

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 356 of 2019

STATE

V

1. SHAFIL SHIMRAAZ ALI

2. MOHAMMED JAVED

3. MOHAMMED NAUSHAD

Counsel : Ms. Shirley Tivao for the State
Mr. Jiten Reddy with Ms. K. Dugan, Mr. Y. Kumar and Ms. S.
Begum for the Accused

Dates of Trial : 12 & 15 October 2021; 2, 3, 14 & 15 December 2021; 28
February 2022 and 1 March 2022

Closing Submissions : 7 March 2022

Judgment : 20 April 2022

Sentence Hearing : 11 May 2022

Sentence : 28 June 2022

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "RTC".

SENTENCE

[1] Shafil Shimraz Ali, Mohammed Javed and Mohammed Naushad, you were charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SHAFIL SHIMRAAZ ALI, on the 23rd day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SHAFIL SHIMRAAZ ALI, on the 23rd day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, with his finger without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED JAVED, on the 23rd day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED NAUSHAD, on the 23rd day of October 2019, at Nakasi, in the Central Division, penetrated the vagina of **RTC**, without her consent.

- [2] The three of you pleaded not guilty to the respective charges and the matter proceeded to trial. The ensuing trial was held over 8 days. The complainant (RTC) testified on behalf of the prosecution and was the sole prosecution witness. The three of you testified on your own behalf.

- [3] At the conclusion of all the evidence and having reviewed the said evidence, this Court found the three of you guilty of the respective charges. Accordingly, Shafil Shimraz Ali you were convicted of the first and second counts of Rape; Mohammed Javed you were convicted of the third count of Rape; and Mohammed Naushad you were convicted of the fourth count of Rape.
- [4] It was proved during the trial, on 23 October 2019, at Nakasi, that you Shafil Shimraz Ali penetrated the vagina of the complainant with your penis, without her consent. It was also proved that you penetrated the vagina of the complainant with your finger, without her consent.
- [5] It was also proved during the trial, on 23 October 2019, at Nakasi, that you Mohammed Javed penetrated the vagina of the complainant with your penis, without her consent.
- [6] And it was further proved during the trial, on 23 October 2019, at Nakasi, that you Mohammed Naushad penetrated the vagina of the complainant with your penis, without her consent.
- [7] It was established during the trial that the complainant's date of birth was 22 September 2006. Therefore, at the time the three of you committed these offences on her she was 13 years and one month of age. At the time she testified in Court she had turned 15.
- [8] The complainant clearly testified to all the aforesaid incidents. I have referred to the complainant's evidence at length in my judgment. The complainant was subjected to rape one after the other, as each of you took turns raping her, and satisfying your lustful sexual desires.
- [9] In terms of the Victim Impact Statement filed in Court, it is recorded that the complainant has been emotionally and psychologically traumatized by your actions. It is clear that the impact of your actions are continuing, as the complainant remains traumatized by the incidents.
- [10] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[11] Shafil Shimraz Ali, Mohammed Javed and Mohammed Naushad, I have duly considered the above factors in determining the sentences to be imposed on you, which is primarily to deter offenders or other persons from committing such offences and also to signify that the Court and the community denounce the commission of such offences.

[12] The offence of Rape in terms of Section 207(1) of the Crimes Act No. 44 of 2009 ("Crimes Act") carries a maximum penalty of imprisonment for life.

[13] 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."

[14] In the case of **State v. Marawa** [2004] FJHC 338; HAC 16T of 2003S (23 April 2004); His Lordship Justice Anthony 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."*

[15] In **The State v Lasaro Turagabeci and Others** (supra) Pain J had 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."

- [16] His Lordship Justice Daniel Goundar, in the case of **State v. AV** [2009] FJHC 24; HAC 192 of 2008 (2 February 2009); observed:

"...Rape is the most serious form of sexual assault. In this case a child was raped. Society cannot condone any form of sexual assaults on children. Children are our future. The Courts have a positive obligation under the Constitution to protect the vulnerable from any form of violence or sexual abuse. Sexual offenders must be deterred from committing this kind of offences".

- [17] In the case of **State v. Tauvoli** [2011] FJHC 216; HAC 27 of 2011 (18 April 2011); His Lordship Justice Paul Madigan stated:

"Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and the Courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound."

- [18] In the case of **Felix Ram v. The State** [2015] FJSC 26; CAV 12 of 2015 (23 October 2015); His Lordship Chief Justice Anthony Gates laid down the following factors that a Court should take into account when sentencing an offender who has been convicted of 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."

