

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 94 OF 2015

STATE

v

EDWIN ALVIN KUMAR

Counsel: Ms. S. Kiran for State
Ms. S. Vaniqi for Accused

Date of Judgment: 07th of April, 2018

Date of Sentence: 20th April, 2018

SENTENCE

1. Mr. Edwin Alvin Kumar, you were convicted on following counts after a fully defended trial.

First Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Edwin Alvin Kumar on the 6th day of May, 2015, at Nadi in the Western Division, penetrated the vagina of Sofiya Begum without her consent.

Second Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Edvin Alvin Kimar on the 6th day of May, 2015, at Nadi in the Western Division, indecently assaulted Sofiya Begum by licking and sucking the vagina of the said Sofiya Begum.

2. You now come before this Court for sentence after conviction.
3. You are complainant's former husband. On the 5th of May, 2015, you visited complainant around midnight notwithstanding her protest while she was alone with the daughters. When the complainant went to the bedroom to make two daughters sleep, you entered the bedroom despite her protest. While she was making daughters sleep, you started touching her. Then you pushed her and told her to lie down on the bed. When she fell on the bed, you came on her and started pulling her nightie up and pantie down. Then you dragged her to the kitchen and pushed her hard down on the mattress. You started kissing her tummy and told her to suck your penis. Then you started licking her vagina.
4. You made her turn and told her to do "sit ups" on his penis. Then you made her lie down on the mattress and started having sexual intercourse with her without her consent. You ejaculated inside her vagina. When he was doing all these things she was feeling the pain in her vagina. When she was crying you threatened her and told, '*don't go to police and report. If you will go to Police, I will take out one of your eyes and kill you*'.
5. The maximum penalty for Rape is life imprisonment.

6. The tariff for rape of an adult is well settled. The starting point is seven years' imprisonment *Kasim v The State* (Crim App. No. AAU0021j of 1993S) and the tariff is set between 7 and 15 years' imprisonment (*State v Marawa* [2004] FJHC 338).
7. The maximum penalty for Sexual Assault is 10 years' imprisonment. In *State v Epeli Ratabacaca Laca*, HAC 252 of 2011, Madigan J set the tariff for the offence between 2 and 8 years imprisonment, the higher tariff being set for serious sexual assaults.
8. Having considered the Legal Guidelines for Sentencing in the United Kingdom, Justice Madigan, in Laca (supra), divided 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 parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

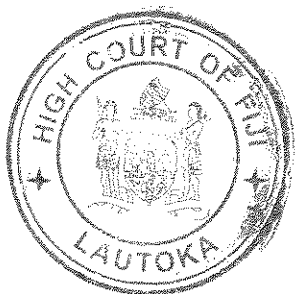
9. Licking of a vagina falls into category 2(ii) above.

10. Rape is the most serious crime in your offending. Therefore, in reaching the final sentence, I consider the rape as the head count. By prescribing life imprisonment for Rape, the law makers expect Courts to impose harsher punishment on rape offenders. This heinous crime is prevalent in Fiji and the offenders must be punished to denounce and to send a clear message to the community that no such actions will be tolerated by courts. Not only the offender but potential offenders must be deterred. The offender must be severely punished to ensure safety and security of all women.
11. Bearing in mind Section 11(1) of the Constitution and Section 4, and 15(3) of the Sentencing and Penalties Act, I now proceed to craft your sentence to punish you to an extent which is just in all the circumstances of this case.
12. In selecting the starting point, the Court must have regard to the objective seriousness of the offence. In doing so, I have considered culpability and harm factors of your offending. You have used a degree of force and exploited a vulnerable woman who was alone at home with her daughters. Having considered the gravity and objective seriousness of the offence, and principles laid down in *Koroivuki v State* [2013] FJCA 15; AAU0018.2010 (5 March 2013), I pick 7 years' imprisonment as the starting point for the 1st count of rape.
13. I have considered following aggravating circumstances in light of the Section 4(2) of the Sentencing and Penalties Act and guidelines set out by the Chief Justice Gates in *Ram v State* [2015] 26; CAV 12.2015 (23 October 2015).
 - i. Victim is your former wife. She has been in a family or domestic relationship. You have committed a "Domestic violence" within the meaning of Section 3(1) Domestic Violence Act.
 - ii. Victim trusted you when you visited the children and opened the door at night. You breached that trust when you committed these offences in a night invasion.
 - iii. You chose to satisfy your lustful demands without having any regard to your children who were also sleeping on the same bed as the victim.
 - iv. Despite victim's protest, you ejaculated inside her vagina.

- v. You threatened the victim with death and warned her not to report the rape to police.
14. I have considered following mitigating circumstances that your Counsel has submitted to this Court.
- i. You are a 27 year old young offender. You are a father of two daughters. You are employed as a general machine operator and you look after your elderly and sick father. You are the sole breadwinner of your family. I have considered your personal circumstances although they have a very little mitigatory value.
 - ii. This offence was committed in 2015 and the charge was hanging over your head for the past 3 years. With the uncertainty of the outcome, you have suffered. The court is mindful of that.
 - iii. You seek mercy and forgiveness of the court.
15. I add 2 years to the starting point for above mentioned aggravating factors bringing the interim sentence to 9 years' imprisonment for the 1st count. I deduct 1 year for the above mentioned mitigating factors bringing the sentence to one of 8 years' imprisonment. According to the submission filed by the State Counsel, you have been in remand approximately for 16 months and 10 days (1 year 4 months and 10 days). I deduct further 1 year 4 months and 10 days to reflect your remand period. Now your final sentence for the 1st count is 6 years 7 months and 20 days' imprisonment.
16. For the 2nd count (Sexual Assault) I select a starting point of 2 years. I add 2 years for the aforementioned aggravating factors and deduct one year for mitigation. Your sentence for the 2nd count is 3 years' imprisonment.
17. You are a young offender. I have considered your rehabilitation potential in determining your non-parole period. Considering Section 18 (1) of the Sentencing and Penalties Act, and principles enunciated in Tora v State [2015] FJSC 23; CAV11.2015 (22 October 2015), I impose a non-parole period of 6 years.

Summary

18. 1st Count - 6 years 7 months and 20 days' imprisonment.
- 2nd Count- 3 years' imprisonment.
19. Having considered one transaction and totality principles, I order that you serve both sentences concurrently.
20. **You are sentenced to 6 years 7 months and 20 days' imprisonment. You are eligible for parole after serving 6 years in prison.**
21. 30 days to appeal to the Fiji Court of Appeal.



Aruna Aluthge

Judge

At Lautoka

20th April, 2018

Counsel:

- **Office of the Director of Public Prosecution for State**
- **Vaniqi Lawyers for Accused**