IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 377 OF 2016

STATE

v

AVINESH KUMAR

Counsel: **Mr. Lee Burney with R. Kumar for State**
Mr. Jiten Reddy with Mr. L. Qetaki for Defence

Date of Judgment: **13 May 2019**

Date of Sentence Hearing: **14 June 2019**

Date of Sentence: **17 June 2019**

SENTENCE

1. Avinesh Kumar, you stand convicted of two representative counts of Rape. The information on which you were convicted reads as follows:

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

AVINESH KUMAR on the 12th of February, 2019 at Suva, in the Central Division, penetrated the vagina of **NAFIZA BI**, with his penis without her consent.

SECOND COUNT
REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

AVINESH KUMAR on the 13th of February, 2019 at Suva, in the Central Division, penetrated the vagina of **NAFIZA BI**, with his penis, without her consent.

2. The court found that the complainant did not consent to sexual intercourse on her own free will and that you knew that she was not freely consenting. You were found guilty on each count and convicted accordingly.

3. You now come before this Court for sentence.

4. The facts proved in court should be succinctly stated. You were the agriculture teacher of the complainant for nearly three years. The complainant was a minor when you first met her at the school. You are married and a mature father of two children. Your wife was also teaching in the same school with you.

5. You, in a subtle manner, used your authority in school to influence the complainant to be your girlfriend. She submitted herself to your demands and agreed to have an intimate relationship with you. Within this relationship you maintained a possessive attitude towards the complainant. You placed restrictions in her dealings with other friends. You threatened to punish her, if she did not listen to you. You gave assignments in the classroom unbecoming of a teacher and asked her to write love letters as part of her classroom 'assignments'. You used those letters to blackmail her. The day she turned 18, you took her to a hotel in Labasa on the pretence of celebrating her birthday and you had sex with her. That was the beginning of 20 odd sexual encounters you admitted in your evidence.

6. When the complainant was determined to move to Suva for her tertiary education you became furious. When she wanted to stop the relationship, you got angry and by distributing the love letters amongst her neighbours, you threatened to make the affair public. Before she left for Suva, you secretly made a sex video of you having sex with her. You used the sex video to keep her under your control by blackmailing her.

7. Those are your ante offence conducts. However, you have not been charged for any of those conducts and will not be punished for maintaining a sexual relationship with the complainant who is your former student, although it is morally blameworthy. You will be punished for crimes you committed on the 12th and 13th of February, 2016, for which you were convicted of.

8. When the complainant moved to Suva in January, 2016, you sent her screenshots taken from the sex video via Facebook Messenger. You threatened to post the sex video on social media, if she did not agree to be with you. You came to Suva on the guise that you are going to hand over the sex video to the complainant and you took her to a hotel in Suva on the 12th February 2016. In the hotel room, you had sexual intercourse with her several times. After having sex, you intimidated her to secure her attendance at the same hotel on the following day. You took the complainant again to the same hotel on the 13th February, 2016, and had sexual intercourse with her several times. You sucked her breasts, licked her vagina and made her to sit on your penis. The complainant agreed to come to the hotel because you threatened her. She agreed to have sex with you because she feared that you will post the sex video on social media. You also punched and slapped her on both of these days.

9. In sentencing you, I must have regard to the proportionality principle enshrined in the Constitution, Section 4 of the Sentencing and Penalties Act 2009, the maximum penalty prescribed for the offence, the current sentencing practice and applicable guidelines issued by the courts.

10. The maximum sentence for Rape in Fiji is life imprisonment.

11. The starting point in an adult rape case is seven years' imprisonment. However, there are cases where the proper sentence may be substantially higher or substantially lower than that starting point, depending on the particular circumstances of the case [***Kasim v State*** [1994] FJCA 25; Aau0021j.93s (27 May 1994)] The tariff for adult rape is set between 7 and 15 years' imprisonment (***State v Marawa*** [2004] FJHC 338).

12. In selecting the starting point, I should consider the objective seriousness of the offending and the impact or harm caused to the complainant. The level of culpability of your offending is considerably high. **I pick a starting point of 8 years from the lower range of the tariff for each count**.

13. There are number of aggravating factors I should consider in enhancing your sentence. You planned to commit this offence over a period of time and the modus operandi used to overpower the freewill of the complainant is quite sophisticated. You made a sex video without complainant's knowledge for it to be used to blackmail the complainant.

