

The implementation of SGBV Laws- Judicial Attitudes to sexual and gender based violence in Fiji

Fiji Women's Crisis Centre

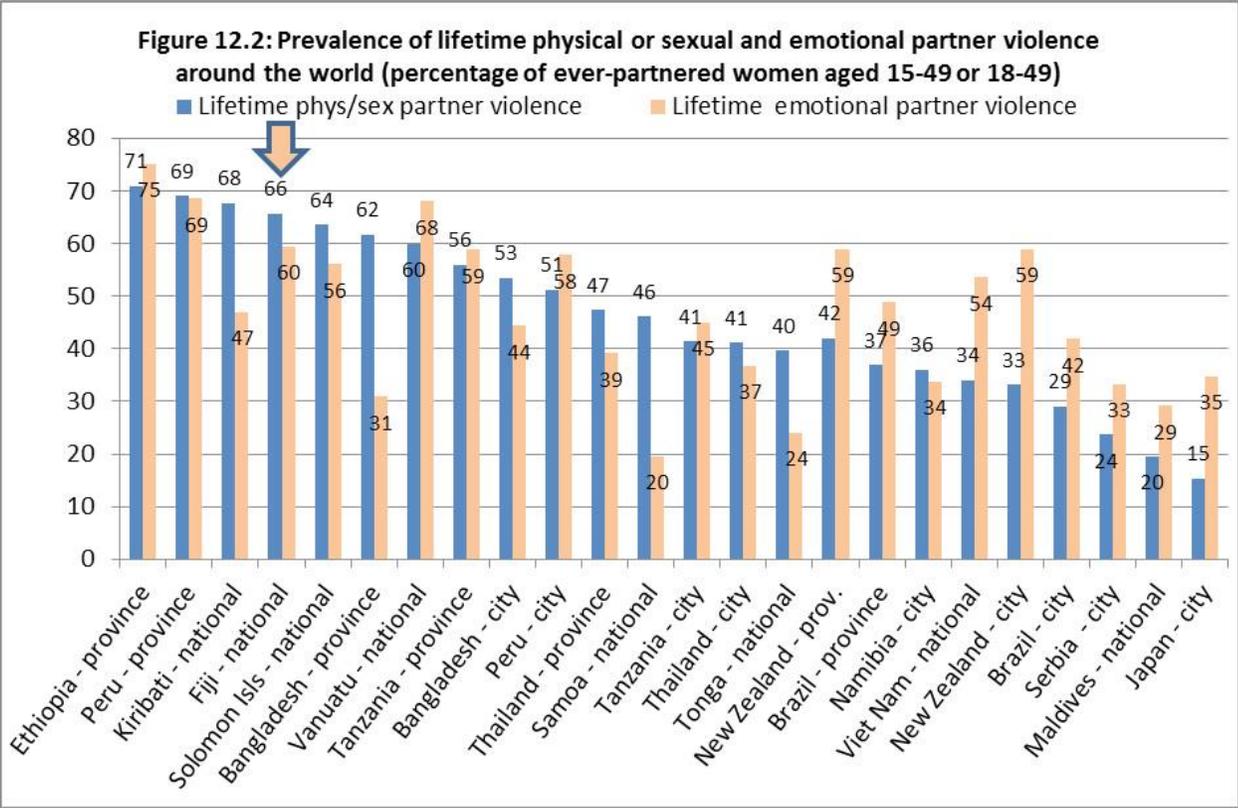
Gender Based Violence In Fiji and The Pacific - Prevalence

- ▶ Rates of Violence Against Women in the Pacific amongst the highest in the world.
- ▶ Research on intimate partner violence conducted using WHO methodology reveal the following rates of intimate partner violence in the Pacific for women aged between 15 -49:
 - ▶ Kiribati - 68%
 - ▶ Fiji- 64%
 - ▶ Solomon Islands - 64%

Sexual Assault

- ▶ Prevalent yet under-reported throughout the Pacific.
- ▶ Fiji: largest group of sexual assault victims 11-15 years. 74% of perpetrators known to the victim; 30% relatives.
- ▶ Emerging trend of younger offenders
- ▶ Rape within marriage

Prevalence



Attitudes Towards SGBV

- ▶ Women as the “property of men”
- ▶ Domestic Violence – a private matter
- ▶ Religion and culture used to justify the violence
- ▶ Seen as a means of “keeping women in their place” – Women “asking for it”.
- ▶ Lack of support by families and social institutions
- ▶ Compounded by religious and cultural beliefs/ practices/ interpretations

Impact of Violence Against Women

- ▶ Physical injuries – bruising, black eyes, broken bones, burns, head injuries,..... death
- ▶ Reproductive Health – unwanted pregnancies, miscarriages, STIs, HIV/AIDS,
- ▶ Emotional/ Psychological – low self esteem, stress related illnesses eg. Asthma, migraines, mental illness, social isolation, anxious, depressed, fewer coping skills
- ▶ Impact on Children
- ▶ Economic costs- individual (family), direct & indirect costs – Fiji: \$300 million
- ▶ Correlation between violence and poverty (Housing)
- ▶ Community, national, political participation
- ▶ Health costs – reproductive health, vulnerability to STIs, HIV/AIDS,
- ▶ Larger cycle of violence

Everyday in Fiji

Box 7.1: Estimates of the impact of intimate partner violence in Fiji each year

According to Fiji's 2007 Census there were 189,385 women in Fiji aged 18-64 who were ever in an intimate relationship with a man. Using the data from this survey, it is possible to estimate the number of women affected by partner violence each year, each week and each day:

- 15,725 women will suffer from injuries each year – this is an average of 302 women every week or 43 women injured every day due to violence by their husband/partner. However, only about 1 in 10 of these women will tell a health worker the true cause of their injury.
- 312 women will become permanently disabled – 6 every week or almost 1 every day.
- 3,682 women will be physically assaulted so severely that they lose consciousness – 71 each week or 10 every day.
- 5,678 women will need health care for their injuries – 109 each week or about 16 each day; but many of these women will not get the health care they need.
- 10,733 women will have eardrums broken or eye injuries – 206 per week or about 29 every day.
- 1,872 women will have a bone fractured or broken – 36 each week, or 5 each day.
- 1,872 women will suffer from internal injuries – 36 every week or 5 each day.
- 1,622 women will have sprains or dislocations – 31 each week or 4 each day.
- 437 women will suffer from burns – 8 each week or 1 each day.
- 936 women will have their teeth broken – 18 each week or 3 every day.

Note: Estimates are calculated as follows: the percentage of women who said they were injured in the previous 12 months before the survey (Table 7.2 of Annex 1) is applied to the number of ever-partnered women in Fiji, based on 2007 Census data (Table 3.3 of Annex 1). These are minimum estimates because they use 2007 Census data, and because the survey counted the number of women with each type of injury (whereas some injuries may happen multiple times). Source: Table 7.10 of Annex 10.

Relevant Laws

- ▶ Crimes Decree 2009
- ▶ Criminal Procedure Decree 2009
- ▶ Bail Act 2000
- ▶ Domestic Violence Decree 2009
- ▶ Police Act

Implementing Authorities

- ▶ Police
- ▶ DPP
- ▶ Courts
- ▶ Judiciary

Implementation of SGBV Laws by Police and Court officials

Issues with Implementation

Inconsistent Legislation

- ▶ Bail -several definitions of police bail
- ▶ Bail Act 2000 - s 8: Police officer (defined as above rank of sergeant or station officer) may grant bail except if offence is serious (serious offence defined as over 5 years imprisonment)
- ▶ Crimes Decree increased sentences for offences, bringing many more offences within definition of serious offences. This has implications for women who report SGBV offences.
- ▶ Criminal Procedure Decree 2009 - s24: Any officer of or above rank of corporal can release person on bail “unless the offence appears to be of a serious nature” (offence of a serious nature not defined)

Issues with Implementation

Knowledge/Awareness

- ▶ New legislation by decree
- ▶ Police not aware of their powers
- ▶ Court officials not aware of laws and processes
- ▶ Correct procedures not being followed
- ▶ DV - medical and police certificates required to file

Issues with Implementation Resources

- ▶ Police
- ▶ Service of DVROs
- ▶ Rendering assistance to women
- ▶ Releasing offenders
- ▶ Victims
- ▶ Difficulties accessing the justice system

Issues with Implementation

Attitudes

- ▶ No Drop Policy not being implemented
- ▶ Women are charged when they make complaints
- ▶ Women told to obey husbands and stop being troublemakers
- ▶ Promotion of reconciliation (including traditional reconciliation ceremonies) by police. Ref Bale case

Judicial Implementation of SGBV Laws

Positive Changes

- ▶ Definitions of offences broadened
- ▶ Codification of removal of requirement for corroboration warning and prohibition of questioning on past sexual history
- ▶ Increase in penalties
- ▶ Tarrifs have substantially increased - Kasim v State [1994] FJCA 25 : starting point for sentencing an adult in any rape case without aggravating or mitigating features - 7 years
- ▶ Drotini v The State [2006] FJCA 26: “the sentencing court should not hesitate to increase the sentence substantially where there are further aggravating factors”
- ▶ Anand Abhay Raj {AAU0038 of 2010} - sentences for rape of children should be in range of 10-16 years
- ▶ Non Parole periods are being imposed

Definitions of Offences

SGBV crimes against Children

- ▶ In Fiji, sexual offences against children are defined by age, are confusing and lead to perpetrators being incorrectly charged and acquitted.
- ▶ For instance, while a child under 13 is said not to be able to consent to sex, it is a defence to sex with children between the ages of 13 and 16, if the accused can show an actual belief, on reasonable grounds, that the child was over 16. However, if such a belief not shown, then the penalty is only 10 years as opposed to life for a child under 13 and life for rape. So if a child of 14 is raped and charge is under section 215 and not 207 (Rape), the penalty is only 10 years as opposed to a person of 25 or 35 being raped. Section 215 goes on to say that consent is not a defence!!!!

State v Mateo Matavura; Criminal Case No. 347 of 2011

The accused was acquitted of 1 count of Rape against his 15 year old niece, who became pregnant as a result of the sexual abuse.

The presiding judge failed to fully explore the application of the relevant provisions of the Crimes Decree, and exonerated the accused while condemning the complainant for her conduct before and after the alleged rape.

The acquittal was on the basis of consent.

The judge failed to consider that consent is not a defence for children between the age of 13-16 unless the perpetrator reasonably held the belief that the child was above 16. In this case the accused was related to the child and such a belief could not have been held

Section 162 (1) of the CPD gives powers to convict an accused charged with rape for a lesser charge if the court is satisfied that the evidence adduced supports such conviction.

Rape

Repealed Laws: Penal Code

Rape was defined as:

149. Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

By this definition there was an implication that only woman are raped. Anal and oral rape not punishable under this section. All forms of sexual penetration apart from vaginal penetration was prosecuted as a less serious offence and thus attracted lesser penalties.

Current Laws on SGBV Offences

Crimes Decree 2009

Rape

207. – (1) Any person who rapes another person commits an indictable offence.

Penalty – Imprisonment for life.

(2) A person rapes another person if –

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

(3) for this section, a child under the age of 13 years is incapable of giving consent.

The definition of rape has been broadened to include other orifices and insertion of objects. It is also phrased in gender neutral language.

BIU v the State [2000] FJHC 120

The accused raped his 11 year old niece. He tried to push his erect penis into her vagina. The Complainant struggled in pain and the accused was unable to penetrate her vagina. He then fully penetrated her anus and ejaculated. The accused was charged with:

Count 1- Rape

Count 2- Unnatural offence

He pleaded guilty to both counts and was convicted as charged. He was sentenced to 4years imprisonment on count 1 and 5 years imprisonment on count 2. He then appealed his sentence on the ground that it was harsh and excessive. The Conviction on Count 1 was quashed and substituted with Attempted Rape and Sentenced to 4 Years imprisonment on that count. Sentence for Count 2 remained.

State v Nalawa [2005] FJMC 16

The accused was charged with 3 counts of Rape of his step daughter. Medical report stated that:

"No bruises. Vaginal findings consistent with loss of virginity but no conclusive sign of recent vaginal intercourse, pending sperm analysis".

The Magistrate said:

If she was telling the truth then the medical report would have supported her version. I believe that [complainant] probably exaggerated the incidents. In light of the doctor's findings I come to the conclusion that there was no penetration in respect to count three and I am also left in some doubt as to what actually happened with respect to the two earlier incidents and I have to resolve the doubts in favour of the accused. And I therefore acquit the accused on all three counts.

Dineshwar Prasad v The State (CA. AAU105 of 2013)

- ▶ Appellant was convicted of rape of his friend who had shared a taxi with him while drunk. Instead of dropping her home, he took her to a hotel and had sexual intercourse with her. He argued that the sex was consensual.
- ▶ Evidence of force and physical violence
- ▶ Appellant was sentenced to 12 years imprisonment. Sentence upheld on appeal
- ▶ Appeal court mentions that medical evidence of bodily injuries and recent complaint negates consent

Consent

Consent is defined as

(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained –

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

In **DPP v Veresa [2012] FJMC 167** the victim was cross examined at great length about her physical resistance, some of these questions include:

Question: Did you make any attempt to rush towards the door?

Question: Did you ever make attempt to resist him?

Question: Did you make attempt to resist?

Despite the fact that consent must be freely and voluntarily obtained, if there is no evidence of physical resistance, there is a general trend to assume it was consensual.

It is should be noted that physical resistance is in many cases an unrealistic expectation of a complainant particularly if the perpetrator is stronger or armed. The basic reason for requiring evidence of physical harm is to prove that the victim did not consent and suffered sexual violence.

The accused should describe how he obtained consent rather than the victim showing that there was physical resistance to prove lack of consent.

“The burden of proving consent should be on the accused”.

State v Chand [2013] FJMC 248

The Magistrate made the following comments:

[34] In above police statement shows that the victim was not that much feeble and could able to run. Then why she did not scream or bite the accused. The victim said that she was fear of expel from home if she revealed the story. Then, why she revealed this story when matrimonial issue comes? It is notable that she still stays with the accused's former wife and this incident give raise for the breakdown of the of marriage. As defence clearly pointed out they have been married for past 17 years but this incident led their separation. The wife (Pw2) did not take the husband's side although they have two grown up children and lived together for 17 years. The PW2 said that there were some assaults and incidents [Dex-2], but I note they did not separate, why this juncture PW2 decided to separate?

[35] Is this story fabricated by the victim or on the instructions of another party (PW2)? In **Reg v Henry** [1968] 53 cr. app Rep 150 at 153 his Lordship Salmon LJ discussed the story of concoction in sexual cases as follows;

"...human experience has shown that in these courts girls and women sometimes tell an entirely false story, which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate and sometimes for no reasons at all"

[emphasis added]"

Judicial Implementation of SGBV Laws - Corroboration

The warning on corroboration is no longer required to be given in Fiji. This was first determined in *State v Balelala [2004] FJCA 49*, where the Fiji Court of Appeal held that requiring corroboration in sexual offences cases was discriminatory and violated Fiji's obligations to CEDAW.

This has now been codified in the Criminal Procedure Decree 2009.

CPD 2009 - 129. Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted; and in any such case the judge or magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration.

Corroboration cont....

However, our courts continue to bring up the issue of corroboration, and appear to require proof of resistance.

In *State v Prasad* [2011] FJHC 622; HAC101.2011, Justice Thurairaja says that “*according to our laws Rape does not need medical corroboration but it will be helpful. Only evidence for the Prosecution is the Prosecutrix. She appears to have acted with some plan on that day and the following day. Telephone calls made and received by her create a doubt in her credibility*”.

In *Ganesh Goundar v The State* [AAU0077 of 2011] the accused had been convicted of rape of a 14 year old child and was acquitted on appeal. In determining whether consent was given, the court states: “The only evidence available against the use of force on Emma by the appellant is that of Emma. **There is no evidence of any injury caused as a result of resistance.**”

The court after acquitting the accused of rape, convicts him of defilement but only gives a sentence of **3 years imprisonment** “*considering the part played by the victim.*” This according to the court includes the fact that the victim’s evidence on whether the accused gave her lunch or not was inconsistent, that she met the accused on “pre-arrangement”, went to a hotel room with the accused, took money from him for bus fare, and sought refuge with the accused when her mother found out she had missed school.

(Also see *Dineshwar Prasad v The State* where the fact that the complainant had physical injuries was stated as supporting lack of consent.)

Judicial Implementation of SGBV Laws

- Recent Complaints

- ▶ Recent complaints are “relevant to the question of consistency, or inconsistency, in the complainants conduct, and as such was a matter going to her credibility and reliability as a witness” *Raj v State [2014] FJSC 12* (followed in *State v Draunimasi [2015] FJHC 115*)
- ▶ Recent complaints are seen as negating consent (*Dineshwar Prasad v The State*)
- ▶ Does not take into account the sensitivities around women reporting rape - particularly where the rapist is known, or related to the complainant - Date Rape/ Marital Rape - women often take time and reflect before reporting the rape.

Judicial Implementation of SGBV Laws

- Past Sexual History

CPD: 130. – (1) This section applies to all offences of a sexual nature for which an accused person is charged or to be sentenced for, and includes all proceedings against an accused as a principal offender or an accessory to such an offence in any capacity.

(2) In any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to –

(a) the sexual experience of the complainant with any person other than the accused; or

(b) the reputation of the complainant in sexual matters, except by leave of the court.

DPP v Veresa[2013] FJMC 73

The Accused, a police officer, was charged with the rape of his sister. In sentencing the Accused to 8 years imprisonment to be served only on weekends, Magistrate Premachandra said:

“His mind was anomalous. It seems that the act was done by his alcohol, if he was in normal sense he would not have done this act. It is seen that act was done to get rid of homo sexual behavior of the victim (According to the accused) and get affection to men and natural behavior of sex. It should be noted that there is no single injury in genital areas and the victim was tuned up and ravished before the act. This act was to get affection for natural behavior of sex. This act was suggested to him by his alcoholic mind. Thus, superficially this is a grave, cynical crime but attended alcoholic circumstance says that is was not done for lust but to chasten the victim from homo sexual behavior. This was a random act and it was not premeditated.”

“Normally incestuous rapae are done by perpetrators for long period of time on victims and many times but in this occasion it was a single act of rape. I therefore decide to give partial supended sentence.”

Sentenced on appeal to 17 years 8 months - non parole period of 15 years.

State v Joeli Tawatatu Case No 549/07

- ▶ Accused was acquitted of the charge of Rape despite a medical report confirming physical injuries consistent with the complainants allegations.
- ▶ From our observations: - the Magistrate passed comments on the complainants attire in court. The Accused, who was self represented, made comments on the complainants past sexual history one day one and this was not challenged. However, the Prosecution did object to questions on past sexual history on day 2.

Judicial Implementation of SGBV Laws

- Inconsistent Application of Laws

- ▶ While there are many instances where the tariffs in *Kasim* and other guideline judgments have been applied, Magistrates and Judges have been inconsistent in their application of the law.
- ▶ In a sentence handed down on 27 March 2015 in State v Joeli Noka Tawake (Taveuni Magistrates Court 263/2011), the Accused pleaded guilty to defilement of a fifteen year old girl and was sentenced to 12 months, suspended for three years. One of the reasons given by the magistrate for this lenient sentence was that” there is only a slight age differences between the parties” There was in fact, a 9 year age difference.
- ▶ In the case of Shalendar Kumar v State [2011] the perpetrator pleaded guilty to punching and stabbing his de facto partner and was handed a suspended sentence of four months
- ▶ State v Joseva Vaileba -convicted by the High Court on 25 July 2011 on one count of rape. Sentenced to 4 years imprisonment - no non parole period fixed. Released after 2 years 8 months.

Recommendations/Challenges

- ▶ Sensitivity towards victims.
- ▶ Gender sensitivity training - understanding the reasons behind why survivors of SGBV act as they do
- ▶ Adherence to the *Pacific Island Judges Declaration on Gender Equality in the Courts 1997*; *Denarau Declaration on Gender Equality 1997* “ ...be sensitive to court procedures to eliminate cross examination of sexual assault survivors and rape victims on past sexual experiences...and to continuously examine...work practices and procedures to see if gender sensitivity is being addressed.”
- ▶ Speaking out against violence.
- ▶ Strengthening regional networks - sharing of experiences and resources

Vinaka, Dhanyawad,
Thank you