[19] His Lordship Justice Goundar in ***State v Apisai Takalaibau*** – Sentence [2018] FJHC 505; HAC 154 of 2018 (15 June 2018); making reference to statistics of Aggravated Burglary cases filed in the High Court in 2017 and 2018, stated that "A factor that influences sentencing is the prevalence of the offence in the community.....The more prevalent is an offence, the greater the need is for deterrence and protection of the community."

[20] This has been affirmed by the Supreme Court in ***Alfaaz v. State*** [2018] FJSC 17; CAV0009.2018 (30 August 2018); where it was recognized that the prevalence of cases of child rape calls for harsher punishments to be imposed by Courts. Their Lordships held:

"According to the statistics released by the Director of Public Prosecutions Office it appears that a number of rape victims as well as victims under the age of 18 years and victims in domestic relationships or relatives were also victims of other serious sexual offences. The rape of children is a very serious offence and it is very frequent and prevalent in Fiji. The courts must impose harsh penalties dictated by the legislation. The courts should not leniently look at this kind of serious cases of rape of children of tender years when punishing the offenders."

[21] In the case of ***Anand Abhay Raj v. The State*** [2014] FJSC 12; CAV 0003 of 2014 (20 August 2014); Chief Justice Anthony Gates (with Justice Sathya Hettige and Madam Justice Chandra Ekanayake agreeing) endorsed the view that Rapes of juveniles (under the age

of 18 years) must attract a sentence of at least 10 years and the acceptable range of sentences or sentencing tariff is between 10 and 16 years imprisonment.

- [22] However, in the case of **Aitcheson v State** [2018] FJSC 29; CAV0012 of 2018 (2 November 2018); His Lordship Chief Justice Gates (with Justice Saleem Marsoof and Madam Justice Chandra Ekanayake agreeing) stated that the sentencing tariff for the Rape of a juvenile should now be increased to between 11 and 20 years imprisonment. His Lordship held:

*"[25] 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."*

- [23] It was also stated in **Aitcheson v State** (*Supra*):

"[72] Undoubtedly it has been accepted by the society that rape is the most serious sexual offence that could be committed on a woman. Further it is said that; "A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female."

- [24] 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."

- [25] Shafil Shimraz Ali, Mohammed Javed and Mohammed Naushad, in the light of the above guiding principles, and taking into consideration the objective seriousness of the offences, I commence your sentences at 11 years imprisonment for each of the counts of Rape you have been convicted.

- [26] The aggravating factors are as follows:

- (i) There was a considerable disparity in age between you and the complainant. The complainant was 13 years of age, at the time you committed these offences on her. At the time of the offending Shafil Shimraz Ali and Mohammed Javed, you were 28 years of age; while Mohammed Naushad, you were 26 years of age. Therefore, you were all more than double the age of the complainant.
- (ii) Considering the fact that the complainant was of tender age, you took advantage of the complainant's vulnerability, helplessness and naivety.
- (iii) You had no regard to the personal security and decency of the complainant.
- (iv) You have exposed the innocent mind of a child to sexual activity at such a tender age, and thereby robbed the complainant of her innocence.
- (v) The complainant was subjected to rape one after the other. Each of you took turns raping her.
- (vi) This incident was specially degrading and humiliating due to the fact that while the complainant was naked and been raped at the back of the vehicle by each of you, the others were watching her being raped.
- (vii) There is evidence to show that alcohol or drugs had been used to condition the victim.
- (viii) The complainant has been emotionally and psychologically traumatized by your actions and the harm is said to be continuing.
- (ix) Shafil Shimraz Ali you are now convicted of multiple offending.

[27] Considering the aforementioned aggravating factors, Shafil Shimraz Ali, I increase your sentence by a further 8 years, while Mohammed Javed and Mohammed Naushad, I increase your sentences by a further 6 years. Shafil Shimraz Ali, now your sentence is 19 years imprisonment for each of the counts of Rape, while Mohammed Javed and Mohammed Naushad, now your sentence is 17 years imprisonment for each of the counts of Rape.

[28] During the course of the sentence hearing, the Learned Counsel for the State submitted to Court that the manner in which the defence case was conducted, whereby the complainant was subjected to lengthy and protracted cross-examination, should be considered as an aggravating factor in this case. Although agreeing that the complainant was subjected to rigorous cross-examination, this Court will not consider this factor as a separate aggravating factor in the instant case.

[29] Shafil Shimraz Ali, you are now 30 years of age (Your date of birth being 26 September 1991). You are said to be married with two small children and residing with your family

at Salim Street, Nakasi, Suva. You are said to be the sole breadwinner of your family earning \$200.00 per week. You are employed with Ansh Furniture since 2018 till date and is said to be a very loyal employee of the company. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.