14. The disparity in the age between you and the complainant is considerably wide**.** An age gap of approximately 15 years will be considered as an aggravating factor.

15. The complainant was your former student. You groomed her to be your sexual partner when your wife was also teaching in the same school. You betrayed the complainant, your wife and above all the noble teaching profession which is held in high esteem in the society.

16. The complainant was vulnerable by reason of her age and other circumstances of the case. You were fully aware of the circumstances which led the complainant to be in your vulnerability. You knew that the complainant was in fear of being exposed in social media thus preventing her from reporting the matter to anyone. Having known all these facts you exploited her vulnerability.

17. You used violence on the complainant although she was not seriously injured. You punched and slapped her several times. You had rough sex and she received injuries in her vagina as evidenced by the medical report. She suffered pain.

18. The complainant came to Suva to peruse her tertiary education in Agriculture to which you put the foundation as a teacher. She was staying at her cousin's place in Suva and had secured a scholarship. Because of this whole incident she had to discontinue her education and go back to Labasa. She was staying home for one year to recover from her ordeal. Disruption of her education and relocation should be considered as an aggravating factor.

Lack of Remorse / Conduct of the Accused at Trial

19. The State Counsel- Mr. Burney strenuously argues that your conduct in court during the course of trial should be considered as an aggravating factor. In the mitigation submission filed on your behalf, your counsel has argued otherwise. I thank both counsel for filing comprehensive written submission and assisting me in coming to my finding on this particular argument.

20. I doubt if the post offence conduct of the offender, whether in the course of trial or otherwise has ever been considered in Fiji for sentencing save it is relevant to gauge remorse or lack of remorse. The issue raised by the State is an important one in a modern rape trial and no doubt a controversial one because such a consideration will come into conflict with the principle that no person shall be punished for an offence he or she is not convicted of [***Vakalalabure v State*** [2006] FJSC8; CAV0003U.20045 (15 June 2006)]. It also raises serious concerns *vis-`a-vis* the right to a fair trial of an accused in terms of his or her right to conduct a robust defence. Therefore, without a comprehensive analysis and a discussion of this issue, it is not proper for me to accept or reject this argument. In the following paragraphs, I intend to discuss this issue in greater detail before coming to my conclusion. (For the purpose of this discussion you will interchangeably be referred to as the 'offender')

21. At the outset, it is pertinent to discuss the factual background that has given rise to this particular conduct. Before the trial commenced, you informed court through your counsel that you dispute the fact that you are the male partner in the sex video and it was insisted that the video be played before the assessors. Basically, the ostensible intention, as I understood it to

be, was to convince the assessors that (in the video) the complainant was engaged in sex with a person other than you. Although Section 130(2) (a) of the Criminal Procedure Act does not allow evidence of past sexual experience of the complainant with any person other than the accused to be adduced in a trial of sexual nature, the application was allowed under S 130 (3) (a) of the said Act, because the court was satisfied that this video raised a trial issue in the proceedings.

22. At the trial however, you took completely a different stance and, in your evidence, you admitted that the man in this video was you. Having admitted this fact, you blamed the complainant for producing this video to blackmail you. This is exactly the opposite of what the Prosecution was telling the court. The main issue before the assessors and the court therefore was to ascertain the truth out of these two conflicting version and decide as to who the producer of this sex video would be.

23. Screening the sex video in view of the assessors would no doubt have put the complainant in an embarrassing and difficult situation. The complainant's palpable and profound discomfort at being made to sit through the playing of this video in court was quite obvious and it will live long in the memory of all decent people present at trial. The damage done to the complainant is irreparable. You admitted watching this video before trial with your counsel and you knew that it was you that was in this video. This embarrassing situation could have been avoided if you properly advised your counsel beforehand and recorded an admission in this regard. You did not do that. Your counsel took your advice and acted like a 'hired gun'. He did not assist court to avoid this rather unsavoury situation. Finally, live screening added nothing to the Defence case.

24. Mr. Burney asserts that the insistence to play the video without any legitimate reason is a calculated and deliberate attempt to humiliate the complainant, and a last minute attempt to demoralise her giving evidence and it caused further harm to the complainant. This assertion was reinforced when the Defence Counsel, before he started the Defence case, made an unsuccessful application demanding a replay of the video. Adding insult to injury, the complainant was subjected to unnecessary harassment during lengthy cross-examination, (mostly based on 'rape myths' and social portrayals), when she was made to repeat what she had already admitted in her examination-in-chief.

25. During the course of cross-examination, it became apparent that there was an ulterior motive behind the screening of this video. In the video, the complainant was happily enjoying consensual sex. It had been shot in Labasa during the relationship and there was no dispute that the complainant was engaged in consensual sex with the offender during that period. Therefore there is no basis for Defence Counsel's claim in his written submission that sex video was used to confirm the relationship …. and advance his claim that everything that had occurred was consensual. In contrast, it was suggested to the complainant that the video had been shot at Outrigger Hotel when the offender himself, in his evidence, admitted that he came all the way to this hotel to obtain this video. The only inference that the court could draw from your conduct was that the sex video was used in the trial to mislead the assessors (this fact was confirmed when the assessors returned with a not guilty opinion) and also humiliate and demoralise the complainant.

26. Section 4(2)(g) of the Sentencing and Penalties Act (The Act) provides that, in sentencing offenders, a court must have regard to the conduct of the offender during the trial as an indication of remorse or the lack of remorse. Accordingly, the conduct of the offender is a relevant consideration in deciding offender's remorse or lack of remorse. The Act does not state that remorse should be considered as a mitigating factor, nor does it state that lack of remorse should be regarded as an aggravating factor. It only provides a test.

27. The Sentencing and Penalties Act does not define remorse. The Longman Dictionary of Contemporary English provides a fairly typical definition: "a strong feeling of being sorry that you have done something very bad". Whilst the section requires a sentencing court to have regard to conduct during trial, it does not elucidate how conduct might indicate remorse or a lack thereof. It does not guide the sentencing court on the consequences of a finding that conduct during trial indicates remorse or a lack of remorse.

28. The section guides the sentencer to gauge remorse or lack of remorse by looking at the conduct of the offender during the trial. For example, when an early guilty plea is tendered, the court may infer that the offender has been remorseful of his wrongdoing. Apart from an early guilty plea, confessions, and restitution to the victim made in court may be considered as evidence of such remorse. However, an apology tendered in a *i soro* ceremony or confessions made to police may not be considered as evidence of remorse because the section clearly refers to a conduct of the offender 'during the trial'.

29. A review of the authorities reveals that the courts are generally concerned with the issue whether remorse is "true" or "genuine". In ***State v Deo*** [2005] FJHC 64; HAA0008J.2005S (23 March 2005), Shameem J defined what might constitute a genuine remorse.

> "The issue is not just restitution. The issue is true and sincere remorse, an early guilty plea and confession, and restitution to the victim as evidence of such remorse and apology."

30. Therefore, an early guilty plea may not be regarded as evidence of remorse if the court feels that it was not true or genuine. In ***Aitcheson v State*** [2018] FJSC 29; CAV0012.2018 (2 November 2018), Gates CJ (as he then was) was not prepared to accept that an early guilty plea was necessarily indicative of genuine remorse: "[p.18]

> "The issue is remorse that is genuinely feeling sorry for what the offender has done. Accepting the inevitable of proof of the offender's deeds and therefore pleading guilty is not the same thing. An early guilty plea could form part of that process but courts must assess the early guilty plea along with other factors before arriving at a conclusion that genuine regret, sometimes accompanied (particularly in property offences) by apology and restitution: *State v Deo* Cr. App. No. HAA008 of 2005S 23rd March 2005 Shameem J."

31. It appears that, the concept of genuine remorse is best assessed subjectively by the sentencing judge [p20]:

> "The sentencing judge had not expressly treated the guilty plea as acceptable remorse or as part of the mitigation. That assessment is very much a role for the trial judge, which I do not believe this court should usurp. The judge before whom the plea is tendered, the summary of facts is read, and the mitigation is urged in the presence of the Offender, is in a much stronger position to assess remorse and whether it is sincere and acceptable."

32. In the same way, lack of remorse is best assessed subjectively by the trial judge, having taken into consideration the conduct of the offender during trial. Some of the indicators would

be that; a remorseful offender will not plead not guilty to the charge and fight his case; he will not blame or traduce his victim in court.

33. However, mere fact that the offender has pleaded not guilty, thereby causing his victim to attend court and relive her ordeal in evidence, may not generally be taken as an aggravating factor in sentencing, even though some harm is caused to the victim in the trial process, because the offender is entitled to exercise his right to deny the charge, cross examine prosecution witnesses and defend his case.

