

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 41 of 2015

STATE

V

PETERO MASALA

Counsel : Ms. S. Kiran for the State.
: Ms. K. Vulimainadave for the Accused.

Date of Hearing : 11 October, 2018
Closing Speeches : 15 October, 2018
Date of Summing Up : 16 October, 2018
Date of Judgment : 17 October, 2018
Date of Sentence : 02 November, 2018

SENTENCE

(The name of the complainant is suppressed she will be referred to as ("EB").

1. In a judgment delivered on 17 October, 2018 this court found the accused guilty as charged as per the following information:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western Division, unlawfully and indecently touched the vagina of “**EB**” with his finger, without the said “**EB’s**” consent.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western Division, had carnal knowledge (penile sex) of “**EB**” without the said “**EB’s**” consent.

COUNT THREE

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 29th day of July, 2013 and 3rd day of August, 2013 at Raiwai, Suva in the Central Division, unlawfully and indecently touched the breasts, neck, and private parts of “**EB**” on top of her clothes, without the said “**EB’s**” consent.

2. The brief facts were as follows:

The victim “**EB**” in 2012 was 15 years of age a Form 3 student. On one of the days during the second term of school she was at the house of her uncle the accused, her aunty had gone to work. The victim did not go to school because she was having stomach ache.

The accused offered to massage the victim’s stomach, the victim was alone with the accused.

3. She was wearing a shorts and a top, in the sitting room the accused started to massage the stomach of the victim, as he continued he started to massage the victim's vagina and was playing around by touching it.
4. Thereafter the accused removed the victim's shorts and underwear and went on top of her and penetrated her vagina with his penis. When the accused penetrated her for the second time the victim pushed the accused away because it was painful for her, her legs were shaking she felt weak and emotionally broken.
5. The victim did not consent to what the accused had done to her. After two days the victim told her friend Faustina about what the accused had done to her. Faustina wanted to tell her mother but the victim stopped her since she felt nobody would believe her and that she was scared.
6. The matter was reported to the police after the victim couldn't continue to live with it any longer she informed her distant relative Laisiana Tukana.
7. Between 29 July, 2013 and 3 August, 2013 the victim went to Suva, she stayed at the house of an aunt. The accused also resided there.
8. One night when she was sleeping she felt a light being shown on her face she opened her eyes and saw the accused shining a torch at her face and at the same time touching the victim's neck, breasts and private part on top of her clothes. The victim was scared and did not know what to do. The accused touched her for about an hour she did not consent to the touching by the accused.
9. The victim later told her relatives and the matter was reported to police. The accused was arrested and charged.
10. Both counsel filed written sentence submissions for which this court is grateful.
11. 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 42 years of age at the time of the offending;
 - (c) He is married supports his nieces and nephews in the village;
 - (d) Was employed as a cleaner;

- (e) Is supporting his two grandchildren who are in class 1 and class 3;
 - (f) Seeks leniency from court;
 - (g) Did not use any physical violence or aggression on the victim to make her submit to his unlawful acts;
 - (h) His time behind bars has taught him a lesson and he admits that he has learned a lesson;
 - (i) He has cooperated with the police in their investigations since his arrest;
 - (j) He sympathizes with the victim and is remorseful for indecently assaulting the victim;
 - (k) The accused pleaded guilty to the count of indecent assault.
12. 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.
13. The aggravating features are:
- (a) Breach of Trust
The victim is the niece of the accused by virtue of his marriage. The accused breached the trust of his niece who had come to stay at his house and was having stomach ache. The accused took advantage of the victim's vulnerability since she was alone with the accused at home.
 - (b) Planning
The accused had planned to do what he did when his wife had gone to work in the guise of massaging the stomach of the complainant. He knew the complainant was helpless and innocent at the time of the offending.
 - (c) Age Difference
The victim a Form 3 student was about 15 years of age at the time of the offending whereas the accused was 42 years of age. The age difference was substantial.

14. In presenting the mitigation of the accused the counsel for the accused at three different paragraphs made the following comments:

Paragraph 9.1.9

“While he accepts this Honorable Court’s decision to convict him, he prays that this Honorable Court will also accept his belief that he did not commit the offence and that his belief that he is still innocent will not be used as an aggravating factor.”

Paragraph 7.11.2

“While we humbly accept Your Lordship’s decision to convict Mr. Masala we pray that his belief that he is still innocent and his behaviour not to show any remorsefulness will not be considered as an aggravating factor.”

Paragraph 7.11.4

“He still believes that he did not commit the offence which he now stands convicted for.”

15. This court is concerned that counsel for the accused has embarked into making such incongruous and insinuating comments on behalf of the accused in her submissions knowing fully well that the accused has been found guilty and convicted as charged. Whilst not taking the above comments against the accused it is the duty of counsel to exercise professional responsibility in filing submissions in court.
16. This court notes that the accused had pleaded guilty to the third count of indecent assault when the opportunity presented itself and this aspect has been taken into account in sentencing.
17. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in the decision of *Anand Abhay Raj* (supra) has confirmed that the tariff for the rape of a juvenile is now a sentence between 10 years to 16 years imprisonment.

18. It is the duty of the court to protect children from sexual exploitation of any kind that is the reason why the law has imposed life imprisonment for the offence of rape as the maximum penalty.
19. There has been an increase in sexual offences involving offenders who are known to the victim and matured adults. It is sickening to note the manner in which the accused had breached the trust of this victim.
20. Section 17 of the Sentencing and Penalties Act states:

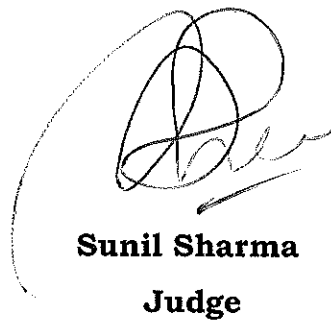
“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment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

21. 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.
22. After assessing the objective seriousness of the offences committed I take 12 years imprisonment as the starting point of the aggregate sentence. I add 5 years for the aggravating factors, bringing an interim total of 17 years imprisonment. Since the personal circumstances and family background of the accused has little mitigatory value I find his good character has substantive mitigating value. I therefore reduce the sentence by 2 years.
23. I note from court file that the accused was remanded for 2 weeks. In exercise of my discretion I deduct 1 month in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence is 14 years 11 months imprisonment.
24. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the head sentence of imprisonment for one count of sexual

assault, one count of rape and one count of indecent assault is 14 years 11 months.

25. Mr. Masala you have committed serious offences against your niece who had come to stay at your house. The victim was unsuspecting and vulnerable you had instilled fear in her by your conduct. You cannot be forgiven for what you had done to this child. You have not only scarred the victim's life forever but have brought shame to the family that accepted you by virtue of your marriage into the family. You have also broken the sanctity of the relationship that existed between you and the victim. As a result of your selfish act as per the victim impact statement the victim has lost her self-esteem and confidence in life to the extent of losing concentration in school work. The victim cannot stop thinking about the incidents which has led to her losing trust on the male members of her family.
26. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on a victim who was 15 years of age compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
27. Under section 18 (1) of the Sentencing and Penalties Act, I impose 12 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.
28. I am satisfied that the term of 14 years 11 months 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.
29. In summary I pass an aggregate sentence of 14 years 11 months imprisonment with a non-parole period of 12 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.

30. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

02 November, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.