said he will support you when you come back.

28. Your neighbor Anil Kumar giving evidence stated that he know you since you are a baby. You are a good boy. He is confident that you have learnt the lesson and your family will support when you come back.

29. Considering all above, I deduct two years. Now your sentence is 12 years.

30. You pleaded Guilty to this charge at very late stage of the trial.

31. Considering the time of the plea and circumstances under which you pleaded Guilty this court is of the view only token deduction could be given for the plea. I deduct 6 months for the plea. Now your sentence is 11 years and 6 months.

32. You were in remand from 11.5.2013 for a period of 1 year 2 months and 14 days. Acting under Section 24 (1) of the Sentencing and Penalties Decree I deduct that period from the sentence. Now your sentence is 10 years 3 months and 16 days.

33. Your counsels have sought this Court to suspend at least the part of your sentence.

34. You are convicted of a serious offence involving violence.

35. In Koroivuata –v-State [2004] FJHC 139; HAA0064.2004 (20 August 2014) Hon. Mr Justice Gerald Winter has held that:

"The appellant pleads that he is young first offender and that his sentence should be suspended. He is wrong. This was violent offending. It will only be in rare and exceptional circumstances that the court may be required to consider a suspended term of imprisonment for violent offending. The public need for deterrence will often be outweigh the personal needs of a young but violent first offender."

36. Hon. (Mr. Justice Priyantha Nawana in State Prosecution v. Tilalevu [2010] FJHC 258; HAC 081.2010 (20 July 2010) held that:

"I would respectfully adopt the formulation by Winter J. as endorsed by His Lordship Justice Gates, as referred to in paragraph 19 above, as regards the issue of suspended sentence in a case involving violent offending and personal injury. I accordingly refuse the plea for suspended sentences in this case in respect of the two accused as the case does not qualify such a course of punishment."

I might add that the imposition of suspended terms on first offenders would infect

the society with a situation - which I propose to invent as ' First Offender Syndrome ' - where people would tempt to commit serious offences once in life under the firm belief that they would not get imprisonment in custody as they are first offenders. The resultant position is that the society is pervaded with crimes. Court must unreservedly guard itself against such a phenomenon, which is a near certainty if suspended terms are imposed on first offenders as a rule."

37. Considering above and the nature of the evidence available in this case, I am of the view that this is not a fit case to consider even partial suspension of the sentence.
38. Acting under Section 18 (1) of the Sentencing and Penalties Decree, I fix a non-parole period of 8 years for each accused for the above charge.
39. Following trial lasting five days in this Court each accused was found guilty on above Rape count against him.
40. After considering the unanimous verdict of Guilty of the assessors and having reviewed the evidence and summing up in this trial, the Court decided to concur with the verdict of the assessors and found each accused guilty of the Rape charge against him.
41. According to the Crimes Decree the maximum punishment for rape is Imprisonment for life. It is a serious offence.
42. The tariff for rape is well settled since the Judgment of Hon. Mr. Justice A.H.C.T. Gates in **State v Marawa**. [2004] FJHC 338; HAC 0016T.2003S (23 April 2004). The starting point of a rape of an adult is 7 years. The tariff is 7 years to 15 years.
43. In **Mohamed Kasim v The State** (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993; 27 May 1994, The Court of Appeal observed:

"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 that starting point."

44. I start sentence for each accused at 8 years.

45. The aggravating factors are:

- (i) Group offending,
- (ii) Injury caused to the complainant,
- (iii) Lack of remorse.

46. According to victim impact statement filed by the prosecution she is having sleepless nights and in fear of staying alone. She had lost a lot of her self-confidence and had affected her career.

47. I add 3 years for the above and now your sentence is 11 years.

48. I deduct 2 years for mitigating factors mentioned above of each accused. Now the sentence is 9 years.

49. The Fiji Court of Appeal in **Vukitoga v State** [2013] FJCA 19; AAU 0049.2008 (13 March 2013) cited with approval the following citation of D.A. Thomas, Principles of Sentencing (2nd edition, 1979) p. 56-57 which was cited in High Court of Australia judgment **Mill v The Queen** [1988] HCA 70:

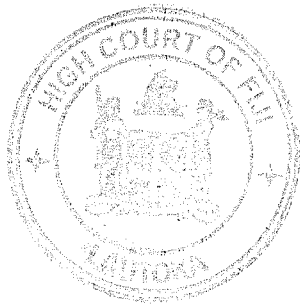
“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong’; “when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences.”


50. Considering the totality principle and the age of each accused, Court orders that sentences against each accused to run concurrently.

Summary

51. Each accused sentenced for 10 years 3 months and 16 days imprisonment with non-parole period of 8 years for the 1st charge. Each accused is sentenced for 9 years for the rape charge against him. Both sentences to run concurrently with one non-parole period.

52. 30 days to Appeal to Court of Appeal.




Sudharshana De Silva
JUDGE

At Lautoka
25th July 2014

Solicitors : Office of the Director of Public Prosecution
Office of the Legal Aid Commission for 1st Accused
Anil J Singh Lawyers for the 2nd and 3rd accused