34. The real question here is whether the court can consider lack of remorse as an aggravating factor. The Supreme Court provided the answer in ***Senilolokula v State*** [2018] FJSC 5; CAV0017.2017 (26 April 2018), at [23]"

> "One of Goundar JA's other concerns was the one year by which the trial judge had enhanced the defendant's sentence for his lack of remorse. The Court of Appeal did not address that. We do not know why. It addressed Goundar JA's concern about the possibility of double-counting even though there had been no application for leave to appeal against sentence. As it is, lack of remorse is not an aggravating factor. Not being sorry about what you have done does not make what you have done any the worse. It just means that you forfeit whatever chances you may have had for a more lenient sentence. The trial judge should therefore not have enhanced the defendant's sentence for the defendant's lack of remorse."

35. It is obvious that the Supreme Court in no uncertain terms has held that lack of remorse is not an aggravating factor. However, it is not clear on what basis and in what context the trial judge in the impugned sentencing ruling had taken lack of remorse into account to enhance the sentence. The Supreme Court appears to have taken lack of remorse to mean "not being sorry about what you have done". It is in this limited sense that the Supreme Court has found fault with the trial judge. If the conduct from which lack of remorse was inferred by the trial judge was limited to offender's determination to fight his case, having pleaded not guilty to the charge, that will definitely not be considered as an aggravating factor. It may also be wrong to punish an offender because in his attempt to establish his defence he suggested to the complainant that she was not telling the truth.

36. I doubt however if the Supreme Court was ever in contemplation of a case scenario that this court is confronted with at present. In this case, the court is not called upon to draw inferences as to lack of remorse from a particular conduct of the offender but his conduct itself constitutes more than lack of remorse. His act was calculated to humiliate and undermine complainant's courage to present her evidence in the trial. His conduct not only caused further harm to the complainant, but it greatly affected her right to access justice and administration of justice as a whole as it was effective enough to send a 'horrors of trial' message to potential rape victims.

37. Mr. Burney has tendered two important case authorities from English jurisdiction that suggest that an offender's conduct around the trial may be an aggravating factor.

38. In the English case of ***Attorney General's Reference No. 38 of 2013 (Stuart Hall)*** 2014 1 Cr App R (S) 61No. 38 of 2013 the offender, Stuart Hall, had publicly denounced his victims in particularly virulent terms and the Court of Appeal recognized that public denunciations of allegations can amount to a serious aggravating feature. The court found the offender's denial to the media outside the court, a deliberate falsehood, was a seriously aggravating feature. The court observed:

> "He hoped to escape justice and attempted to use the media for the purpose of possibly influencing potential jurors. He traduced the 13 adult women who had been sexually assaulted by him in different ways 20- 30 years ago. "

39. The underlying principle appears to be that the offender's conduct interfered with due administration of justice.

40. ***R v. Frank Maxwell Clifford*** [2014] EWCA Crim 2245 provides further guidance on the proper limits on the principle that conduct around trial may constitute aggravation. In that case, in passing the sentence the trial judge referred to certain behaviour of the offender, making some comments to the reporters asserting his innocence. The Court of Appeal (England and Wales) having cited ***Stuart Hall*** (supra) At [p58], stated:

> "Whilst we readily understand that victims who were eventually vindicated would find such comments upsetting, we think that great care needs to

be taken by sentencing courts not to elevate denials, albeit vehement, into something deserving of further punishment **in the absence of some more explicit traducing of the victim**. The court, of course, is perfectly entitled to reflect these matters in withholding available mitigation since the offender has shown no sign of remorse. Similarly, an offender who has contested the trial will lose what might be substantial credit for a guilty plea. We think that these remarks, properly considered, would of course justify a withholding of mitigation, but they should not have been used by way of positive aggravation." (emphasis added)

41. The offender's conduct in the present case was not so much his traducing of the complainant, although he did falsely label her a blackmailer. Rather, it was his deliberate act of publicly shaming and humiliating the complainant and it also had far reaching consequence for due administration of justice.

