

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 99 of 2016

STATE

V

ENESHWAR RAJ

Counsel	:	Ms. Shirley Tivao for the State Ms. Talei Kean for the Accused
Dates of Trial	:	26 September, 28-29 September & 2 October 2017
Summing Up	:	3 October 2017
Judgment	:	5 October 2017
Sentence Hearing	:	9 October & 31 October 2017
Sentence	:	3 November 2017

### SENTENCE

[1] Eneshwar Raj you have been found guilty and convicted of the following offences for which you were charged:

#### COUNT 1

##### *REPRESENTATIVE COUNT*

##### *Statement of Offence*

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

*Particulars of Offence*

**ENESHWAR RAJ** between the 30<sup>th</sup> day of November 2015 and the 4<sup>th</sup> day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

**COUNT 2**

*Statement of Offence*

**RAPE** : Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

*Particulars of Offence*

**ENESHWAR RAJ** between the 1<sup>st</sup> and 31<sup>st</sup> day of December 2015 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with an eggplant without her consent.

**COUNT 3**

*Statement of Offence*

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

*Particulars of Offence*

**ENESHWAR RAJ** on the 5<sup>th</sup> day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

**COUNT 4**

*Statement of Offence*

**RAPE** : Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

### *Particulars of Offence*

**ENESHWAR RAJ** on the 5<sup>th</sup> day of January 2016 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with his finger without her consent.

- [2] As could be noted there are four counts of Rape; two counts in terms of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) and two counts in terms of Section 207 (1) and (2) (b) of the Crimes Act.
- [3] You pleaded not guilty to the above mentioned charges and the ensuing trial was held over 4 days.
- [4] At the conclusion of the evidence and after the directions given in my summing up, the three Assessors unanimously found you not guilty of count 1, and unanimously found you guilty of counts 3 and 4. By a majority decision the three Assessors found you guilty of count 2.
- [5] Having reviewed all the evidence, this Court found you guilty and accordingly convicted you of all four charges.
- [6] The sole witness for the prosecution was the complainant, Renuka Devi Narayan. You gave evidence on your own behalf. It is an admitted fact that you and the complainant have been husband and wife for 10 years and have a 9 year old daughter from your marriage.
- [7] It was proved during the trial that, between 30 November 2015-4 January 2016, you raped the complainant, by penetrating her vagina, with your penis, without her consent (count 1).
- [8] It was also proved during the trial that, between 1 December 2015-31 December 2015, you raped the complainant, by penetrating her vagina, with an eggplant, without her consent (count 2).
- [9] It was also proved that, on 5 January 2016, you raped the complainant, by penetrating the complainant's vagina, with your penis, without her consent (count 3).
- [10] And finally it was proved that, on 5 January 2016, you raped the complainant, by penetrating the complainant's vagina, with your finger, without her consent (count 4).
- [11] You have made 'love making' between husband and wife, which should be a pleasurable act, a horrendous act of violence.
- [12] You testified that your wife was having affairs and cheating on you. Even if you were to be believed, still that would not have entitled you or given you the licence to have forced yourself on your wife. On the other hand, and again if you were to be believed, and in actual fact your wife was having affairs and cheating on you that would have been sufficient reason for her to resist your sexual advances.

[13] The offence of Rape in terms of Section 207(1) of the Crimes Act carries a maximum penalty of imprisonment for life.

[14] The severity of the offence of Rape was highlighted by the Fiji Court of Appeal in the case of **Mohammed Kasim v. The State** [1994] FJCA 25; AAU 21 of 93 (27 May 1994); where it was stated:

*"It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage."*

[15] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16 of 2003S (23 April 2004); His Lordship Justice Gates stated:

*"Parliament has prescribed the sentence of life imprisonment for rape. Rape is the most serious sexual offence. The Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences"*.

*"A long custodial sentence is inevitable. This is to mark the gravity of the offence as felt, and correctly so, by the community. Imprisonment emphasizes the public's disapproval and serves as a warning to others who may hitherto regard such acts lightly. One must not ignore the validity of the imposition of condign punishment for serious crime. Lastly the sentence is set in order to protect women from such crimes: **Roberts and Roberts** (1982) 4 Cr. App R(S) 8; **The State v Lasaro Turagabeci and Others** (unreported) Suva High Court Crim. Case No. HAC0008.1996S."*

[16] In **The State v Lasaro Turagabeci and Others** (supra) Pain J said:

*"The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences to the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences."*

[17] It was further held in **Mohammed Kasim v. The State** (supra):

*".....We consider that in any rape case without aggravating or mitigating features **the starting point for sentencing an adult should be a term of imprisonment of seven years**.....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 that starting point.”[Emphasis is mine].*

[18] It is settled that the tariff for a rape of an adult victim is a term of imprisonment between 7 years and 15 years-As per Fernando J in **State v. Naicker** [2015] FJHC 537; HAC 279 of 2013 (15 July 2015).

[19] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*“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.”*

[20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the first count of Rape.

[21] The aggravating factors are as follows:

- (i) You were the husband of the complainant at the time of the offending.
- (ii) Being her husband you should have protected her. Instead you have breached the trust expected from you and the breach was gross.
- (iii) The act of rape was premeditated.
- (iv) Since you were married to the complainant at the time, this tantamount to a domestic violence offence.
- (v) You are convicted of multiple offending.

[22] You are 33 years of age. You are now divorced. You have one child from your marriage, a daughter who is now 10 years old. You were employed as a carpenter, prior to being remanded for this case. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.

[23] In terms of the Previous Convictions Report filed in Court it is confirmed that there two previous convictions recorded against you. Therefore, this Court cannot consider you as a first offender.

- [24] However, Court is mindful of the fact that the two previous convictions are in relation to a breach of a domestic violence restraining order and for escaping from lawful custody. Both these previous convictions seem to stem from the domestic relationship with your wife, who is the complainant in this case. As such, Court takes cognizance of the fact that prior to these incidents you were of good character.
- [25] Considering the aforementioned aggravating factors, I increase your sentence by a further 5 years. Now your sentence is 12 years. I deduct 2 years from your sentence for your previous good character. Your sentence is now 10 years for count 1.
- [26] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the second count of Rape.
- [27] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 12 years. I deduct 2 years from your sentence for your previous good character. Your sentence is now 10 years for count 2.
- [28] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the third count of Rape.
- [29] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 12 years. I deduct 2 years from your sentence for your previous good character. Your sentence is now 10 years for count 3.
- [30] Similarly, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 7 years for the fourth count of Rape.
- [31] Considering the aforementioned aggravating factors, which are common for all offences, I increase your sentence by a further 5 years. Now your sentence is 12 years. I deduct 2 years from your sentence for your previous good character. Your sentence is now 10 years for count 4.
- [32] In the circumstances, your sentences are as follows:

Count 1- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 10 years imprisonment.

Count 2- Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act - 10 years imprisonment.

Count 3- Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act – 10 years imprisonment.

Count 4- Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act - 10 years imprisonment.

I order that all four sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 10 years.

[33] Accordingly, I sentence you to a term of 10 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act), I order that you are not eligible to be released on parole until you serve 8 years of that sentence.

[34] Section 24 of the Sentencing and Penalties Act reads thus:

*"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."*

[35] You have been in custody for this case since 25 February 2016. Accordingly, you have been in custody for 20 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 20 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[36] In the result, you are sentenced to a term of imprisonment of 10 years with a non-parole period of 8 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence	-	8 years and 4 months.
Non-parole period	-	6 years and 4 months.

[37] You have 30 days to appeal to the Court of Appeal if you so wish.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitor for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Office of the Legal Aid Commission, Suva.