[30] Mohammed Javed, you are now 30 years of age (Your date of birth being 7 August 1991). You are said to be married with three small children and residing with your family at 10 miles, Sasavira, Suva. You are said to be the sole breadwinner of your family earning \$120.00 per week. You are employed with Ansh Furniture since 2018 till date and is said to be a very loyal employee of the company. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.

[31] Mohammed Naushad, you are now 29 years of age (Your date of birth being 15 April 1993). You are said to be married with two small children and residing with your family at 10 miles, Sasavira, Suva. You are said to be the sole breadwinner of your family earning \$100.00 per week. You are employed with Ansh Furniture since 2018 till date and is said to be a very loyal employee of the company. Unfortunately, these are all personal circumstances and cannot be considered as mitigating circumstances.

[32] As per the Antecedent Report filed, it is noted that there are nil previous convictions recorded against the three of you. The State Counsel too has confirmed that you are all first offenders. Therefore, Court considers you as persons of previous good character.

[33] It is also submitted that the three of you had co-operated with the police during the course of investigations into this case and during the recording of your caution interview statements.

[34] Shafil Shimraz Ali, Mohammed Javed and Mohammed Naushad, I accept that you are a persons of previous good character and that you all co-operated with the police during the course of investigations into this case and during the recording of your caution interview statements. Accordingly, considering the aforesaid mitigating factors I reduce 2 years from your sentences. Shafil Shimraz Ali, now your sentence is 17 years imprisonment for each of the counts of Rape, while Mohammed Javed and Mohammed Naushad, now your sentence is 15 years imprisonment for each of the counts of Rape.

[35] In the circumstances, your sentences are as follows:

Shafil Shimraz Ali

Count 1- – Rape contrary to Section 207 (1) and 2(a) of the Crimes Act – 17 years' imprisonment.

Count 2- – Rape contrary to Section 207 (1) and 2(b) of the Crimes Act – 17 years' imprisonment.

Mohammed Javed

Count 3- Rape contrary to Section 207 (1) and 2(a) of the Crimes Act – 15 years' imprisonment.

Mohammed Naushad

Count 4 – Rape contrary to Section 207 (1) and 2(a) of the Crimes Act – 15 years' imprisonment.

Shafil Shimraz Ali, I order that your sentences of imprisonment to run concurrently. Therefore, your total term of imprisonment will be 17 years.

- [36] Accordingly, Shafil Shimraz Ali, I sentence you to a term of 17 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 15 years' imprisonment.
- [37] Mohammed Javed, I sentence you to a term of 15 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 13 years' imprisonment.
- [38] Mohammed Naushad, I sentence you to a term of 15 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I fix your non-parole period as 13 years' imprisonment.
- [39] 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."

- [40] Shafil Shimraz Ali, Mohammed Javed and Mohammed Naushad, you all had been arrested for this case on 24 October 2019 and remanded into custody until 15 December 2019, the day on which you were granted bail by Court. That is a period of nearly two months. Thereafter, you were again remanded into custody on 20 April 2022, the day on which you were found guilty and convicted for this case. That is a period of over 2 months to date. Accordingly, you have been in custody for a period of about 4 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 4 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.
- [41] In the result, Shafil Shimraz Ali, your final sentence is as follows:

Head Sentence	-	17 years' imprisonment.
Non-parole period	-	15 years' imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 16 years' and 8 months imprisonment.
Non-parole period - 14 years' and 8 months imprisonment.

[42] In the result, Mohammed Javed, your final sentence is as follows:

Head Sentence - 15 years' imprisonment.
Non-parole period - 13 years' imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 14 years' and 8 months imprisonment.
Non-parole period - 12 years' and 8 months imprisonment.

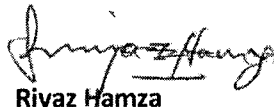
[43] In the result, Mohammed Naushad, your final sentence is as follows:

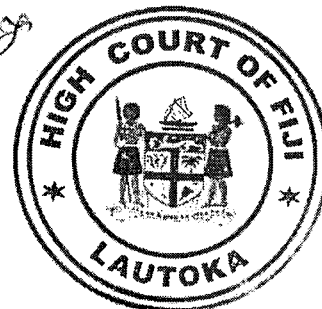
Head Sentence - 15 years' imprisonment.
Non-parole period - 13 years' imprisonment.

Considering the time you have spent in remand, the time remaining to be served is as follows:

Head Sentence - 14 years' and 8 months imprisonment.
Non-parole period - 12 years' and 8 months imprisonment.

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


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LAUTOKA

Dated this 28th Day of June 2022

Solicitors for the State: Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused: Messrs Jiten Reddy Lawyers, Barristers and Solicitors, Suva.