

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 348 of 2018

[CRIMINAL JURISDICTION]

STATE

V

SHIVA SHIVNESH LAL

**Counsel** : Ms. K. Semisi for State  
Mr. L. Qetaki for Accused

**Hearing on** : 22 - 25 July 2019

**Summing up on** : 25 July 2019

**Judgment on** : 26 July 2019

**Sentenced on** : 31 July 2019

[The name of the victim is suppressed. Accordingly, the victim will be referred to as "SL". No newspaper report or radio broadcast of the proceedings shall reveal the name and address, or include any particulars calculated to lead to the identification of the said victim.]

SENTENCE

1. Shiva Shivnesh Lal, you were charged by the Director of Public Prosecutions for the following offence;

**COUNT ONE**

*Statement of Offence*

**Rape:** contrary to section 207(1) and (2) (a) of Crimes Act of 2009.

*Particulars of Offence*

**SHIVA SHIVNESH LAL** between the 1<sup>st</sup> day of August 2018 and the 31<sup>st</sup> day of August 2018 at Nasinu in the Central Division had carnal knowledge of **SL**, without her consent.

**COUNT TWO**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210 (1) (a) of Crimes Act of 2009.

*Particulars of Offence*

**SHIVA SHIVNESH LAL** between the 1<sup>st</sup> day of August 2018 and the 31<sup>st</sup> day of August 2018 at Nasinu in the Central Division had unlawfully and indecently assaulted **SL**, by touching her thighs and kissing her mouth.

2. After trial the assessors unanimously opined that you are not guilty of both counts. However, I declined to conform to the said opinion and found you guilty of both counts.
3. The maximum sentence for the offence of rape in terms of section 207 of the Crimes Act 2009 is imprisonment for life.
4. The sentencing tariff for rape of an adult victim is a term of imprisonment between 7 years and 15 years. (*State v Naicker* [2015] FJHC 537; HAC279.2013)
5. In the case of *Aitcheson v State* [2018] FJSC 29; CAV0012.2018 (2 November 2018) the Supreme Court held that the sentencing tariff for rape of a child victim should be a term of imprisonment between 11 to 20 years.
6. In the sentencing submission filed by the prosecution, it is submitted that the tariff endorsed in *Aitcheson* (supra) should be applied in this case.

7. The victim when she gave evidence said that she is 18 years old. She said this when she took her oath. Her age at the time of offence or her date of birth did not come out in her evidence. Even though there is a high likelihood that the victim may have been below the age of 18 years last year at the time of offending, since the victim's age was not clearly established by evidence, I consider it appropriate in this case to apply the tariff for rape of adult victims which is a term of imprisonment between 7 years and 15 years.
8. The offence of sexual assault under section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment. The sentencing tariff for this offence is an imprisonment term between 2 to 8 years [*State v Laca* [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012)].
9. The evidence revealed that the victim is your biological sister. On or about 29/08/2018 you raped her by penetrating your penis inside her vagina after you forcefully lifted her legs. Just before you did that, you sexually assaulted her by touching her thighs and her breasts and kissing her.
10. The victim sustained injuries on her breasts and in her genitalia as a result of your abhorrent conduct. You approached her while no one else was at home and she was watching television lying down on the bed. When she tried to get down from the bed to free herself from you, you pulled her back onto the bed.
5. The offences you are convicted of are founded on the same facts and are offences of similar character. Therefore, in view of the provisions of section 17 of the Sentencing and Penalties Act, I consider it appropriate to impose an aggregate sentence of imprisonment against you for the two offences you have committed.

6. Section 17 of the Sentencing and Penalties Act 2009 ("Sentencing and Penalties Act") reads thus;

*"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."*

11. In my view, punishment and deterrence should be the main purposes of sentencing you. It should be made clear to you and other persons with similar impulses that this court and the society denounces your conduct.
12. I would select 07 years imprisonment as the starting point of your aggregate sentence.
13. You are 18 years old and unmarried. You have reached Form 4 and presently engaged in farming.
14. I consider the following as aggravating factors in this case;
- a) You being the victim's biological elder brother, there is a serious breach of trust;
  - b) You have used force on the victim to overpower her;
  - c) The victim sustained injuries;
  - d) You exploited the victim's vulnerability; and
  - e) As a result of your crime, the victim had to leave the house she was living in and her education was interrupted.


15. I would add 06 years to your sentence in view of the above aggravating factors. Now your sentence is an imprisonment term of 13 years.
16. The only mitigating factor in your favour is that you are a young first offender. I would accordingly deduct 03 years of your sentence.
17. I hereby sentence you to an imprisonment term of 10 years. I order that you are not eligible to be released on parole until you serve 06 years of that sentence pursuant to the provisions of section 18 of the Sentencing and Penalties Act. In deciding the non-parole term, I have again considered the fact that you are a young first offender.
18. In my view, the release date in view of section 27(2) of the Prisons and Corrections Act should be calculated based only on the total head sentence alone and the said provisions does not allow the said release date to be calculated on the difference between the head sentence and the non-parole period. If the non-parole period had elapsed by the release date calculated in terms of the said section 27(2) and in the event the prisoner was not released on parole, it is open for the Fiji Corrections Service to release the prisoner on the said release date accordingly, of course subject to any other relevant provisions of the Prisons and Corrections Act and subject to any relevant rule or regulation in the Fiji Corrections Service. Therefore, the non-parole period fixed in this case should not prevent you from being released after serving two-thirds of your head sentence.
19. In the sentencing (written) submission, the prosecutor has stated that you were arrested on 02/11/18 and the time you had spent in remand is 01 month and 10 days. Your counsel initially submitted that he disputes the time in remand claimed by the prosecutor and said that you had been in remand for about 03 months. But he later accepted the date of arrest mentioned by the prosecutor in the said written

submission. The counsel for the prosecution who appeared in court for the hearing on sentencing and mitigation (the prosecutor who conducted the trial did not appear for the said hearing) reaffirmed that you were kept in custody for only 01 month and 10 days and further said that after your (initial) arrest you were not kept in custody.

20. I find that in this case the prosecution (represented by both the prosecutor who conducted the trial and the counsel who appeared for the hearing on sentencing) has been, to say the least, irresponsible in submitting that you were arrested on 02/11/18 whereas according to the court record you were produced before the magistrate court in view of this matter on 05/09/18 and you had been in remand since that date until you were granted bail on 12/12/18. It is an admitted fact that you were interviewed under caution on 03/09/18. Therefore, it could be inferred that you were in custody for this matter since 03/09/18. Regrettably, both the prosecution and the defence in this case have failed to properly assist the court in determining the period you had spent in custody.
21. In addition to the period from 03/09/18 to 12/12/18, you are also in remand from 26/07/19 to date pending your sentence. Accordingly, you have spent 03 month and 15 days in custody. The period you were in custody shall be regarded as a period of imprisonment already served by you in terms of section 24 of the Sentencing and the Penalties Act.
22. In the result, you are sentenced to 10 years imprisonment with a non-parole period of 06 years. Considering the time spent in custody, the time remaining to be served is as follows;
  - Head Sentence - 09 years; 08 months; and 15 days
  - Non-parole period - 05 years and 08 months; and 15 days

23. Having considered the facts of this case, a permanent Domestic Violence Restraining Order is issued against you, identifying the victim 'SL' as the protected person. You are hereby ordered not to have any form of contact with the victim directly or by any other means, unless otherwise directed by this Court.
24. Thirty (30) days to appeal to the Court of Appeal.



  
Vincent S. Perera  
JUDGE

**Solicitors:**

**Office of the Director of Public Prosecutions for the State  
Jiten Reddy Lawyers, Nakasi for the Accused**