

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 139 - 2015

STATE

-v-

ARSEN KUMAR NAND

For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Ms. Tavaiqia L. [Legal Aid Commission]
Date of Trial : 12th August 2019
Date of Judgment : 15th October 2019
Sentence : 31st January 2020

SENTENCE

1. **ARSEN KUMAR NAND**, having pleaded not guilty and after your trial, I have found you guilty and convicted you of the following:

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 of the **Crimes Act 2009**.

Particulars of Offence

ARSEN KUMAR NAND between the 9th day of May, 2015 and 10th day of May, 2015 at Tavua in the Western Division unlawfully and indecently assaulted the female victim.

2. The female victim was 14 years old at the material time. You are her uncle. The victim was staying over at your home. The family usually slept in the same room. You would normally sleep on the floor. In the night at around 11.30pm after drinking grog, you came over to the bed where the victim was lying down and touched the victim on her forearm, bicep and her chest area. The victim felt bad and told you to go away. The victim told her aunty or your wife the following morning what had happened.

3. You have not spent any time in remand.
4. You are 42 years old. You are employed as a casual worker. You support your sister and her family. You are a helpful member of your community. You maintain your innocence.

MAXIMUM SENTENCE

5. For indecent assault, the maximum punishment that is imposable is up to 5 years imprisonment.

SENTENCING RANGE or SENTENCING TARIFF

6. The sentencing tariff sentencing tariff for indecent assault is between 12 months to 4 years imprisonment [Rokota v The State [2002] FJHC 168; HAA0068J.2002S (23 August 2002)].

Starting Point

7. Considering the objective seriousness of the offence, I select 13 months imprisonment as the starting point.

Aggravating Factors

8. This was your niece.
9. She was 14 years old.
10. This was a breach of trust. She was also staying over at your place.
11. I increase your sentence to 20 months imprisonment.

Mitigating Factors

12. You are a first offender.
13. You have a family to support.
14. I accept that you are a helpful member of the community and that this is out of character for you.
15. I reduce your sentence to 14 months imprisonment.

DISCRETION

16. I can suspend your sentence whether in whole or in part pursuant to section 26 (1) and (2) (b) of the **Sentencing and Penalties Act 2009** if your sentence does not exceed 2 years imprisonment.
17. It is also discretionary whether a non-parole period should be imposed if your sentence is less than 2 years but not less than 1 year imprisonment, pursuant to section 18 (3) of the **Sentencing and Penalties Act 2009**.
18. I am also mindful of section 4 of the **Sentencing and Penalties Act 2009** when considering your sentence in this case.
19. I place emphasis on the community's denunciation of this type of offending and the need for deterrence when sentencing you.

SUMMARY

20. No further reduction in sentence will be made as you did not spend any time in remand.
21. You are sentenced to 14 months imprisonment.
22. I accept that these were non-penetrative acts but I cannot accept your counsel's submission that this case warrants a non-custodial sentence.

23. We send a wrong message to the community if no immediate custodial sentence is given to a sexual offender who preys on a young male or female. Especially if there is a domestic relationship in existence. If no compelling circumstance exists or no mitigating factor exists that warrants a non-custodial sentence, then the general rule should be to imprison. How long for? will depend on each case.
24. Overall, ARSEN KUMAR NAND, in your case, I am inclined to suspend your imprisonment term but only in part.
25. 8 months of your imprisonment term is suspended for the next 3 years.
26. You are not to commit any other offence punishable with imprisonment in the next 3 years. If you do, this 8 months imprisonment term held in waiting or in reserve may be activated.
27. You will serve 6 months imprisonment immediately.
28. The interim Domestic Violence Restraining Order [DVRO] section 27 standard non-molestation conditions which was imposed and explained to you earlier on the 27th of November 2018 is made final.
29. Do not breach any of the condition of the DVRO or misbehave towards the female victim [your niece]. If you do, you may be charged and prosecuted for another offence.

28 days to appeal.



Dated at Tavua this 31st day of January, 2020

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Lisiate T.V. Fotofili

Resident Magistrate