

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 04 of 2020

STATE

V

NOUMAN PATEL

Counsel : Ms. P. Lata and Ms. R. Uce for the State.
: Mr. S. Heritage and Mr. A. Prasad for the Accused.

Dates of Hearing : 24, 25, 26, 27 and 28 April, 2023
Closing Speeches : 08 May, 2023
Date of Judgment : 08 May, 2023
Date of Sentence : 25 May, 2023

SENTENCE

(The name of the victim is suppressed he will be referred to as "A.A")

1. In a judgment delivered on 8th May, 2023 this court found the accused not guilty for one count of rape as charged but guilty of the lesser offence of attempt to commit rape and he was convicted accordingly.
2. The brief facts were as follows:

- a) On 2nd January, 2020 the 8 year old victim went to the Nadi Jamie Mosque with his father before going into the prayer room the victim went to the washroom to relieve himself. As the victim was leaving the washroom the accused came and pushed the victim inside and locked the door.
 - b) The accused removed his trousers and pulled down his underwear and told the victim to hold his penis and to masturbate him. The victim did as he was told after this the accused removed the victim's pants and underwear and turned the victim facing the opposite side.
 - c) The accused tried to penetrate the anus of the victim with his penis the victim shouted since it was painful to him. After the accused took out his penis the victim saw that a white liquid came out of the penis.
 - d) The victim told the accused that he wanted to go, the accused opened the door and as the victim was about to leave after wearing his pants the accused gave the victim a \$2 coin and told him not to tell anyone about what had happened otherwise he will kill the victim.
 - e) Later in the day the victim told his father about what the accused had done to him. The matter was reported to the police and the victim was medically examined. The doctor saw slight redness around the anal opening which is the anal orifice. The matter was reported to the police the accused was arrested, caution interviewed and charged.
3. The state counsel filed written submissions and the victim impact statement and the defence counsel filed mitigation for which this court is grateful.

4. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:
- (a) The accused is a first offender;
 - (b) Is now 32 years of age;
 - (c) Was employed as a Baker;
 - (d) Is not married and was living with his parents and siblings;
 - (e) Is very remorseful of his actions;
 - (f) Is an active member of the community;
 - (g) Had cooperated with the police;
 - (h) Is a religious person who has done charitable work for the mosque;
 - (i) Regrets what he has done;
 - (j) Realizes his actions were unwarranted and unnecessary;
 - (k) Has learnt his lesson;
 - (l) Seeks leniency of the court.
5. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v the State, CAV 003 of 2014 (20 August 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.
6. The aggravating factors are:
- (a) Breach of Trust

The accused and the victim belonged to the same mosque and were known to each other. The accused grossly breach the trust of the victim by what he did.

(b) Victim was vulnerable

The victim was alone, naive and vulnerable. The accused took advantage of the situation.

(c) Planning

This is some degree of planning by the accused. He knew prayers were about to start so there will be no one around in the washroom. The accused was bold and undeterred in what he did to the victim.

(d) Victim Impact Statement

According to the victim impact statement the victim gets flash back of the incident, has become short tempered, cannot sleep alone and is afraid to go to the washroom alone.

(e) Prevalence of offending

There has been a notable increase in sexual offence cases by matured individuals who are known by the victims.

(f) Safety of the victim

The victim was supposed to be safe at the mosque but this was not to be due to the actions of the accused.

(g) Age disparity

The victim was 8 years old at the time and the accused was 29 years. The age difference is substantial.

TARIFF

7. The maximum punishment for the offence of attempt to commit rape is 10 years imprisonment. The tariff for the offence of attempt to commit rape was established in 2001 which is from 1 year to 5 years imprisonment (see *Jioji Aunima vs. The State, criminal appeal no. HAA 033 of 2001 (27 June 2001)*).
8. Taking into account the judgment of the Supreme Court in *Gordon Aitcheson vs. The State, Criminal Petition no. CAV 0012 of 2018 (02 November, 2018)* in particular the new tariff for the offence of rape of a juvenile which is now between 11 years to 20 years imprisonment. It is to be noted that *Aitcheson's* case (supra) has increased the tariff range for the offence of rape. In *Anand Abhay Raj's* case the tariff range was between 10 and 16 years, in my considered judgment there is a need to revisit the tariff in *Aunima's* case (supra) which is 22 years old.
9. In view of the above, I do not think that it will be incorrect to say that a new tariff is long overdue, in my judgment a range between 2 years to 8 years would be a fair sentencing range depending on the mitigating and aggravating factors.

STARTING POINT

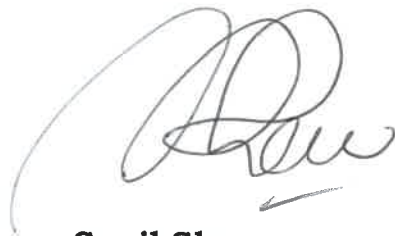
10. In selecting a starting point I am guided by the Court of Appeal in *Laisiasa Koroivuki v The State, criminal appeal no. AAU0018 of 2010* at paragraphs 26 and 27 the following is stated:
“[26] *The purpose of tariff in sentencing is to maintain uniformity in sentences. Uniformity in sentences is a reflection of equality before the law. Offender committing similar offences should know that punishments are*

even handedly given in similar cases when punishments are even-handedly given to the offenders, the public's confidence in the criminal justice system is maintained.

[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.

11. Considering the objective seriousness of the offence committed I select a starting point of 2 years imprisonment (lower range of the tariff). The sentence is increased for the aggravating factors, although the personal circumstances and family background of the accused has little mitigatory value, however, the sentence is reduced for the other mitigating factors and good character of the accused which has substantive mitigating value. I have also taken into account the character references provided in support.
12. From the court record I note that the accused was remanded for 1 month and 5 days the sentence is further reduced as a term of imprisonment already served. The final sentence is now 5 years 4 months and 25 days.
13. Having considered section 4 (1) of Sentencing and Penalties Act and the serious nature of the offence 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 nature.

14. Under section 18 (1) of the Sentencing and Penalties Act (as amended) I impose 4 years imprisonment 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.
15. Mr. Patel you should be ashamed of what you have done to this child within the precinct of a holy place of worship. You cannot be forgiven for what you have done. You have not only brought shame to your family but also to all the Islamic worshippers, it is unacceptable that a place of worship has been used by you for your lust and sexual gratification.
16. In summary the accused is sentenced to 5 years 4 months and 25 days imprisonment with a non-parole period of 4 years to be served before the accused is eligible for parole.
17. 30 days to appeal to Court of Appeal.



Sunil Sharma
Judge



At Lautoka

25 May, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Iqbal Khan & Associates for the Accused.