



### *The Role of Culture in Shaping Judicial Opinions in Sexual & Gender Based Violence (SGBV) Cases: Fiji Case Law Survey*

In Fijian culture, *bulubulu* - a custom for reconciling differences - is an essential part of traditional village life. Disputes were settled with the offer of a whale's tooth (*tabua*), a gift or compensation, and asking for forgiveness. There is social pressure to accept this apology because the historic outcome of accepting *bulubulu* was to break the cycle of vengeance. The offer is directed to the senior male member of the family, but generally not the victim. As the population has begun to move from rural to urban locations, however, the "custom itself is being redefined."

It is important to note that traditional reconciliation (*bulubulu*) is practiced by the indigenous population (*I-Taukei*), however, the more common understanding of "reconciliation" between two parties is also used by the non-indigenous population.

Advocates from Fijian Women's Crisis Center (FWCC) argue that the current practice of *bulubulu* in violence against women cases is an affront to the traditional practice of *bulubulu* "because in the olden days, the punishment for the crime [of rape] under customary law was death." Over the past two decades, *bulubulu* has been manipulated by perpetrators of SGBV to: get sexual assault and domestic violence cases dropped by police officers, receive reduced court sentences, and deny redress to survivors of SGBV. Unfortunately, judges contribute to the misuse of reconciliation (in both its forms) in SGBV cases because of their reliance on using the evidence of reconciliation to mitigate sentences. Judges have also expanded the applicability of reconciliation to sexual assaults and domestic violence in the Criminal Procedure Statute, even though the statute provides for reconciliation only in common assaults.

In reviewing the Pacific Islands Legal Information Institute database, we narrowed our review to 61 total cases at the Magistrate, High Court, High Court (Appellate Jurisdiction), Court of Appeals, and Supreme Court level from 1977-2013 where reconciliation was considered as a mitigating factor in sexual assault and domestic violence cases.

The case law survey looked at 3 primary points:

- Was evidence of reconciliation in SGBV a factor in mitigating the defendant's sentence;
- Did the court award no custodial sentence or partially suspend a sentences where the perpetrator was found to have committed SGBV;
- Whether or not reconciliation was used to mitigate a sentence in that case, did the judge generally believe it was acceptable to do so in SGBV cases.

In 27 of 55 cases (6 were N/A for this point), or 49% of cases, judges used reconciliation as a factor in mitigating the sentence in domestic violence and sexual assault cases. In 30 of 59 cases, or 50.8% of case, judges gave no custodial sentences or partially suspended sentences in sexual assault and domestic violence cases. Interestingly, almost all the judges cited legislation that specifically prohibited the dismissing of SGBV cases because there was evidence of reconciliation, yet, other factors like the defendant being a "first time offender," or "sole bread winner," led to outright suspension of sentences. And, finally, slightly more than half the judges who rendered decisions in these cases believed that it was acceptable to reduce a sentence based on evidence of reconciliation.

In breaking down the data, we found that after the Domestic Violence Decree 2009 went into effect, judges were more cognizant in their judicial opinions of not giving undue weight to reconciliation because of the power imbalance. Yet, since 2010, Magistrate judges still used reconciliation to mitigate sentences in 77.7% of cases (14 of 18). In contrast, in all the High Court, Appellate Jurisdiction cases (8; 1 N/A) where the appellant sought reduction of sentence based on reconciliation, not one case awarded a reduced sentence. A similar result was reached in all Court of Appeal (3) cases. This brings into question the value of precedent and authority of the higher courts.

One example is the Supreme Court's refusal to reduce a sentence in a domestic violence case where the husband had "expressed remorse in Fijian style [*bulubulu*]." The Court was clear, "[t]he responsibility for his conduct must rest upon the husband. If by reason of his crimes his family may be reduced to poverty the blame cannot be laid at the door of the Court which imprisons him. Even in 1977, the Supreme Court understood that there was a power imbalance in SGBV cases and that accountability (custodial sentences) was necessary to prevent husbands from having a license to harm women. Yet, this long-standing precedent continues to be ignored.

Despite the Assistant Minister of the Fiji Ministry for Women, Social Welfare and Poverty Alleviation's contention that reconciliation functions largely outside the legal system, judges today continue to mitigate sentences for sexual assault and domestic violence cases based on reconciliation, as shown in our case law survey analysis.

