IN THE RESIDENT MAGISTRATES COURT AT LABASA
CRIMINAL DIVISION

Criminal Case No. 39/08

THE STATE–v- VILITATI RAVAI

For the State	:	**PC Varma (On behalf of ODPP)**
For the Accused	:	**In Person**
Date of Sentencing Hearing	:	**11th and 20th December 2017**
Date of Sentencing	:	**20 February 2018**

SENTENCING

1.0 **Offence**

1.1 **VILITATI RAVAI** you are convicted for the amended charge of Annoying a Person contrary to section 154 (4) of the Penal Code.

1.2 Initially you were charged with Attempted Rape in 2007. The matter continued for some time until charges were amended and it proceeded to trial.

1.3 The particulars of the offence are –

AMENDED CHARGE

Statement of Offence

INDECENTLY INSULTING OR ANNOYING FEMALES: contrary to section 154 (4) of the Penal Code.

Particulars of offence

VIITATI RAVAI on the 11th day of October 2007 at Nanuku Street, Labasa Town in the Northern Division uttered the words 'au via veicaikeiiko' translated to mean ' I want to fuck you' intending

that such words be hard by **ALISI RABUKA** and thereby insulting her modesty.

1.4 The court after conducting trial, determined that your conduct and the words uttered ' Au via veicai kei iko' meaning ' I want to fuck you' were indecently insulting to Alisi Rabuka that particular night. Alisi Rabuka was your wife's neice and hence you were related to her in marriage.

2.0 **Law on Sentencing**

2.1 Section 4 (1), (2) of the Sentencing and Penalties Decree 2009 stipulates the principles of sentencing and the factors to be taken into consideration when sentencing an Accused.

3.0 **Mitigation**

3.1 The court considers that you have had an illustrious civil service career up until when the offence occurred. From then onwards you life has spiralled downwards. You wife separated from you for 3 years and return thereafter, you can no longer work as you are 56 years of age, you have 5 children and one of them had unfortunately committed suicide. You are now a diabetic patient with kidney problems and require constant hospital checks and thus you seek leniency of this court. You have no other previous criminal records and was serving as a Divisional Secretary for the North with the Ministry of Provincial Development when the offence occurred.

3.2 When sentencing you the court recognises your service to the government and people of Fiji. In accordance with the case of Batiratu –v- State [2012] FJHC 864; HAR 001.2012 (13 February 2012), the court considers these are mitigatory factors and must treat all Accused equal before the law. His Lordship the Chief Justice stated –

> **'Celebrity Status and Service to State**
>
> These two issues must not be confused. Equality before the law is the overriding principle. It is a long standing principle contained in all of our Constitutions, but not always applied in practice. Celebrity status or fame, though strongly attractive, are not in themselves mitigating factors.
>
> [31] But a history of good service to the **State** , combined with good character are both strongly mitigatory. Traditionally, fighting for one's country such as in World War II or serving with the military in Iraq or Afghanistan would have been considered service for one's country, and mitigatory. Merely being famous, would not, nor would it entitle such a person to special leniency."

4.0 **Aggravating Factor**

4.1 There is a breach of trust as she was related to you, your age difference as well. The was an aged difference between you at the time of the offence, being the authority in the household, which you took advantage of for your benefit.

5.0 **Maximum penalty and Starting Tariff**

5.1 The maximum penalty for the offence is one year imprisonment..

5.2 In State –v- TomasiYabakiono [2016] FJHC 383; HAC 77.2014 (9 May 2016) Madigan J held that for three counts of indecently annoying personsagainst three junior police officers warranted 6 months imprisonment for harassing one female officer with suggestive and obscene phone calls, with another female officer he stated he wanted to rape her prior to eventually doing it and the third he told her he wanted to have an affair with her. In State-v- Bhupendra Kumar [[2015] FJHC 860; HAC 077.2013LAB (30 October 2015) Temo J determined that the Accused be imprisoned for 6 months for showing and asking the minor to suck his penis. In Kumar –v- State [1995] FJHC 2; Haa0003j.1995b (7 February 1995) in which Justice Pathik held that 9 months imprisonment was too excessive and reduced the term of imprisonment to 3 months for the offence of indecently insulting and annoying a female when the Accused forcefully kissed the mouth of the complainant. In the case of Prakash –v- State [2013] FJHC 656; HAA 27.2013 (4 December 2013) Justice Bandara J held that the sentence of 3 months imprisonment suspended for 2 years was harsh and excessive and quashed the decision imposing a binding over order instead. The offence was the sending of text messages continuously. This was adopted in the case of Herbert Wise –v- State [2015] FJHC 75; HAA 31.2014 (4 February 205) in which Madigan J upheld the decision in Prakash (Supra) for an offence of swearing at a police officer whilst a strip search was conducted in the cell of the police station and stated –

> 'The maximum penalty for annoying a person is 12 months' imprisonment, and the normal sentence being handed down by the Magistrates is a binding over order. (seeSemo[2014] FJHC per de Silva J. and Prakash[2013] FJHC 656 per Bandara J.)'

