

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 316 of 2022

STATE

v

OSINTAI GILL FOKILAU

Counsel: Ms. S. Bibi for the State
Ms. O. Grace for the Accused

Date of Mitigation/Sentencing Hearing: 28 February 2025
Date of Sentence: 18 March 2025

SENTENCE

1. **Osintai Gill Fokilau**, the accused, was tried, found guilty and duly convicted on 14 February 2025 of **Rape** contrary to section 207(1) & 2(a) of the Crimes Act 2009, laid out as follows in the Information by the Director of Public Prosecutions dated 17 October 2022 and filed on 18 October 2022:

Statement of Offence

RAPE: Contrary to sections 207(1) and 2(a) of the Crimes Act 2009.

Particulars of Offence

OSINTAI GILL FOLIKAU, between the 31st day of October, 2021 and the 1st day of November, 2021, at Nasinu, in the Central Division, had carnal knowledge of **KAROLINA RADINI QELE**, without her consent.

Brief facts

2. In October to November 2021 the complainant Karolina Radini Qele (PW1) stayed for about one and a half weeks at her uncle's place situated at Rokara Settlement, Delaivalelevu, Nasinu, with her cousin-sister Wasevina Vurai Raisaluwaki and her husband Osintai Gill Fokilau (the accused), her cousin-brother and his wife and their child, and her sister-in-law. On Sunday 31 October 2021, the complainant joined her cousin-sister Wasevina Vurai Raisaluwaki, cousin-brother and his wife and others in a beer drinking session outside their house, and she consumed four cups of beer, and after a while left the group and went inside the house to sleep wearing a t-shirt, a suluvakatoga, a short shorts, and a panty. The accused was not part of that beer drinking session. The complainant lied down inside the house on a mattress beside the settee and fell asleep, and on her right lay her cousin-brother's son. When the complainant was asleep, she could feel someone lying on top of her, and a penis going in and out of her vagina, and at that moment her shorts and panty were placed together at the settee closer to her uncle's room. The complainant tried to turn but couldn't, and when she tried to call her brother-in-law, the accused whose penis was in her vagina, took a pillow and put it on top of her mouth to prevent her from calling out. The complainant tried to move but couldn't and also tried to smack the accused. The complainant observed the accused lying on top of her and being very close to her for a short moment, and the only light emanated from the porch via a small globe light that shone onto where she was lying down inside the house, enabling the complainant to see and identify the accused. The accused then got off the complainant, and the complainant saw him walking around inside the house. After putting on her clothes, the complainant then ran to her cousin-sister Wasevina Vurai Raisaluwaki's room to tell her of what her husband, the accused, had done to her, but her cousin-sister was not inside that room. The complainant then opened a door and ran out towards her grandmother's place also situated at Rokara Settlement. Upon reaching

her grandmother's place, the complainant then woke her grandmother and told her that the accused had raped her, and subsequently called the Valelevu Police Station for assistance. The police from Valelevu Police Station then arrived, and the complainant told the police that the accused had raped her. Soon after this, the accused and his wife then entered the complainant's grandmother's house, and the police asked the accused about the rape complaint, but he just bowed his head down. Thereafter the accused boarded the police vehicle and taken to the Valelevu Police Station for formal interrogation. The complainant stated that the sexual intercourse between her and the accused was not consensual because she was sleeping and did not know how he entered the house between 2am and 3am and inserted his penis into her vagina. The complainant lodged the rape complaint with the police on the same day it happened.

Rape sentence analysis

3. *Rape*, in this instant, is contrary to sections 207(1) – (2)(a) of the Crimes Act 2009, and the maximum penalty is life imprisonment.
4. The sentencing tariff for rape of an adult is 7 to 15 years imprisonment according to Rokolaba v State [2018] FJSC 12; CAV0011.2017 (26 April 2018) and at paragraphs 39 – 40, the Supreme Court held:

[39] Though starting points in Fiji for calculating sentence used to be, for adult victims, as low as 7 years – Mohammed Kasim v. The State [2018] FJCA 25; AAU0021j.93S (27 May 1994) (27 May 1994), the court said:

“We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”

*[40] Kasim was decided in 1994. Tariffs for sexual offences and specially rape have moved upwards as befits such a serious offence under the Crimes Act, and which in turn reflects the community's increasing yet justified sense of outrage and horror for the crime. **Presently the tariff for rape of an adult has been set between 7 and 15 years imprisonment** - State v. Marawa [2004] FJHC 338. In really bad cases the tariff may have to be exceeded.*

5. The aforesaid tariff for rape of an adult remains applicable hitherto, despite the repeal of the Penal Code (Cap.17) and subsequent enactment of the Crimes Act 2009, substantiated by Navuda v State [2023] FJSC 45; CAV0013.2022 (26 October 2023) whereby the Supreme Court held at paragraph 34:

*34, The tariff. Akuila's only ground of appeal in the Supreme Court against sentence relates to the tariff for rape which the judge took. It was not a ground which Akuila had argued in the Court of Appeal. **That tariff was 7-15 years imprisonment.** Akuila claims that this tariff represents the tariff for rape since the repeal of the Penal Code and the enactment of the Crimes Act 2009, whereas the tariff which the judge should have taken was the tariff which prevailed while the Penal Code was in force. Even if that argument is correct, it does not help Akuila. **The tariff for rape while the Penal Code was in force as well as since then has been 7-15 years imprisonment.** Indeed, the four cases which the judge referred to in his sentencing remarks which he regarded as authorities for the tariff for rape being 7-15 years imprisonment were all decided before the repeal of the Penal Code.*

