

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

Criminal Case No: 98 - 2016

STATE

-v-

M.A

For Prosecution: WPC Chand [Police Prosecution]
Accused : Ms Henao [Legal Aid Commission]
Trial Date: 9th October 2018
Judgment Date: 26th October 2018

Date of Sentence: 16th November 2018

SENTENCE

1. 1. **M. A.**, after pleading not guilty and after your trial, the court found you guilty of the following charge:

Statement of Offence

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

Particulars of Offence

MA on the 18th day of April, 2016 at Tavua in the Western Division unlawfully and indecently assaulted the victim.

1. 2. The victim here was your niece. The victim was 10 years old at the time when the incident happened. The victim is the daughter of your older sister.
1. 3. You were staying with your older sister at the time. Your older sister and her husband had brought you into their home since you were a young boy of around 13 years old and looked after you.
1. 4. You committed the offence when you were around 25 years old.
1. 5. On the night in question you called the victim who at the time was watching T.V with her mother. When the victim came to you, you had the victim lie on the kitchen floor, you pulled up her shirt right to her breast and you licked her stomach. Your older sister came to check on the both of you and saw what you did. She was understandably upset and told you to leave the house the same day. You did and later your sister lodged a complaint with police the following day.
1. 6. You were interviewed by police and you admitted that you 'rubbed' your tongue on the victim's stomach.
1. 7. During your trial you disputed giving those answers to police. You alleged that it was fabricated by police. After trial, the court accepted that your answers were not fabricated.

1. 8. The victim had to give evidence during your trial, she is now 12 years old.
1. 9. I found her evidence overwhelmingly convincing.
1. 10. The victim's evidence was in addition to, the direct evidence of your older sister who witnessed what you did and was supplemented by your confession in your police interview.
1. 11. You are presumed innocent until proven guilty.
1. 12. However in cases such as this where there is overwhelming evidence, I am inclined to hold you accountable for pleading not guilty which inevitably led to the victim having to endure the ordeal of giving evidence during your trial.
1. 13. You are a first offender.
1. 14. The court record does not reflect that you have spent any time in remand.
1. 15. In your mitigation, it is submitted on your behalf that you are 29 years old. You are single, you don't have any children and you are farming. Since the incident, you are residing somewhere else and that is with your cousin. You seek leniency and the forgiveness of the court.
1. 16. I observed you during your trial.
1. 17. I find that you are a simple man with an unsophisticated view of the world. It was challenging at times to have to explain some of your rights or options to you such as the options I explained to you after I found that there was a case against you.
1. 18. I don't think that you have had much experience with a female partner. You may have not had any experience at all despite your age.
1. 19. You had directed your sexual urges to the closest vulnerable person to you and that was your 10 year old niece.
1. 20. I hope that you have learnt that this is unacceptable.
1. 21. If any other thing is learnt by you from this sad case, is that in the future, you will have to find ways of dealing with this sexual urges constructively. Maybe, find a consenting adult partner.
1. 22. I find that you failed to realize this flaw of yours and you gave into your sexual urge because of your inability to recognise this.
1. 23. Your failure to recognize this, is off course not a defence, however, I am inclined to hold it in your favour as part of your mitigation.

MAXIMUM SENTENCE

1. 24. The maximum sentence a court can impose for indecent assault is 5 years imprisonment.

SENTENCING RANGE or SENTENCING TARIFF

1. 25. The sentencing tariff for this type of offence is between 12 months to 4 years imprisonment [**Rokota v The State** [2002] FJHC 168; HAA0068J.2002S (23 August 2002)].

Starting Point

1. 26. The circumstance of your case persuades me to select a starting point of 12 months imprisonment.

Aggravating Factor

1. 27. The age difference here is substantial. This was your 10 year old niece and you were around 25 years old at the time.
1. 28. The victim had to give evidence during your trial.
1. 29. You also breached the trust bestowed on you.
1. 30. You used your tongue.
1. 31. Your sentence is increased to 19 months imprisonment because of these.

Mitigating Factors

1. 32. You will receive some discount for your past good history.
1. 33. You will not get any reduction although I found that you cooperated with police. This is so because you unsuccessfully claimed during your trial that your answers in your police caution interview were fabricated or made up.
1. 34. For the above and your limited mitigation which I have explained in paragraphs 16 to 23 hereof, I reduce your sentence to 14 months imprisonment.

DISCRETION

1. 35. 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 is below 2 years imprisonment.

1. 36. Having considered the circumstance of your case, I will suspend your sentence in part.

1. 37. This will serve to denounce such acts of sexual depravity on our young children, to serve as a deterrence to would be offenders and to punish you adequately.

SUMMARY

1. 38. Your final sentence is 14 months imprisonment.

1. 39. 7 months imprisonment will be served by you immediately.

1. 40. The remaining 7 months will be suspended for the next 2 years.

1. 41. Commit any other offence in the next 2 years and your 7 months imprisonment held in waiting maybe activated.

1. 42. I also order a permanent Domestic Violence Restraining Order [DVRO] with standard non-molestation conditions [section 27] against you. This is to protect the victim, indefinitely.

1. 43. In addition to the standard non-molestation conditions and pursuant to section 24 (2) of the **Domestic Violence Act 2009**, I impose an additional condition as part of the permanent DVRO, in that, you are not to be within 2 meters alone with the victim whether in an open space or in a house, building, structure or dwelling place unless at least one of the parent or guardian of the victim gives prior consent or if it is an emergency. This additional condition will expire when the victim turns 16 years old, unless varied or removed earlier by the court.

[Final DVRO explained to the Defendant]

1. 44. I also order the permanent non-publication or name suppression of the victim in this case.

28 days to appeal.

.....
Lisiate T.V. Fotofili
Resident Magistrate

Dated at Tavua this 16th day of November, 2018.

