

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 27 OF 2016**

**BETWEEN:**           **THE STATE**

**AND:**                   **DANIEL BHURRAH**

**Counsel:**           **Ms A Vavadakua for the State**  
                          **Mr V Tuicolo and Ms M Singh for the Accused**

**Date of Hearings:**    **21 – 23 and 26 February 2018**

**Date of Summing Up:** **28 February 2018**

**Date of Judgment:**   **01 March 2018**

**Date of Sentence:**   **02 March 2018**

**SENTENCE**

- [1] Daniel Bhurrah, you stand convicted of indecently and sexually assaulting and raping an elderly victim suffering from stroke and dementia. I now pronounce your sentence.
- [2] The offences you committed are serious. Indecent assault is punishable by 5 years imprisonment. The tariff for indecent assault is 1- 4 years imprisonment (*Rokota v The State* [2002] FJHC 168; HAA0068J.2002S (23 August 2002)). Sexual assault is punishable by 10 years imprisonment. The acceptable range for sexual assault is from 2-8 years' imprisonment (*State v Baravilala* [2016] FJHC 679; HAC49.2016 (27 July 2016)). These two offences were committed as part of one transaction. You kissed the

victim on the lips and touched her genitals. She was not wearing an undergarment at the time.

- [3] The more serious offence is rape. The maximum penalty for rape is life imprisonment. There is no established tariff for rape of an adult victim but in *Kasim v State* [1994] FJCA 25; Aau0021j.93s (27 May 1994), the Court of Appeal recommended a starting point of 7 years imprisonment. In that case the Court said:

While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. 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. 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. 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.

- [4] In *Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015), the Supreme Court endorsed the following factors to be considered when sentencing for rape:

- (a) whether the crime had been planned, or whether it was incidental or opportunistic;
- (b) whether there had been a breach of trust;
- (c) whether committed alone;
- (d) whether alcohol or drugs had been used to condition the victim;
- (e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;
- (f) whether the impact on the victim had been severe, traumatic, or continuing;
- (g) whether actual violence had been inflicted;

- (h) whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;
- (i) whether the method of penetration was dangerous or especially abhorrent;
- (j) whether there had been a forced entry to a residence where the victim was present;
- (k) whether the incident was sustained over a long period such as several hours;
- (l) whether the incident had been especially degrading or humiliating;
- (m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;
- (n) Time spent in custody on remand.
- (o) Extent of remorse and an evaluation of its genuineness;
- (p) If other counts or if serving another sentence, totality of appropriate sentence. (per Gates CJ)

[5] The facts are that on 14 May 2016, the victim was left alone at home by her family members who were attending a church service. She was living with her daughter and her family at the time. The victim's daughter had become her carer after she had a stroke seven years ago. You were returning home from a drinking session when you noticed that the victim was sitting alone on the veranda of her home. You went and sat beside her. You are her nephew. You called her "Aunty". You are also her neighbour. You have been a frequent visitor to her home. You knew about the victim's physical and mental health. You knew she was alone at home. You exploited the situation. You kissed her and touched her genitals. Later you sexually penetrated her genitals. It was an opportunistic crime without any planning. But the breach of trust was gross. The victim was vulnerable due to her age and illness. She was about 71 years old when you sexually molested her.

[6] In presenting your mitigation, your counsel has informed the court that you are 56 years old, married but separated. You have an adult son and a juvenile daughter

studying and living in Suva. You are a farmer and you earn about \$200.00 a month. The only meaningful mitigating factor is your previous good character. I make a downward adjustment to your sentence to reflect your previous good character. Your age and your personal circumstances are of little value in sentencing for rape.

[7] I have searched for evidence of remorse but could not find any. You did not dispute the alleged sexual acts but you claimed they were consensual. I find your defence that the elderly victim suffering from stroke and dementia engaged in consensual sexual acts including penetration with her younger nephew fanciful. This case dispels the myths and stereotypes about rape. The victim was not in a wrong place to be raped. She was in the security of her home when she was molested. The victim was not among strangers to be raped. She was with her relative when she was molested. The victim did not dress in a manner to be raped. She had a dress on when you placed your hand underneath her dress and molested her. Her crime was she was a woman, elderly, sickly and vulnerable.

[8] Although no physical force or violence was used, the experience of being sexually violated by a family member was humiliating for the victim. The victim said in her evidence that she did not agree to the sexual acts because you were her nephew. The prosecution has not led any other impact evidence from the victim.

[9] I consider the following factors as aggravating to make an upward adjustment to the sentence:

- Gross breach of trust,
- Vulnerability of the victim due to old age and illness,
- Humiliating experience of the victim.
- Victim's juvenile granddaughter witnessed the act of kissing.

[10] You have been in custody on remand for 6 months. I make a downward adjustment to your sentence to reflect your remand period.

[11] The courts have a duty to denounce and deter any form of sexual violence. Rape is a form of sexual violence. Although the victim's body is attacked, the impact is felt on the victim's soul. Emotional trauma can last long. Taking all these matters into account, I sentence you as follows:

Count 1 – Indecent Assault – 6 months' imprisonment.

Count 2 – Sexual Assault – 2 years' imprisonment.

Count 3 – Rape – 12 years' imprisonment.

[12] All sentences are to be served concurrently. Your total sentence is 12 years' imprisonment. I fix a non-parole period of 8 years.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused