

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 282 of 2020

BETWEEN : **THE STATE**

AND : **ABHINESH KUMAR**

Counsel : Ms. Shameem, S. for the State
: Mr. Singh, R with Mr. Liganivai J for the Accused

Trial : 30 May – 6 June 2022
Judgment : 29 July 2022
Sentence : 11 August 2022

SENTENCE

1. The offender is the victim's father's younger brother. He and another brother and their families had lived together with the victim's family. In 2012, the offender and his family left the extended family setting and moved to their own flat immediately next door to the victim's home. They continued to interact closely with the victim and the rest of the family next door, visiting each other and taking part in family functions and celebrating religious festivals together.
2. Sometime in May 2020, while the victim's mother was in Labasa, the victim and her grandmother were doing some work at the back of the house. When the victim went inside the house, the offender pulled her into her room, shut the door and pushed her onto the bed. He removed her pants and undergarments and after removing his own, had sexual intercourse with her without her consent. He covered her mouth with his hand. When he was finished, he left as if nothing had happened. The victim said the offender had done this to her on three other occasions.

3. The victim did not tell anyone as the offender had told her not to tell anyone or he would do something to her. He was aggressive and fought with the victim's father. She was afraid of him, she said. She also did not tell anyone at home as her family had not believed an earlier complaint she had made against an aunt's brother who had touched her inappropriately until she reported at school and the Social Welfare got involved.
4. Awareness programs at school encouraged students to talk about things they could not share at home. The programs referred to depression and suicide. The victim decided it was time to let someone know before she did harm to herself. The form captain of the victim's class noticed she was withdrawn and probed her for the reasons. The victim shared with her and the matter was taken up with the teaching staff and principal, and reported to the Social Welfare Department and the Police.
5. The offender is 43 years old. He is married with a daughter. The only mitigating factor is his previously clean record.
6. The victim is the offender's niece. She is now 19 years old and was 17 at the time of the offending. There is a vast age difference between her and the offender. As her father's brother, he was someone the victim should have been able to look to for protection. The offending was a breach of that trust. The victim experienced both physical and psychological harm. Her performance in school and relationship with other family members were adversely affected. She was threatened into silence. These factors aggravate the offending.
7. The maximum penalty for rape is life imprisonment. It is the most serious sexual offence, involving as it does what the Supreme Court in *Ram v State*, Petition for Special Leave to Appeal No: CAV 12/2015, Decision of 23 October 2015 referred to as

...the unwanted invasion, the violation of the person, the forcible intrusion into the privacy and body of another.
8. Of the tariff, the Supreme Court in *Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) stated at [24] – [25]:

The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise their discretion taking into account the age group of these child victims. I do not for myself believe that that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.

The tariff previously set in Raj v The State [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.

9. The conviction is in respect of a representative charge of rape. The offender is sentenced only on the count proved and not on the other alleged incidents.
10. I take 11 years imprisonment as a starting point. I increase the sentence by 6 years to reflect the aggravating features, and deduct 2 years for the offender's previous good character.
11. The period of about 5 months spent in custody on remand is taken as part of sentence served. The remaining sentence is 14 years, 7 months imprisonment.
12. Defence counsel invites the Court to consider also time on bail when the offender was on a curfew and required to report in the computation of time in custody, what counsel refers to as pre-sentence quasi custody.
13. The Sentencing and Penalties Act makes comprehensive provision for the sentencing of persons for criminal offences and to reform processes applicable to the prescription of penalties in the laws of Fiji and the determination and enforcement of a range of sentencing options imposed by the Courts, and for related purposes. (See the preamble to/long title of the Act)
14. In Chand v State [2016] FJCA 65; AAU0063.2012 (27 May 2016) at [15], the Court stated that the Sentencing and Penalties [Act] was [promulgated] for a wider purpose than merely

codifying the common law principles on sentencing. Prematilaka JA with whose judgment Calanchini P and Gamalath JA concurred, stated:

In my opinion, in view of this legislation the common law principles developed by courts over the years on sentencing should be applied only in so far as they are caught up within the specific provisions of the Decree or not inconsistent with the provisions of said Sentencing and Penalties Decree, 2009 or where there is a lacuna in the said Decree to cater to a specific situation or to fill in gaps, if any, in the Decree or as persuasive guidance, where relevant, to interpret the provisions thereof.

15. At [22], the Court was of the view that the ultimate object of the Sentencing and Penalties Act and judicial guidelines was

...to help judges arrive at a just and fair sentence proportionate to the gravity of the offence for an accused considering all the circumstances of the case while maintaining an acceptable degree of uniformity and consistency. It is not to insist on a straightjacket approach to sentencing.


16. Section 24 of the Sentencing and Penalties Act provides for time in custody to be deducted. The provision is in the following terms:

If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.

17. The section refers to any period when the offender was “held in custody” prior to the trial.
18. Case authority in this jurisdiction refers to this as the period during which an offender was held in custody in remand prior to sentencing. (See *Suguturaga v State* [2013] FJCA 82; AAU0084.2010 (29 July 2013) at 11; *Vasuca v State* [2015] FJCA 65; AAU011.2011 (28 May 2015) at [14], and; *Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) at [25].

19. In *Apakuki Sawane v State*, [2016] CAV 38/15 (apf AAU 62/06) 21 April 2016 at [10]; the Supreme Court (per Gates P with Hettige and Aluwihare, JJ) referred to time spent in custody as “time spent in incarceration.”
20. Neither the Sentencing and Penalties Act nor the Bail Act make provision for the effect of any bail conditions, let alone strict bail conditions such as a curfew on sentence, at least in the way that the mandatory requirement for consideration of the period spent in custody does.
21. Given the weight of binding authority above, I do not consider bail conditions imposing curfew hours on the offender and requiring him to report to a Police Station amount to time spent in custody under section 24 of the Sentencing and Penalties Act.
22. The remaining period to be served is as follows:
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|-------------------|----------------------------------|
| Head sentence | : 14 years 7 months imprisonment |
| Non parole period | : 11 years 7 months imprisonment |
23. There is an interim domestic violence restraining order in place. It is made permanent for the protection of the victim. The Order is for standard non molestation and no-contact conditions pursuant to ss. 27 and 29 (1) (2) (a) (b) and (c) of the Domestic Violence Act.
24. The name of the victim is permanently suppressed.




Siniu F. Bull
Acting Puisne Judge

Solicitors:

Office of the Director of Public Prosecutions for the State
Munro Leys for the Accused