

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 138 of 2019

STATE

V

AISEA NAQASE

Counsel	:	Mr. T. Tuenuku for the State.
	:	Ms. K. Vulimainadave for the Accused.
Dates of Hearing	:	12, 13, 17 November, 2020
Change of Plea	:	17 November, 2020
Date of Submissions	:	26 November, 2020
Date of Sentence	:	15 December, 2020

SENTENCE

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

1. The accused is charged with the following offences as per the amended information filed by the Director of Public Prosecutions dated 4th May, 2020:

COUNT ONE

Statement of Offence

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

Particulars of Offence

AISEA NAQASE, on the 4th day of August, 2019 at Lautoka in the Western Division had carnal knowledge of “MM”, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

AISEA NAQASE, on the 4th day of August, 2019 at Lautoka in the Western Division on an occasion other than Count 1 had carnal knowledge of “MM”, without her consent.

2. On 17th November, 2020 when the defence was to have opened its case the accused through his counsel informed the court that he wished to plead guilty to the above charges.
3. The amended information was put to the accused who in the presence of his counsel pleaded guilty. As a matter of precaution this court had to confirm with the accused whether he had made this decision on his own freewill without any pressure from anyone and that he had understood and accepted what the victim had told the court. The accused agreed to the above without any reservations.
4. After considering the change of plea from not guilty to guilty this court is satisfied that the accused had entered an unequivocal plea of guilty to the amended information which was read to the accused. This court is also satisfied that the accused has pleaded guilty on his freewill after understanding the nature of the charges and the consequences of pleading guilty.

5. In view of the above this court finds the accused guilty of both the abovementioned counts and he is convicted accordingly.

6. The brief facts were as follows:

The victim and the accused are husband and wife and they have three children. On the 3rd of August, 2019 the accused went to play rugby he did not return until about 4am the next day. When the accused came home he was drunk, the victim was lying down on the mattress and breast feeding their two weeks old baby daughter while their 4 year old son was sleeping beside her.

7. The victim asked the accused why he had come so late which resulted in an argument between the two. The accused wanted to have sex with the victim but she refused, he then forcefully removed her tights and panty and also removed his clothes and then had forceful sexual intercourse with her.

8. The second time the accused had sexual intercourse with the victim was after sometime the same morning despite her refusal. The accused pulled the victim and removed her clothes and had forceful sexual intercourse. The victim did not consent to what the accused had done to her on both occasions.

9. The victim told her mother about what the accused had done, the matter was reported to the police the victim was medically examined, the accused was arrested, caution interviewed and charged.

10. Furthermore, the accused was also charged with the offence of assault causing actual bodily harm. On 27th September, 2019 the accused had pleaded guilty to the following:

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act, 2009.

Particulars of Offence

AISEA NAQASE on the 4th day of August, 2019 at Lautoka in the Western Division assaulted “MM” thereby causing her actual bodily harm.

11. On 12th March, 2020 the accused had understood and admitted the summary of facts read. After this court was satisfied that the accused had entered an unequivocal plea of guilty on his freewill and after understanding the nature of the charge and the consequences of pleading guilty the accused was found guilty and convicted.
12. The summary of facts admitted by the accused also satisfied all the elements of the offence of assault causing actual bodily harm.
13. The brief facts were as follows:

On 4th August, 2019 at about 4am the victim and the accused had a family dispute whereby the accused punched the victim's face and head. The matter was reported to the police, the victim was medically examined.
14. The doctor noted swelling on the victim's left eye and she had difficulty in opening her eyes, there was a black eye due to blunt trauma. When the accused was caution interviewed by the police he admitted assaulting the victim.
15. Both counsel filed sentence, victim impact statement and mitigation for which this court is grateful.
16. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:
 - a) The accused is a first offender;
 - b) He was 27 years at the time of the offending;
 - c) Married with three children;
 - d) Was a Process Worker;
 - e) Supports his children and family including his elderly parents.

17. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs. the State, CAV 0003 of 2014* that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

18. The following aggravating factors are obvious in this case:

a) Breach of Trust

The accused is the husband of the victim, he breached the trust of the victim by his actions.

b) Victim was vulnerable

The victim was lying down and breast feeding their two weeks old daughter. She was vulnerable and helpless when the accused assaulted and raped her.

c) Victim had not recovered from child birth

As per the evidence of the doctor who had examined the victim, the victim was recovering from childbirth when the incidents happened.

d) Victim was injured

The victim was hurt and bleeding yet the accused did not have any mercy on her he continued with whatever he wanted to do.

e) Victim Impact Statement

In the victim impact statement the victim states that she has been emotionally and psychologically affected. She has started to feel insecure and scared, her relationship with her friends and family have changed, with a sense of low self-esteem ever since.

19. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victim. However the contents of the victim impact statement cannot be ignored in light of the facts and circumstances of this case. The harm caused to the victim was a direct result of what the accused had done to her (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).
20. The maximum penalty for the offence of rape is life imprisonment and the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.
21. 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.”

22. Section 17 of the Sentencing and Penalties Act states:

“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”

23. I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the three offences.
24. Bearing in mind the objective seriousness of the offences committed I take 8 years imprisonment (lower end of the tariff) as the starting point of the aggregate sentence. I add 5 years for the aggravating factors, bringing an interim total of 13 years imprisonment. The accused comes to court as a first offender hence I accept him as a person of good character. I also accept the two character references attached to the mitigation. For the mitigation the sentence is reduced by 1 year. The interim aggregate sentence is now 12 years imprisonment.
25. The accused pleaded guilty on the day the defence had to open its case which was not at the earliest opportunity in respect of the two counts of rape. In *Gordon Aitcheson vs. The State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court has offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

*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.*

26. 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)).
27. This court does not agree that the accused has shown any genuine remorse when he pleaded guilty for the two counts of rape on the day the defence had to open its case. The date of allegations is 4th August, 2019 the accused did not plead guilty for the two offences of rape until the prosecution called the victim and two witnesses and the court had ruled that the accused had a case to answer and the defence was to have opened its case.
28. The victim had to relive her ordeal in court and be subjected to cross examination. 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*. A

guilty plea is part of that process but the sentencing court then has the 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. before arriving at a conclusion.

29. In my view the accused has not shown any genuine remorse in respect of the two counts of rape that he is charged with. In this regard the accused does not receive any discount for the guilty plea, however, the accused does get a reduction for guilty plea in respect of the offence of assault causing actual bodily harm which is a reduction of 2 months. The interim aggregate sentence is 11 years and 10 months imprisonment.
30. I note the accused has been in remand for 6 months and 11 days in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I deduct 6 months and 15 days as a period of imprisonment already served.
31. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of assault causing actual bodily harm and two counts of rape is 11 years and 3 months and 15 days imprisonment.
32. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences 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.
33. Under section 18 (1) of the Sentencing and Penalties Act, I impose 9 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.

34. Mr. Naqase you have committed serious offences against the victim who is your wife and mother of your three children. You are a disgrace to the society the victim had given birth about two weeks ago and you wanted to have sex with her despite her refusal. What is even more appalling is that the victim was breast feeding your two weeks old daughter when you assaulted her and forced her into something that she was not willing. You did not give any heed to the safety of your child or the victim but for your sexual gratification you had forceful sexual intercourse after assaulting her. The victim was injured with blood flowing but you had no mercy.
35. You are a selfish person who cannot be trusted, the manner in which you had treated the victim warrants a long term imprisonment. The victim was vulnerable with two young children around her. According to the victim impact statement the victim is emotionally and psychologically affected and she is unable to lead a normal life, the experience she has endured is still very much alive in her mind.
36. Your actions against your wife have to be condemned in the strongest of terms. Domestic violence is on the rise because of people like you. You do not deserve to go back to your family anytime soon. Your behaviour in this case is appalling, you do not deserve any mercy from this court.
37. Due to the closeness of the relationship between the accused and the victim a permanent non-molestation order is issued to protect the victim as well as all the children of the victim under the Domestic Violence Act.
38. I am satisfied that the term of 11 years and 3 months and 15 days imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.

39. In summary I pass an aggregate sentence of 11 years and 3 months and 15 days imprisonment for one count of assault causing actual bodily harm and two counts of rape that the accused has been found guilty and convicted of with a non-parole period of 9 years to be served before he is eligible for parole.
40. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

15 December, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.