

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 63 of 2019

STATE

V

AMITESH PRASAD

Counsel : Mr. S. Seruvatu for the State.
: Mr. R. Charan and Mr. S. Singh for the Accused.

Dates of Hearing : 13, 14, 15, 16 February, 2023
Closing Speeches : 20 February, 2023
Date of Judgment : 20 February, 2023
Date of Sentence : 06 March, 2023

SENTENCE

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

1. In a judgment delivered on 20th February, 2023 this court acquitted the accused for one count of rape but found him guilty and convicted him of the lesser offence of sexual assault. The accused was also found guilty and convicted of one count of indecent assault as charged.
2. The brief facts were as follows:

3. On 20th March, 2019 at about 3:30 pm the victim who was 11 years of age and her younger brother were offered a joy ride by the accused in the bus he was driving. The victim knows the accused who was their school bus driver. The accused after completing his usual trip stopped the bus at the place where the victim and her brother had boarded.
4. The brother of the victim got out but when the victim was coming out of the bus the accused held her hand and threatened her not to get off the bus. The victim got scared she could not get out of the bus because the bus at this time was moving so she went and sat in one of the seats. The accused drove the bus to a secluded place in Savalau, after stopping the bus he grabbed the victim and pulled her out.
5. The accused took the victim to a small hill where he forcefully made her lie down and squeezed her breast by putting his hand inside her clothes. The victim felt pain so she told the accused to stop and go away at the same time with the other hand the accused forcefully put his hand inside the victim's panty and rubbed her vagina with his finger. The victim resisted but the accused continued she felt pain and a burning sensation.
6. The accused again touched the breast of the victim by putting his hand inside her clothes. The victim in retaliation pushed the accused hand up which was near her chin and bit the hand of the accused between the thumb and the index finger.
7. The accused said "*ouch*" pushed the victim and then went to the bus and drove off. The victim walked home, shortly after the victim's mother came and took the victim to the Namaka Police Station. The victim was medically examined at the Nadi Hospital the same day. The medical findings of the

doctor were of recent injury and reddening around the perineum which was consistent with rubbing.

8. The accused was arrested, caution interviewed and charged.
9. Both counsel filed written sentence and mitigation submissions for which this court is grateful.
10. The following personal details and mitigation was submitted by the counsel for the accused:
 - a) The accused was 24 years old at the time of the offending;
 - b) Is a first offender;
 - c) Is the eldest of three siblings;
 - d) Sole bread winner for the family of 5;
 - e) Is a motor mechanic and bus driver;
 - f) Cooperated with police during investigations;
 - g) Is remorseful of what he had done and seeks forgiveness;
 - h) Promises not to reoffend;
 - i) Seeks leniency of the court.
11. 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

12. 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 was the bus driver who used to pick and drop her during school trips. The victim had entered the bus upon the request of the accused for a joy ride and she had trusted him. The accused grossly breached the trust of the victim by his actions.

b) Victim was vulnerable

The victim was vulnerable, unsuspecting and alone the accused took advantage of the situation and sexually abused her. The accused drove the bus to a secluded area without any second thoughts about the victim.

c) Prevalence of offending

There has been a notable increase in sexual offence cases by individuals known to the victim. The victim was 11 years and the accused was 24 years the age difference is substantial.

d) Safety of the victim

The accused was self-centered and selfish that he left the victim in the middle of nowhere on a late afternoon and left her without regard to the safety of this young victim.

TARIFF

13. 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.*
14. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (*Rokota vs. The State, criminal appeal no. HAA 0068 of 2002*).
15. Section 17 of the Sentencing and Penalties Act states:10 *“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.”*
16. I am satisfied that the two 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 for the two offences. It is to be noted that for the offence of sexual assault which is serious of the two offences category 2 (ii) of *Laca’s* case (*supra*) applies.
17. Bearing in mind the objective seriousness of the offences committed I take 2 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. The sentence is increased for the aggravating factors, the personal circumstances and family background of the accused has little mitigatory value, however, the accused good character and other mitigation are substantive factors. The sentence is further reduced for mitigation and good character.

18. I note the accused has been in remand for about 7 months and 28 days, in accordance with section 24 of the Sentencing and Penalties Act the sentence is further reduced as a period of imprisonment already served.
19. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final aggregate sentence of imprisonment for one count of sexual assault and one count of indecent assault is 3 years, 2 months and 2 days.
20. I am satisfied that the term of 3 years, 2 months and 2 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.
21. 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. Since the final aggregate sentence exceeds 3 years imprisonment this court has no powers to suspend the term of imprisonment.
22. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 2 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 which is just in the circumstances of this case.

23. Mr. Prasad you have committed serious offences against the 11 year old victim who was a passenger in the bus driven by you. As a public service provider you had a responsibility towards the victim. She trusted you that is why she accepted your request for a joy ride which ended in a misery for her.
24. I am sure it will be difficult for the victim to forget what you had done. Your actions towards the victim were senseless, you did not care about her when you left her alone in the middle of nowhere late in the afternoon.
25. In summary, I pass an aggregate sentence of 3 years, 2 months and 2 days imprisonment for one count of sexual assault and one count of indecent assault that the accused has been convicted of with a non-parole period of 2 years to be served before he is eligible for parole.
26. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

06 March, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Ravneet Charan Lawyers for the Accused.