6. Furthermore, in Chandra v State [2024] FJSC 21; CAV0029.2022 (27 June 2024), the Supreme Court in granting leave and ultimately quashing the adult rape sentence of 13 years imprisonment with a non-parole period of 10 years imprisonment, *in lieu* of a custodial term of 11 years with a non-parole period of 10 years imprisonment, applied the tariff of 7-15 years imprisonment, and held at paragraphs 6, 7 & 32:

The sentencing decision

6. In determining a sentence of imprisonment of thirteen years with a non-parole period of ten years as appropriate in the circumstances, the judge referred to the serious nature of the crime of rape and to the maximum punishment of life imprisonment. He then proceeded to compute the sentence by initially referring to the tariff for rape of an adult being a term of imprisonment ranging from 7 years to 15 years (as per Mohammed Kasim v The State (unreported) Fiji Court of Appeal Cr. Case No. 14 of 1993 of 27 May 1994).

7. Within that range the judge selected an appropriate starting point to reflect the circumstances and gravity of the petitioner's offending by reference to the following guidance in Koroivuki v The State [2013] FJCA 15; AAU0018.2010 (5 March 2013):

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the

starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

32. Ensuring even-handedness in the dispensation of justice is of the utmost importance and can be notoriously difficult to achieve in the area of criminal justice sentencing. The development of tariffs identifying ranges of sentences for categories of broadly similar offending has done much to assist the courts in achieving even-handedness. Where a marked non-conformity with an identified range of sentencing levels occurs, this has the potential to distort what has come to be regarded as certain in the law and may also result in a substantial and grave injustice.

7. In this instant, given the applicable tariff of 7-15 years imprisonment, I choose a **starting point** of 7 years imprisonment, bearing in mind the objective seriousness of the offence of *Rape*.
8. The starting point of 7 years is enhanced by 3 years due to the following **aggravating factors**:
 - a) The accused had deliberately and opportunistically raped the complainant in the complainant’s uncle’s house at Rokara Settlement, Delaivalelevu, Nasinu, knowing full well that the complainant was vulnerable due to her being asleep late at night.
 - b) The accused raping the complainant who is his wife’s cousin-sister, inside the same house they live, is an atrocious and despicable conduct on the part of the accused, who instead is obliged to protect all females including the complainant, children and other vulnerable person(s) living in that house from being abused, sexually or otherwise.
 - c) The complainant was raped by the accused inside the very house where she should find solace and security; however, the complainant suffered emotional and psychological trauma including rejection due to the rape as highlighted in the *Victim Impact Statement* report dated 23/02/2025:

I could not believe what Gill did to me as he is my sister’s husband. I have

always refused to go back to Rokara Settlement knowing that I will always see Gill and the thought of what he did to me fears. After the incident, my family have rejected me especially Gill's wife saying that I was lying about the report. I am always shy on the thought that I'm a rape victim. I only received counselling when I had gone for medical examination when the report was lodged.

d) Adult rape in Fiji is becoming prevalent and a scourge and menace in our society, thus compelling the need for deterrence weighed together with *inter alia* the sentencing objectives of punishment, retribution and rehabilitation.

9. The 10 years is reduced by 1 year for the following **mitigating factors**, that is, the accused is 37 years old, married with a 4 month old son and 9 year old daughter, a casual worker at a construction site earning approximately \$260 per week to help sustain his family, and has no prior conviction, thus arriving at the interim custodial term of 9 years.

Time spent in custody

10. The 9 years is further reduced by 43 days for time spent in custody, thus arriving at the head sentence of 8 years 10 months 17 days.

11. Therefore, the head sentence for Rape in this instant is 8 years 10 months 17 days.

Non-parole period

12. Based on section 18 of the Sentencing and Penalties Act 2009 and Timo v State [2019] FJSC 22; CAV0022.2018 (30 August 2019), I have decided to fix a non-parole period of 7 years for this case.

Sentence

13. Having being convicted of *Rape*, I hereby sentence **Osintai Gill Fokilau** to an imprisonment term of **8 years 10 months 17 days, with a non-parole period of 7 years.**

Permanent DVRO, standard non-molestation, non-contact orders

14. In addition to the custodial sentence, pursuant to the Domestic Violence Act 2009, I hereby issue a *Permanent Domestic Violence Restraining Order* [s.22] with the standard non-molestation conditions [s.27] including a non-contact order [s.29] against **Osintai Gill Fokilau**, and the protected party being the complainant Karolina Radini Qele.

15. Thirty (30) days to appeal to the Fiji Court of Appeal.

Orders of the Court

- 1) **Osintai Gill Fokilau** is convicted of *Rape* and sentenced to a custodial term of 8 years 10 months 17 days, with a non-parole period of 7 years.

- 2) In addition to the custodial sentence, pursuant to the Domestic Violence Act 2009, a *Permanent Domestic Violence Restraining Order* [s.22] with the standard non-molestation conditions [s.27] including a non-contact order [s.29] are also enforced against Osintai Gill Fokilau, and the protected party being the complainant Karolina Radini Qele.



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Hon. Mr. Justice Pita Bulamainivalu
PUISNE JUDGE

At Suva

18 March 2025

Solicitors

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused