

IN THE HIGH COURT OF THE FIJI ISLANDS
CRIMINAL JURISDICTION
AT SUVA

CRIMINAL CASE NO: HAC 0159 OF 2008

THE STATE

V

AFZAL HUSSEIN [s/o Mohammed Hussein]

Ms. Seini Puamau for the State

Accused in Person

Date of Sentence: 20 January 2009.

SENTENCE

1. AFZAL HUSSEIN [s/o Mohammed Hussein] you were charged as follows:

Count 1

Statement of Offence

Rape: contrary to sections 149 and 150 of the Penal Code cap 17

Particulars of Offence

AFZAL HUSSEIN s/o of Mohammed Hussein on the 2nd day of June 2007 at Nakasi in the central Division had unlawful carnal knowledge of a girl, namely, Zahin Shazeeya Shamim, without her consent

Count 3

Statement of Offence

Rape: contrary to sections 149 and 150 of the Penal Code Cap 17

Particulars of Offence

AFZAL HUSSEIN s/o Mohammed Hussein on the 10th day of December 2007 at Nakasi in the central Division had unlawful carnal knowledge of a girl, namely, Zahin Shazeeya Shamim, without her consent.

Count 4

Assault With Intent To Cause Grievous Harm: contrary to section 224(a) of the Penal Code Cap 17.

Particulars of Offence

Afzal Hussein on the 9th day of December 2007 at Nakasi in the Central Division with intent to cause grievous harm to Zahin Sahzeeya Shamim unlawfully did some grievous harm to the said Zahin Shazeeya Shamim by striking her repeatedly with a roti plate, a wooden stool and a spanner, thereby causing swelling and bruising to the head, arms wrist, back and legs and causing lacerated scratches to the back to the said Zahim Shazeeya Shamim.

2. You pleaded not guilty to the above charges. Following a trial lasting six days in this court you were found guilty on all the above three counts of offences charged against you.

3. After considering the unanimous verdicts of the assessors and having reviewed the evidence and the summing up in this trial. The court had no reason to disagree with the assessors' verdict and found you guilty as charged on each of the above counts.
4. This is your sentence.

Background Facts

5. The following facts were proven in evidence during your trial. The victim Zahin Shazeeya Shamim [Shazeeya] is the younger sister of your defacto wife Razia Shabnam Nisha [Razia]. She came to your house on 2 June 2007 after you agreed to her request through your defacto wife Razia, to come and stay there because she had difficulty staying at her grandparents place. You accompanied your wife Razia to pick her up from her grandparents place and brought her back to your place at Painapiu Street, Nakasi.
6. At your place Shazeeya was given a bedroom for her to sleep in. That night of 2 June 2007 after members of your family had gone to sleep, you went to Shazeeya's room and forced yourself on her after threatening to kill her sister and baby son of 8 months old if she told anyone what you are about to do to her. You then took Shazeeya's clothes off and inserted your penis in her vagina. Having satisfied your criminal and you simply went away leaving the victim to clean herself and live with the shame you have brought on her. The victim was 16 years old at the time of the rape.
7. No doubt embolden by the fact that your wife and the victim had not reported on you after the first incident, you repeated the rape of the same victim Shazeeya on 10 December 2007 in circumstances as brazen and criminal as the first. This time your own daughter witnessed it and gave evidence in court.
8. From the evidence given in your trial it was clear that you did not bother to find out from the victim whether she consented or not to your sexual assaults on her body and person. As you yourself told both the victim and your wife, you are free to do as you please. The victim is someone who is in a position of trust with you because she is the younger sister of your wife. You are not a young person but a mature and many respects calculated person.

9. Despite the mounting evidence called by the prosecution against you in support of the charges that were laid against you, in your cross examination you showed no respect, no remorse for what you did. On the contrary you tried in vain to convince the court you are not responsible for the criminal acts alleged against you.
10. As regards the charge of Act with intent to cause grievous harm, the facts proven on the evidence are that you used a roti plate handle, a wood stool and a spanner to assault Shazeeya with. This was caused by her objection to you placing your hands around her waist. After beating her and while she was in pain and feeling dizzy, you forced her to do 'sit and stand up' routine for sometime. You appear to enjoy inflicting pain on Shazeeya. It was inhuman and degrading conduct of the worse kind.

The sentence

11. The court will first determine the sentence for the rape charges. Under section 150 of the Penal Code Cap 17 the maximum sentence for rape is life imprisonment. It is a serious offence.
12. Since 2003 when the sentence was increased the courts have similarly revised its sentences for serious sexual assaults against women upward. The following cases shows the range of sentences now being passed by the court – in Asesela Drotini v The State [2006] AAU 001 of 2005 the Court of appeal endorsed a sentence of 11 years imprisonment; in State v Lepani Saitava [2007] HAC 0010 of 2007 the High Court held that a tariff for rape of children should range from 10 to 13 years imprisonment and more recently in Philip Fong Toy v The State [2008] FJHC 223 a sentence of 6 years imprisonment was increased in similar circumstances as this case to 14 years imprisonment. Also in State v Nacanieli Marawa [2004] HAC 016 of 2003, where 13 years imprisonment was passed for two counts of rape involving a 14 year old niece.
13. Given the facts of the rape in this case, I would consider this case as one of the more serious and calculated acts of its kind. The court must there determine a sentence that will send out clear message to people of similar intention that the court will be severe in its sentence against anyone found guilty of the offence of rape. In 2003 Parliament in

Fiji increased the sentence for offences against serious sexual assaults from 14 years imprisonment to life imprisonment, with right to fix a minimum term to be served. This is to show our society's abhorrence of this type of criminal offending.

14. The sentence must in principle be such as to deter criminal from committing this type of offence in future. It must also provide adequate protection to the community at large against callous and calculated criminals, who must be notified that long custodial sentence awaits anyone found guilty of these type of offences in the courts.

15. With the above in mind, I chose 10 years imprisonment as the starting point of the sentence in this case.

16. After your conviction this morning you asked for time to prepare your mitigation. The court adjourned to 2.30 pm this afternoon for that. You now informed the court that you do not wish to make any submission in mitigation. You also stated that you did not commit the offences you have been convicted of.

17. The court have considered whether in fairness to you there are any obvious mitigation but there are none that is obvious on the facts of this case.

18. I found the following factors proven in this trial to be the relevant aggravating factors for sentencing:

- The breach by the accused of his position of trust as the brother-in-law of the victim;
- The use of threats to perpetrate his criminal conduct;
- Lack of accountability for what he did given the fact that he a mature person;
- Lack of remorse that what he did is wrong

19. For the above aggravating factors I would increase the sentence by 2 years to 12 years imprisonment.

20. The sentence for each count of Rape is 12 years imprisonment.

21. For the charge of Act With Intent To Cause Grievous Harm the liable penalty under section 224(a) of the Penal Code, is life imprisonment.
22. In State v Mokubula [2003] FJHC 164 the High Court reviewed sentences with regard to section 224(a) Penal Code offences and held that the tariff is between 2 to 5 years imprisonment where a weapon is used in the attack on the victim.
23. The facts in this case is that the accused used a roti plate handle and a wooden stool to hit the victim with. It was a repeated and prolonged. This was followed by the 'sit/stand-up' routine, when the victim was in pain and suffering dizziness in her head. I would chose 3 years imprisonment as the starting point of the sentence.
24. You have submitted no mitigation as you stated above. The court is therefore not in a position to discount your sentence.
25. The aggravating factors for this offence are:
 - The repeated use of weapons to cause the serious injury on the victim;
 - The total lack of disregard for the injuries sustained by the victim;
 - Lack of accountability for what the accused did to the victim
26. I would increase the sentence by 1 year imprisonment to 4 years imprisonment.
27. There is no basis for considering a non custodial sentence on the facts of this case.
28. The sentence now passed is 28 years imprisonment. I now must take a backward step and consider the totality of the accused criminal offending and asked whether 28 years imprisonment is fair and just in the total circumstances of the case.
29. Having done that I consider that a fair and just sentence on the facts here would require me to order the 12 years imprisonment for each

of the Rape counts to be served concurrently. This will leave a balance of 16 years imprisonment. I would further reduce this to 13 years imprisonment after taking into consideration the accused pre-conviction incarceration.

30. The accused is sentenced to 13 years imprisonment effective from today.

Isikeli Mataitoga

JUDGE

At Suva

20 January 2009.