42. The case cited from South African jurisdiction by the Defence Counsel supports State's claim that lack of remorse of the offender during trial may be considered as an aggravating factor. In ***Narada v The State*** [Grahamstown CA 379/08] the High Court of South Africa], Jones J in the footnote of his judgment has cited number of cases where South African courts have taken lack of remorse into account in aggravation. Without looking at the sentencing framework in South Africa and without being satisfied as to its persuasive value in this jurisdiction in view of the Supreme Court decision in ***Senilolokula*** (supra), it is not appropriate to apply this judgment without reservations. However it is relevant to note court's emphasis that the role of absence of remorse in aggravation of sentence must be put in proper perspective. The court at [p8] observed:

"The role of absence of remorse in aggravation of sentence must be put in proper perspective. The real question is its relevance to the imposition of sentence. This seems to me to be at the heart of the passage quoted above from the judgment in *Mukhudo's* case. Lack of remorse may, for example, be relevant to the issue of rehabilitation, the possibility of repeat offences, or **the need to protect society from the conduct of callous, relentless and remorseless offenders**. As *Mukhudo's* case warns us, it is necessary to guard against the danger in, and the potential impropriety and injustice of, increasing a sentence because of the way in which a defence is conducted,

> or because of an offender person's poor demeanor or arrogant behavior in the witness box or in court. These considerations may go hand in glove with a lack of remorse but they will usually be irrelevant. An offender per se should not, of course, be penalized for exercising his right to plead not guilty, to challenge the State evidence, and to require the prosecution to prove his guilt. This does not give him licence to conduct his defence in a vexatious manner. But even if that is what he does, this is not necessarily relevant to sentence. (emphasis added)

43. In the present case, punishing the offender is justified in the need to protect society from the conduct of callous, relentless and remorseless offenders. It is my considered view that the offender's conduct at trial meets the threshold justifying it being treated as an aggravating factor.

44. The State Counsel submits that, offender's conduct in insisting on the playing of the sex video aggravated his offending in the sense it caused further harm to his victim. In reply, it is submitted on behalf of the offender, at [p14] of the written submission, that "further harm to the victim must be proven or shown during the course of trial or through a Victim Impact Report which would allow parties to assess the impact such a video being played had affected / affecting her.

45. Mr. Burney has cited a very recent judgment from English Court of Appeal ***Regina v Chall and four others*** [2019] EWCA Crim 865 that addresses this particular issue. The Court at [p17], observed:

> "The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, **the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence."** (emphasis added)
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> At [p22], the Court elaborated that:

> "Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. **But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanor of the victim when giving evidence may be an important factor in the judge's assessment.** The relevant evidence will, however, often come, and may exclusively come, from the VPS. The court is not prevented from acting on it merely because if comes from a VPS". (emphasis added)
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> At [p30], the Court made the important point that:
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> "We should add that where there is no VPS, the sentencer must not assume that the absence of a VPS indicates an absence of harm. Whether there is evidence of psychological harm and, if so, of its degree, will depend on the facts and circumstances of the case"

46. Before I conclude my discussing on this particular issue, may I add something important to the administration of justice *vis-a-vis* the professional obligation of a defence counsel in conducting his defence in a rape case.

47. The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists. Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants. One of the most contentious issues in this debate pertains to the use of bias, stereotype and discriminatory tactics to advance one's client's position.

48. Defence Counsel asked the complainant why she did not just run away. Why did she not call out for help? Why did she not tell the police immediately? Why did she tell her cousin before she told the police? Why did she wait a day to tell her mother? Why did she not tell the receptionist at hotel after the attack? Defence Counsel asserted that she had engaged in sex with the offender in the past as portrayed in the sex video, suggesting that this behavior made it more likely that she would have consented to the penetration by his client. Defence

Counsel called her a liar, she was evasive, and outright dishonest. It was suggested that she made the whole thing up out of her desire to continue the sexual relationship with his client by using the sex video. Defence Counsel questioned her on her failure to resist the assaults physically, suggested that sexual activity that happened those days were consensual. He argued that she should be disbelieved because of a lack of evidence of significant physical injury. If she had been attacked as she said, why did she not have any injuries to show for it?

49. Defence counsel are ethically obliged to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue, and the closing arguments they submit) to conduct that supports findings of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant: (1) the assumption that once a woman's chastity has been lost she is more likely to have sex with anyone and less likely to tell the truth; (2) the assumption that women who were actually raped will tell someone immediately and, correlatively, that women who do not report an attack promptly are lying; and (3) the assumption that women who genuinely do not want to engage in sex will physically resist or attempt escape.

50. The corroboration requirement is now statutorily done away with in Fiji. Section 206 (1) of the Crimes Act statutorily recognises that the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Evidence of past sexual experience is excluded by Section 130 of the Criminal Procedure Act. Notwithstanding, an examination of recent case law reveals that in many cases of sexual nature in Fiji, defence counsel invoke these social assumptions explicitly and seemingly unapologetically. By doing so, they should be doing more harm than good to his client.