5.3 From these sentences it is clear that the tariff ranges from a binding over to 6 months imprisonment depending on the severity of the offence.

5.4 In Prakash –v- State (Supra) Justice Bandara J stated –

> 'No doubt, the learned Magistrate was aware of the basic general rule, that before passing a suspended prison term, the sentencing court has to be certain that the

"offence" warrants a term of imprisonment. The elementary principle in sentencing is that the 'sentence' has to be proportionate to the 'offence'.
It is stated in 'Principles of Sentencing' (2nd Edition) by D.A. Thomas, that;

"The court has stated many times that a sentencer contemplating a suspended sentence should first consider whether the offence would justify a sentence of imprisonment in the absence of power to suspend". (page 240)

Blackstone's Criminal Practice 2011 (E6.2, page 2150) says that;

"...provides that while there are many similarities between the suspended sentence and the community order, the crucial difference is that the suspended sentence is a prison sentence (or a sentence of detention in a young offender institution) and is only appropriate for an offence that crosses the custody threshold, and for which custody is the only option. As far as the length of the sentence is concerned, before making the decision to suspend, the court must first have decided that a prison sentence (or sentence of detention in a young offender institution) is justified and should also have decided the length of that sentence, which should be the shortest commensurate with the seriousness of the offence if it were to be imposed immediately."

.....

After having considered section 16 (1) (a) (b) and (c) of the Sentencing and Penalties Decree 2009, this court is of the view that the learned Magistrate had not exercised his judicial discretion properly when decided to record a conviction against the appellant. This is a fit and proper instance to grant the appellant a second chance to rectify his wrong doings whilst assuring the safety of the complainant.'

6.0 **Analysis andSentencing**

6.1 From the elements of the offence, it is established that you were solely culpable for the offence. You knew she was your niece but you invited her to have sex with you. The court finds that such an offence is insulting to her modesty given you relationship and given that this transcends the Fijian as well as the normal morals of community. You are a learned man and was well versed with tradition and with values, one of the reasons you were currently working at the position you held prior to your suspension as a public servant.

6.2 To guide this court in determining your sentence, in LaisiasaKoroivuki v the State [2013] FJCA 15; AAU0018.2010 (5 March 2013) his Lordship Justice Goundar discussed the guiding principles for determining the starting point in sentencing and observed:

"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

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.'

6.3 For this case the court will impose a custodial sentence. Your actions and conduct for the offence warrants a custodial sentence. A binding over order is appropriate where it is a moral offence or a technical breach. This one is neither. This offence requires a custodial sentence to be imposed as in the manner in which the offence conducted, warrants a discharge as very lenient and does not serve the purpose of the Crimes Decree. In Batiratu –v-State (Supra) Chief Justice Gates stated in relation to discharges -

> In *State v Nayacalagilagi* (2009) FJHC 73; HAC165.2007 (17th March 2009) Goundar J considered the principles upon which the discretion under the oldsection 44 of the CPC was to be exercised. His lordship summarized the position:
>
> > "Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law *(State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97,* Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."
>
> [27] It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public health or tax legislation, the public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues: *Foster v The State* (supra); *Commissioner of Inland Revenue v George Rubine* [1995] HAC79 OF 1993; *Tebbutt v Commissioner of Inland Revenue* Cr. App. 108 of 1998S; *LTA v Lochan* Cr. App. HAA88.2002S (22nd November 2002).

6.4 The court starts at 6 months, for the top of the tariff and adds 3 months for aggravating factors. The court deducts 4 months for mitigation recognising your service to the government and people of Fiji.

6.5 This is in line with Justice Shameem decision in Nariva v The State [2006] FJHC 6; HAA0148J.2005S (9 February 2006); as follows;

> *"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial*

acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

6.6 Pursuant to section 26 of the Sentencing and Penalties Decree, the court will impose that this sentence be suspended as you have shown remorse, are a first offender.

7.0 **Conclusion**

7.1 **The court sentences you with conviction to 5 months imprisonment suspended for 2 years.**

7.2 A Domestic Violence Restraining Order with non-molestation conditions is imposed to protect your niece, although she does not reside with you anymore.

7.3 28 days to appeal.

7.4 Court clerk will explain the significance of the sentence to you.

Ms Senileba. Levaci
Resident Magistrate

MAGISTRATE'S COURT
LABASA