

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 115 of 2012

BETWEEN: THE STATE

COMPLAINANT

A N D: MOHAMMED ISMAIL

ACCUSED

Counsel : Ms. Latu L for the State
 : Mr. Jitoko S for the Accused

Hearing : 18th and 19th August 2014

Judgment : 20th August, 2014

Sentence : 26th August, 2014

SENTENCE

- [1] Mr. Mohammed Ismail, you stand convicted for the following three counts as this court concurred with the unanimous opinion of the Assessors and found you guilty at the end of a full trial.

Count 1

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to section 208 of the Crimes Decree No 44 of 2009.

Particulars of Offence

MOHAMMED ISMAIL on the 8th of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division attempted to penetrate the mouth of Seruwaia Liau with his penis without her consent.

Count 2

Statement of Offence

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

Particular of Offence

MOHAMMED ISMAIL on the 8th of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division penetrated the vagina of Seruwaia Liau with his penis without her consent.

Count 3

Statement of Offence

INDECENTLY INSULTING A PERSON: Contrary to Section 213 (1) (b) of the Crimes Decree No 44 of 2009.

Particular of Offence

MOHAMMED ISMAIL on the 9th of May 2012 at Bau Settlement, Matawailevu, Nalawa, Rakiraki in the Western Division intruded into the privacy of Seruwaia Liau by showing his penis in front of the said Seruwaia Liau.

- [2] This court accepted the testimonies of your wife, Ms. Seruwaia Liau and your daughter Ms. Litia Lewasedua. According to them, you had gone to your wife's house in the early hours of 08th May 2012 and taken her to the kitchen to discuss about the "divorce" that you were contemplating to have. During your stay

inside the house, Ms Litia and your son were also awake and watching a cartoon in the living room. Your wife was six months pregnant at that time.

- [3] When your wife refused to agree upon your suggestion for a divorce and turned back to go inside the compound, you had forcefully kissed her. Then you had proceeded to twist her shoulders and pushed her to the wall. After removing her underpants, you had tackled her to fall or land on the ground. Thereafter, you had taken her legs to your shoulders and inserted your penis into her vagina. Whilst doing so, at one point, you had held her head and taken your penis towards her mouth demanding her to suck it. When she refused to do so, you had rubbed your penis on her mouth. Later you had ejaculated inside her vagina.
- [4] Around 8.00am, couple of hours later, you had come to your wife again to have sexual intercourse. When you came inside the room where she was lying and laid beside her, you had taken her hand and kept on your penis. It is in this point of time your wife had informed you that she had already reported the previous incidents to the Police. Without proceeding any further, you had gone out of the room.
- [5] Keeping this factual background in mind, I now turn to see the tariffs for the offences that you are been charged with. The maximum sentence for the offence of Rape is life imprisonment. The tariff for 'adult rape' is 7 years to 15 years imprisonment. (see **Mohammed Kasim v The State**, *Criminal Appeal No. AAU 0021j.93S (1994) (FJCA 25, (27 May 1994)*; **Bera Yalimaiwai v The State**, *Criminal Appeal Case No. AAU 0033 of 2003*, **Navuniani Koroi v The State**, *Criminal Appeal*

Case No. AAU 0037 of 2002, **Viliame Tamani v The State**, Criminal Appeal Case No. AAU 0025 OF 2003, **The State v Bijendra**, Criminal Case No. HAC 127 of 2011).

- [6] For Attempted Rape, the maximum sentence is 10 years and the tariff ranges from 12 months to 05 years imprisonment (**State v Bulivou [2010] FJHC 382; Bulimaiwai v State [2005] FJHC 261; HAA0068 J. 2005, 2nd September 2005; State v Samuela Kiniboi, Criminal Case No: HAC 162 of 2012, State v Vitilial Gonesau, Criminal Case No: HAC 204 of 2013, 26th May 2014**).
- [7] Section 213 (1)(b) of the Crimes Decree 2009 carries a maximum penalty of 01 year imprisonment for the offence of *“Indecently Insulting a Person”*. There is no set tariff for this offence and the prior decisions of parallel courts show the sentences vary from Bound overs to 06 months imprisonment (**Prakash v State [2013] FJHC 656; HAA 27 of 2013; 4th December 2013; State v Senikarawa [2003] FJHC 195, HAC 0017; 2002S, 20th May, 2003**).
- [8]. Whereas the aggravating and mitigating factors would be the same for the three charged offences and the most serious crime is *“Rape”*, I will start the sentencing process with the 2nd count of *‘Rape’*.
- [9] Having considered the legal and factual background, Mr Ismail, I take a starting point of 11 years imprisonment for the 2nd count of *‘Rape’*.
- [10] The following factors do aggravate the offending background;

- you blatantly violated the '*Trust*' of your wife. She opened the door for you to come inside the house at that time of the night and accompanied with you to the kitchen because of the trust she had over you.
- Your wife was heavily pregnant at the time of the commission of your forceful acts and thus, helpless and vulnerable, and
- You showed no respect to the commitments within the covenant of marriage.

[11] For the above stated aggravating factors, I increase your sentence from 03 years imprisonment. Now your interim sentence stands at 14 years imprisonment.

[12] In mitigation you avered the following grounds. You are:

- * 34 years old, married and having three children,
- * separated from the complainant, your legally married wife for 04 years,
- * a farmer and lives with your sister,
- * faced with a life threatening experience at sea,
- * a first offender and
- * suffering a lot because of your wife initiated family court proceedings for Maintenance, Custody of children and a DVRO.

[13] Apart from you being a first offender, I see no valid mitigatory factor avered to grant you further concessions. You will receive a reduction of 02 years imprisonment for having a crime free record for the last 13 years.

[14] Now, the final sentence you will receive for the 2nd count of '*Rape*' is 12 years imprisonment.

[15] After a careful consideration of both aggravating and mitigating factors, I conclude that the ends of justice would be met with sentences of 04 years imprisonment and 06 months imprisonment for the 1st count of '*Attempted Rape*' and 3rd count of '*Indecently Insulting a Person*'.

[16] Your final sentences are as follows:

- * 1st Count – Attempted Rape – 04 years imprisonment.
- * 2nd Count – Rape – 12 years imprisonment.
- * 3rd Count – Indecently Insulting a Person – 06 months imprisonment.

[17] This court is of the view that for the purposes of sentencing it is safer to consider the above three charges are founded in the same transaction or stemmed out of the same facts. Thus, the three separate sentences are ordered to run concurrently.

[18] Before concluding, I would prefer to put things in context as far as the "*marital rape*" or "*spousal rape*" is concerned. Mr. Ismail, your wife testified in court that when she refused to have sexual intercourse as you demanded, you told her that "don't try to be a virgin" and you can do whatever you want as you are the "legally married husband".

[19] It is worth to note that the era the society thought in the same way you think today, a husband cannot be held liable for raping his own wife as he has the right to the person of his wife, is dead and gone.

[20] The dialogue about '*Marital Rape*', whether the husband can be guilty of rape upon his legally married wife, runs back to 18th Century. Sir Mathew Hale, (a Chief Justice in England in the 17th Century) in "History of the Pleas of the Crown" (1736) said that,

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract".

[21] In **Popkin v Popkin (1794) 1 Hap. Ece.765n**, Lord Stowell said that:

"The husband has a right to the person of his wife
but not if her health is endangered".

It was said in the 1st edition of **Archbold, Pleading and Evidence in Criminal Cases**, (1882) that:

"A husband also cannot be guilty of a rape upon his wife".

[22] In **Regina v R [1992] 1 A.C. 599**, their Lordships of the House of Lords extensively discussed the legal framework on whether the 'husband' is immune from charges of "Rape" or "Attempted Rape" of his wife. It is a case where the defendant was charged with one count of "Rape" and "Assault Occasioning Actual Bodily Harm". His wife was the victim. Due to the matrimonial difficulties, the wife had left their matrimonial house and gone to her parents

with the son. When she was there with her parents, the defendant had forced his way in and attempted to have sexual intercourse with her. The assault had taken place during the course of the said attempt.

- [23] Before Regina v R (Supra) was referred to the House of Lords to deliberate the issue of “is a husband criminally liable for raping his wife?”, Lord Lane CJ, in the Court of Appeal said that;
(Reported in **R v R** [1991] 2 All ER 257 at page 265 and 266).

“.....we take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim”.

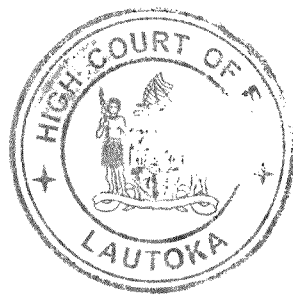
- [24] Lord Keith of Kinkel delivering the House of Lords decision in Regina v R [supra] held that:

“.....that in modern times the supposed marital exemption in rape forms no part of the Law of England”.(page 623).

- [25] The law pertaining to “**Rape**” is well settled in this jurisdiction. When the victim is over thirteen (13) years, ‘consent’ is an essential element to have sexual intercourse. In other words, what matters is the “consent”, but not the “relationship” the perpetrator shares with the “victim”. In the eyes of the Law, irrespective of their gender, everybody is equal and treated equally. A spouse is of no exception. If a wife is compelled to have sexual intercourse or oral or anal sex against her will by the use of authority, force or by threat of using force, she has a right to say ‘NO’ to such sexual demands of a husband. If the husband

decides to proceed ahead despite of that 'NO', he risks of being criminally liable for raping his own wife.

[26] Mr. Ismail, it is in the above context you were found guilty for the offence of 'Rape' and sentenced to twelve (12) years imprisonment. You will not be eligible for parole for nine (9) years. Your sentence is ordered to be commenced from today onwards.



A handwritten signature in black ink, consisting of a large, stylized 'J' and 'B' intertwined.

Janaka Bandara
Judge

At Lautoka
26th August 2014

Office of the Director of Public Prosecution for State
Naco Chambers for the Accused