51. It is assumed that legal practitioners act in court on instructions of their clients and act with sense of responsibility. Therefore, the clients to a greater extent are held responsible for what their principals do and talk in court. A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty. While solicitors have a duty to act in the best interests of their clients, the duty to the court, therefore, takes precedence.

52. I would like to cite over and over again from my own Ruling in ***Talala v State*** [2016] FJHC 1046; HAM200.2016 (17 November 2016) where I quoted from the article of Robert F. Cochran Jr. titled *'Professionalism in the Postmodern Age: Its death, Attempts at Resuscitation, and Alternate Sources of Virtue'* published in Notre Dame Journal of Law (http://scholarship.law.nd.edu/ndjlepp)

> "The traditional lawyer's notion of professionalism was quite different from that of the hired gun. The traditional lawyer did not do what he was told by the client; he told the client what to do. Whereas some of today's lawyers see their obedience to client wishes as a mark of professionalism, the traditional lawyer saw his control of the relationship as a mark of professionalism. Judge Clement Haynsworth reflected this view to a law school graduating class:
>
> > "[The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, as a professional, he cannot give in to a client's attempt to persuade him to take some other stand..... During my years of practice,... I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper".
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> (Clement F. Haynsworth, Jr. Professionalism in Lawyering, 27 SCL Rev. 627,628 (1976)

53. I am convinced that your conduct during the course of trial manifested more than lack of remorse that should be considered as an aggravating factor in the circumstances of this case.

54. Having considered all the aggravating features discussed above, **I increase your sentence by 4 years to arrive at a sentence of 12 years' imprisonment for each count.**

55. Your personal circumstances are that; you are a 42 years old father of two children. You are looking after your family and the elderly parents. However family circumstances have a

very little mitigating value. [***Raj*** 2014] FJSC 12; CAV0003.2014 (20 August 2014). ***Rokolaba v State*** [2018] FJSC 12; CAV0011.2017 (26 April 2018)] You do not have any previous convictions. Your clear record is of little value in this case because you committed this crime in breach of trust. ***Senilolokula v State*** [2018] FJSC 5; CAV0017.2017 (26 April 2018).

56. I understand that you have undergone a hernia operation whilst in the remand custody. Unfortunately, I am not in a position to consider your medical condition as a mitigating factor. The Officer-in-Charge of the Correction Centre must take all necessary actions to facilitate your early recovery.

57. Before trial, you were in remand for 14 days. After the conviction you have spent nearly a month in remand. The period in remand will be separately deducted from the sentence to give effect to Section 24 of the Sentencing and Penalties Act.

58. **I deduct 1 year for mitigating** factors and the remand period bringing the sentence to one of 11 years' imprisonment for each count.

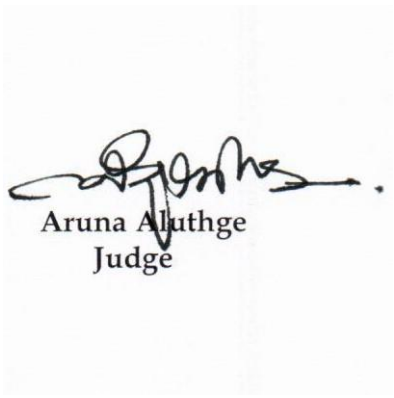
59. You are a first offender. I considered your personal circumstances and chances of rehabilitation as a first offender. In view of the foregoing, I impose a non-parole period of 8 years. You are eligible for parole after serving 8 years in the Correction Centre. The combination of harsh custodial sentence and lenient non-parole period is to give effect to all sentencing purposes in Section 4 of the SPA.

60. In the recent past, the courts in Fiji are inundated with complaints of sexual assaults committed by teachers on their students. This trend must be arrested. This unfortunate incident could have been avoided if the Head Teacher properly investigated the complaint she/he received from complainant's fellow students during her school days and took necessary actions as required by law. A clear message has to be sent to the teacher community that the courts will come down harsh on this type of serious crimes committed abusing teacher-student relationship.

Summary

61. **The offender is sentenced to 11 years' imprisonment to be served concurrently with a non-parole period of 8 years.**

62. 30 days to appeal to the Fiji Court of Appeal.



At Suva

17 June 2018

Counsel:

- **Office of the Director of Public Prosecution for State**
- **Jiten Reddy Lawyers for Offender**