**Case:** *State v Lesuma* [2013] FJMC 230; Criminal Case 51, 53.2013 (5 June 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Sentencing:** June 5, 2013

**Type of Case:** Domestic Violence (victim was aunt)

**Key Opinion Excerpts:**

**"Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate."**

**"It has been noted in *Prasad v The State* [1994] FJHC 132 (Supra) that criminologists recognise that a prison sentence should be the last resort especially where a first offender is concerned unless the charge is very serious or the offender is dangerous and imprisonment is called for in the public interest or in the interest of the offender himself. (Emphasize is mine)."**

**"I therefore impose non custodial sentence for you. I act under section 44 of the Sentencing and Penalty**

Decree. I enter a non conviction, charge is dismissed."

**Sentence Received:** No custodial sentence. Charge dismissed and restraining order applied.

**Sentence Reduction:** Reconciliation did not play a role in this case.

**Was reconciliation used as a justification to reduce the sentence in this case?:** N/A. No reconciliation offered in the matter.

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES. By focusing on the absence of reconciliation, the judge essentially finds that if reconciliation existed it would have been accounted for in sentencing.

**Case:** *State v Momoli* [2013] FJMC 218; Criminal Case 116.2013 (30 May 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** H.S.P. Somaratne

**Date of Sentencing:** May 30, 2013

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "You are 27 years old and married with 02 children. You have reconciled with the victim. For these I deduct another 12 months from your sentence to reach 12 months imprisonment."

"But considering your early guilty plea as well as your reconciliation you will be given a partly suspended sentence."

**Sentence Received:** 10 months imprisonment and restraining order.

**Sentence Reduction:** Partly suspended to 2 months imprisonment. In this matter, the judge seems to reduce the sentence twice because of pleading guilty and reconciliation. The judge initially finds 3 years imprisonment after aggravating factors, reduces 1 year for guilty plea and 1 year for reconciliation. Then after getting to 10 months, the court again states considering reconciliation and guilty plea you, the defendant gets a partly suspended sentence. 8 months suspended. A total of 20 months of the sentence was removed for both offering reconciliation and a guilty plea.

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Baleidrokadroka* [2013] FJMC 107; Criminal Case 33.2013 (11 March 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Samuela Qica

**Date of Sentencing:** March 11, 2013

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "You mitigated and I take the following in your favour:

- Your guilty plea.
- This is your first offence.
- You've remorseful and promised not to re-offend.
- You've reconciled with your wife, and you've also looking after elderly parents and your younger brother.
- You've the sole breadwinner."

**Sentence Received:** 6 months.

**Sentence Reduction:** Suspended full sentence. The arrival at original six month sentence was by reducing 3 months for mitigating factors, including, reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** YES

**Case:** *State v Singh* [2013] FJMC 106; Criminal Case 276.2012 (11 March 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Samuela Qica

**Date of Sentencing:** March 11, 2013

**Type of Case:** Domestic Violence (victim is mother, defendant is daughter)

**Key Opinion Excerpts:** "This is your first offence and also remorseful for the offence. As the court sees it,

you need to be given an opportunity to reform yourself. Your sentence of 6 months imprisonment will hence be suspended for 2 years."

**Sentence Received:** 6 months and restraining order.

**Sentence Reduction:** Suspended full sentence because of first offense and remorseful.

**Was reconciliation used as a justification to reduce the sentence in this case?**: N/A. No reconciliation was offered in this case.

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** N/A

**Case:** *State v Vonolagi* [2013] FJMC 75; Criminal Case 1550.2012 (13 February 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Yohan Liyanage

**Date of Sentencing:** Feb. 13, 2013

**Type of Case:** Domestic Violence (victim was husband)

**Key Opinion Excerpts:** "In your mitigation submission, you stated that you are a 37 year old, mother of four children. You are currently residing with the victim partner and therefore it appears that you have sought forgiveness from the complainant victim. I reduce another one month to reflect your said personal circumstances."

**Sentence Received:** 6 months.

**Sentence Reduction:** Suspended full sentence. In reducing the initial sentence, judge found reconciliation (forgiveness) as one factor in reducing the sentence by 1 month.

**Was reconciliation used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Ralulu* [2013] FJMC 13; Criminal Case 261.2012 (14 January 2013)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Samuela Qica

**Date of Sentencing:** Jan. 14, 2013

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In light of the circumstances of offending in this case, I commence my sentence at 9 months imprisonment. Considering the aggravating features I increase your sentence by 2 months. Your sentence is now 11 months imprisonment. For the early guilty plea I reduce your sentence by 3 months. For other mitigating circumstances including your remorse and reconciliation I reduce your sentence by 2 months. Your final sentence is now 6 months imprisonment."

**Sentence Received:** 6 months and a restraining order.

**Sentence Reduction:** Suspended sentence in full. Original sentence was reduced 2 months for remorse and reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Ledua* [2012] FJMC 342; Criminal Case 664.2012 (10 December 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Yohan Liyanage

**Date of Sentencing:** Dec. 10, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In your mitigation submission, you stated that you are a 33 year old, separated from the relationship, unemployed person. You have sought forgiveness from the complainant victim."

"However you stated in your mitigation that you are currently in custody and looking after your one year old son. If the Court issues a custodial sentence the direct impact will be on the child and it will deteriorate his well being. Therefore the Court decided to suspend your sentence."

**Sentence Received:** 7 months imprisonment and a restraining order.

**Sentence Reduction:** Sentence suspended in full because he was the sole caretaker for his son.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *Masirewa v State* [2012] FJHC 1449; HAA27.2012 (29 November 2012)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Paul K. Madigan

**Date of Judgment:** Nov. 29, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The appellant stressed before me that he and his partner had reconciled however the Domestic Violence Decree is explicit in that there can be no reconciliation of a domestic violence offence, if indeed reconciliation can be seen to be genuine which it rarely is."

In the case of Wise [2008] FJHC, Madame Justice Shameem said this:

"The appellant submitted that this is a family dispute and that this a mitigating factor. I do not agree. The fact that an assault or threats of assault occur within a family home does not make it any less a criminal offence. To suggest otherwise would be to give those who hold positions of power and authority within the home virtual impunity from prosecution and punishment. A criminal offence is an offence whether it is committed on the street on strangers, or in the home on ones own family members. Indeed it may be said that offences committed on family members should be considered very seriously by the courts because of the gross betrayal of trust perpetuated on those family members."

"Violence against family members will not be reconciled and they will be the subject of heavy sentences."

**Judgment:** Appeal dismissed

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO**

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?** NO

**Case:** *State v Prasad* [2012] FJMC 207; Criminal Case 565.2012 (27 August 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Sentencing:** Aug. 27, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "You have reconciled with the complainant and she confirmed it in open court. But under section 154(6) of the Criminal Decree 2009, offences pertaining to domestic violence cannot be reconciled. But reconciliation is a strong mitigating factor."

"Thus as a first offender and according to the Sentencing Principles, I think you should be given another chance. If I convict you, your future may be in a peril. The injuries are minor and patient/victim was treated outward. I consider all attendant circumstances. In this legal backdrop I wish to act under sections 15(1) f and 45(1) of the Sentencing and Penalty Decree 2009. I therefore dismiss the charges against you."

**Sentence Received:** Charges dismissed.

**Sentence Reduction:** No sentence given because first offender and judge make reference to reconciliation as a strong mitigating factor.

**Was *reconciliation* used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Pal* [2012] FJHC 1260; HAC059.2012 (7 August 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Paul K. Madigan

**Date of Sentencing:** Aug. 7, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "His wife has written what appears to be a very genuine letter of forgiveness and reconciliation to the court, speaking of their shame and disgrace as a result of this incident."

"This is obviously an offence of domestic violence. In such an offence reconciliation as a mitigating factor is to be looked at with a high degree of skepticism. The accused's wife's letter however appears to rebut that need for suspicion."

"However given the extraordinary circumstances of this case as outlined in paragraph 8, this Court will extend mercy to the accused."

**Sentence Received:** 8 months imprisonment.

**Sentence Reduction:** Suspended sentence because of age of couple and 42 years of living harmoniously before the incident and the serious health problems of the accused.

**Was reconciliation used as a justification to reduce the sentence in this case?**: NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** NO

**Case:** *Botaki v State* [2012] FJHC 1250; HAA015.2012 (1 August 2012)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Justice P.K. Madigan

**Date of Judgment:** August 1, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The question of reconciliation in a Domestic Violence is a difficult one. It is quite clear that it is not reconcilable offence, it being a domestic violence case and that being so, reconciliation as a mitigating factor is of very dubious value. A female victim will nearly always say that the parties are reconciled because she will fear the loss of the family breadwinner and supporter or she is forced to say it by her accused husband. A sentencing tribunal should always therefore look at a submission of reconciliation with great caution and suspicion. In this case, although the Magistrate has listed reconciliation as a mitigating factor, he later expresses doubts whether it was voluntary or not because the victim did not confirm it in Court. It was a submission of the accused."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None. Found reconciliation as a mitigating factor to be suspect.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** NO.  
The judge doesn't completely foreclose the possibility but strongly cautions its use.

**Case:** *State v Wainidaliga* [2012] FJMC 151; Criminal Case 630.2012 (10 July 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Yohan Liyanage

**Date of Sentencing:** July 10, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In your mitigation submission, you stated that you are a 23 year old, single, unemployed person. You have sought forgiveness from the complainant victim. I reduce another one month to reflect your said personal circumstances."

**Sentence Received:** 6 months and a restraining order.

**Sentence Reduction:** 1 month. Reconciliation was one factor in mitigation that reduced the sentence by 1 month.

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** YES

**Case:** *State v Swami* [2012] FJMC 147; Criminal Case 157.2012 (3 July 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** H.S.P. Somaratne

**Date of Sentence:** July 3, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "I consider following points as mitigating factors in this case I. Married with children II. Seeks forgiveness III. Reconciled with the complainant."

"But sec 154(6) of the Criminal Procedure Decree clearly says that this sec does not apply to domestic violence Offences. Therefore even though you have reconciled I am not going to act under sec 154 (3) of the Criminal Procedure Decree."

"But the reconciliation has been taken as a mitigating factor in this case."

"I reduce further 02 months for other mitigating factors to reach the period of 04 months."

**Sentence Received:** 4 months imprisonment and restraining order.

**Sentence Reduction:** Sentence suspended in full. Reconciliation was one of three mitigating factors for which the judge reduced his sentence by 2 months.

**Was *reconciliation* used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Ratu* [2012] FJMC 143; Criminal Case 52.2012 (25 June 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** H.S.P. Somaratne

**Date of Sentencing:** June 25, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The Court cannot accept the reconciliation and dismiss the proceedings since there is a statutory prohibition contained in section 154 (6) of the Criminal Procedure Decree, 2009."

"I take following grounds as mitigating factors in this case.

- I. Married with a child
- II. reconciled
- III. Seek forgiveness.

IV. Paid the full damage to your step father.

"For the above mitigating factors I deduct another 1 month from your both counts."

"You are a young offender as well as a first offender. In Prasad v The State [\[1994\] FJHC 132](#); Haa0032j.94s (30 September19994) S W Kepa J enunciated that the fact that Appellants are first offenders ought to be a very strong mitigating factor in their favour. A prison sentence ought to be the last resort after the court has explored and exhausted all other alternative sentences. (Emphasize is mine)."

"Therefore I believe you should be given a chance to rehabilitate away from a custodial sentence."

**Sentence Received:** 6 months.

**Sentence Reduction:** Sentence suspended in full because first time offender and young and suspended the sentence. 1 month was reduced for mitigating factors including reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Ratnam* - Sentence [2012] FJMC 137; Criminal Case 169.2012 (20 June 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** H.S.P. Somaratne

**Date of Judgment:** June 20, 2012

**Type of Case:** Domestic Violence (victim was father, perpetrator was son)

**Key Opinion Excerpts:** "But the victim is your father and Sec 154(6) clearly says this section does not apply to offences of **domestic violence** But I will consider the **reconciliation** as a mitigating factor when deciding your final sentence."

" I consider following mitigating factors which were brought before me in your mitigation submission. 1. 26 years old 2. Single 3. Reconciled with the complainant"

**Sentence Received:** 5 months

**Sentence Reduction:** Sentence suspended in full. 1 month of sentence reduced due to mitigating factors, including, reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *State v Padiyachi* [2012] FJMC 133; Criminal Case 700.2008 (19 June 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Rangajeeva Wimalasena

**Date of Sentencing:** June 19, 2012

**Type of Case:** Domestic Violence (victim was father)

**Key Opinion Excerpts:** "In mitigation you said that you are 42 years, single and a priest. You said that you seek forgiveness. You promised that you will not re offend. You further informed Court that you have reconciled with the Complainant and now live in the same house."

"Although you claimed to be a priest your conduct does not seem to fall in line with the conduct of a priest. In any event, the Complainant was present in Court and he confirmed reconciliation. However it should be noted that this is not an offence which can be reconciled. Besides you waited for five years until the date of the trial to inform that you have reconciled with your father. I do not see any remorse on your part. Furthermore domestic violence acts of this nature have been repeatedly denounced by Courts."

"For the mitigatory factors I reduce the sentence by 12 months."

**Sentence Received:** 18 months imprisonment.

**Sentence Reduction:** 12 months reduced because of mitigating factors, including reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *State v Katisawani* [2012] FJMC 121; Criminal Case 416.2012 (8 June 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** YOHAN LIYANAGE

**Date of Sentencing:** June 8, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The grounds of mitigation are as follows: the accused is 34 years old; remorseful; apologised to the victim; both parties are now living together; sought court's leniency; promised not to re offend."

"I have carefully considered the summary of facts and factors rendered in mitigation and early guilty plea for the charges, a reduction of 03months is given to reflect the same."

**Sentence Received:** 6 months imprisonment.

**Sentence Reduction:** Suspended in full. The court reduced initial sentence by 3 months because of mitigating factors, including, reconciliation (apology).

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Bibi* [2012] FJMC 118; Criminal Case 492.2011 (7 June 2012)

**Court:** Magistrate's court, Criminal Jurisdiction

**Judge:** H.S.P. Somaratne

**Date of Sentencing:** June 7, 2012

**Type of Case:** Domestic Violence (victim was husband)

**Key Opinion Excerpts:** "Both these offences are reconcilable under Sec 154 of the Criminal Procedure Decree. However it is clearly stipulated in Sec 154(6) that if these are committed with in domestic setting then there can't be any reconciliation. But still if there is any reconciliation that can be taken as a mitigating factor. There is nothing before the court to show that parties have reconciled."

**Sentence Received:** 8 months imprisonment.

**Sentence Reduction:** Suspended in full.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Chand* - Sentence [2012] FJMC 104; Criminal Case 545.2012 (29 May 2012)

**Court:** Magistrate's Court, Criminal Case

**Judge:** Yohan Liyanage

**Date of Sentencing:** May 29, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Even it is a family dispute the view of this Court is 'Criminal Intimidation' is not a reconcilable offence. Section 154(1) limits reconciliation in to offences of common assault, assault occasioning actual bodily harm, criminal trespass and damaging property. Sub section (6) states that even for the earlier stated offences it cannot be applied if the offences are under the Domestic Violence Decree 2009."

"The reconciliation cannot be totally considered in family disputes due to the weaker bargaining positions of the family members such as women and children. Hence I note that this is not a matter to discontinue proceedings on the reconciliation that said to have entered between the accused and his wife."

" I will only consider his early plea, fact that he is a first offender and above personal circumstances as valid grounds of mitigation."

**Sentence Received:** 13 months imprisonment and restraining order (non molestation condition).

**Sentence Reduction:** 12 months suspended for other mitigating factors not related to reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** NO

**Case:** *Roligalenu v State* [2012] FJHC 1092; HAC052.2011 (18 May 2012)

**Court:** High Court, Criminal Jurisdiction (no appellate jurisdiction)

**Judge:** Daniel Goundar

**Date of Sentencing:** May 18, 2012

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "In our country, we take pride in our customs and traditions. Customs and traditions should never be used to restrict access to justice. If anything, customs and traditions should be a medium to correct the harm done to the victim by making the offender accountable. Without accountability, relationships cannot be restored, no matter how much traditional apology is offered. This is an exceptional case where customs and traditions were exploited to suppress the truth."

"Under the domestic and international law, the State has positive obligation to bring the perpetrators of sexual assaults against children to justice. Children are vulnerable members of our society. They must be protected from sexual abuse."

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**Sentence Received:** 12 years.

**Sentence Reduction:** No mitigation resulting from *bulubulu*, rather, it became an aggravating factor because the victim/ survivor was made to offer the apology to the perpetrator.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO**

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?: NO**

**Case:** *State v. Makutu* [2012] FJHC 1081; HAC141.2011 (15 May 2012)

**Court:** High Court, Criminal Jurisdiction (no appellate jurisdiction)

**Judge:** Priyantha Niwana

**Date of Sentencing:** May 15, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Other circumstances of mitigation are that soon after his offensive conduct, the accused surrendered himself to police and co-operated with the investigation. Under interrogation, he admitted the crime. The accused sought forgiveness and reconciliation from the injured in traditional iTauki

fashion by offering a 'reconciliation' or presentation of a whale's tooth to the injured and the family. I reduce further three months for these gestures of the accused, which reflect true remorse and repent."

**Sentence Received:** 12-months

**Sentence Reduction:** Mitigating factors resulted in 3 months for *bulubulu* and 2 months for being the "sole breadwinner".

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?: YES**

**Case:** *State v Raqanquu* [2012] FJMC 55; Criminal Case388.2012 (12 April 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Sentencing:** April 12, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "You said you have reconciled but this offence cannot be reconciled and it should be treated with some gravity. The reconciliation is not panacea for these types of offences. On the other hand the reconciliation is not confirmed and as Justice Gounder noted it may be pressure of social, economic and norms."

**Sentence Received:** 3 months imprisonment

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?: N/A**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?: YES.** Judge says reconciliation was not confirmed, which means it possibly could have been used as a form of mitigation in this case.

**\*Case:** *State v Chandra* [2012] FJMC 77; Criminal Case 486.2011 (17 February 2012)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Rangajeeva Wimalasena

**Date of Sentencing:** Feb. 17, 2012

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Further it should be stated that reconciliation does not reduce the gravity of the offence although it can be considered as a mitigatory factor."

"In State V David Batiratu HAR 01/2012 Chief Justice Gates stated;

"There may have been association here with reconciliation. Reconciliation is maintained in the Criminal Procedure Decree [section 154]; it was originally provided for in the Criminal Procedure Code at section 163. The promotion of reconciliation applies only to charges for offences of common assault, assault occasioning actual bodily harm, criminal trespass or damaging property. Section 154 of the Criminal Procedure Decree provides a much more detailed section than its predecessor, taking into account appropriate forms of apology, respect for the victim, mandatory counselling, rehabilitation, promises and undertakings to alter habits or conduct, such as the consumption of alcohol or the use of drugs. Most especially the court must be satisfied that reconciliation is in the interests of any victim of crime to proceed in such a manner. This approach gives proper protection to children, women, or vulnerable persons. It also indicates the need for awareness of improper pressures which might be exerted to force through reconciliation I respectfully suggest the old cases, approving discounts in sentence for cases where the complainant wished to withdraw are no longer the correct approach': See Rt Peni Baleidraiba Kevetibau v State (1992) 38 FLR 110.

Not only is assault on a police officer not included in the list of offences where reconciliation may be considered, the offence is one too serious by its nature for the matter to be settled in such a way. Though the instant case may be one "not aggravated by degree", it is not one "substantially of a personal or private nature." As a matter of public policy for the maintenance of law and order, assault on police cases like those of domestic violence would be entirely unsuitable for termination by mere amicable settlement".

"The offenders who create violence at home very often get away by exerting pressure on the victims to settle. On the other hand the victims tend to reconcile with offenders due to social stigma and to save their families. Yet the Courts have a duty to send a strong message to those who are minded to indulge in similar acts, that the society condemns domestic violence despite subsequent reconciliations between parties."

**Sentence Received:** 10 months imprisonment.

**Sentence Reduction:** 9 months suspended because of reconciliation with the victim. This is after the judge in this case cites the Chief Justice who found discounts to sentences are "no longer the correct approach" in domestic violence cases.

**Was *reconciliation* used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?: YES**

**Case:** *State v Autar* [2011] FJMC 163; Criminal Case 579.2011 (22 November 2011)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Jude Nanayakkara

**Date of Sentencing:** November 22, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The complainant in this case is your wife. She informed Court that she has forgiven you and has reconciled with you. This is a "domestic violence" offence. The Court cannot accept the reconciliation and dismiss the proceedings since there is a statutory prohibition contained in section 154 (6) of the Criminal Procedure Decree, 2009. But there is nothing to prevent Court from taking into account the reconciliation as a mitigating factor at the stage of sentencing."

"Mitigating Factors 1) You reconciled with the complainant. 2) The presence of the element of provocation. 3) You are remorseful for your actions and deeds. 4) You tendered an apology to Court."

**Sentence Received:** 2 months imprisonment and a restraining order.

**Sentence Reduction:** Judge found *reconciliation* as one of four mitigating factors in the case and reduced the sentence by 3 months.

**Was *reconciliation* used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?: YES**

**Case:** *State v Nischal* [2011] FJHC 742; HAC176.2010 (18 November 2011)

**Court:** High Court, Criminal Jurisdiction (no appellate jurisdiction)

**Judge:** S Thurairaja

**Date of Sentencing:** Nov. 18, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Frequently the Court gets to form a view that reconciliation is more to do with issues of power and dominance from the domestic relationship where victim has become so dependent on her abuser and so powerless that she has learned only helplessness and make wise life choices because of that debilitation. It is for that reason that while the Court may have sympathy for the late plea of reconciliation nonetheless this must be weighed against the need for vigilance in the eradication of domestic violence. The public have a right to expect zero tolerance for any violence in the eradication of domestic violence. The public have a right to expect zero tolerance for any violence especially that occurring within the home. The protection of the weak and powerless in society requires a movement from rhetoric to reality". Thus 3 ½ year sentence was upheld to be within the range..."

**Sentence Received:** 6 months imprisonment.

**Sentence Reduction:** Suspended in full. Reconciliation was not listed as one of the mitigating factors in the case.

**Was *reconciliation* used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?**  
Questionable.

**Case:** *Patel v State* [2011] FJHC 669; HAA030.2011 (27 October 2011)

**Court:** High Court, Appellate Jurisdiction

**Judge:** P.K. Madigan

**Date of Judgment:** Oct. 27, 2011

**Type of Case:** Domestic Violence (victim was assailant's brother)

**Key Opinion Excerpts:** "This is a domestic violence offence and as such it cannot be reconciled. (Part III Section 3(b) of Domestic Violence Decree). The appellant's ground that the Magistrate did not allow for credit for reconciliation cannot be made out. The victim in this case cannot reconcile with the appellant in order to mitigate this offence. Nor should the Magistrate have allowed it to be a factor in his mitigation

"list". Reconciliation plays no part in a domestic violence offence either for or against an accused."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?**: NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?**: NO

**Case:** *Chand v State* [2011] FJHC 593; HAA024.2011 (23 September 2011)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Paul K. Madigan

**Date of Judgment:** Sept. 23, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The learned Magistrate took a starting point of seven months imprisonment and enhanced that by two months for the aggravating feature of the assault being on his own wife. She then deducted three months for his mitigating features said to include remorse, reconciliation and co-operation with the Police and added a further discount of two months for the early guilty plea bringing the final total sentence to four months imprisonment."

"Assaults in a domestic context are particularly odious in that wives, and husbands for that matter, should be able to feel safe in their homes without having their trust in their loved ones betrayed. The learned Magistrate was quite correct in finding that the domestic element to this offending was an aggravating feature."

**Judgment:** Appeal dismissed

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?**: NO. However, Magistrate did deduct three months of the defendant's sentence because of mitigating factors, including, reconciliation.

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** NO. Prior decisions from Judge Madigan inform this conclusion.

**Case:** *State v Kumar* [2011] FJMC 87; CRC 406.2010 (29 July 2011)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Judgment:** July 29, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** " . . . despite the willingness of the parties to reconcile this matter; court had to hear this case amidst the long list of trials in this court. The accused did not want to plead guilty, if so I could have taken this reconciliation fact as a mitigatory factor."

**Judgment:** Convicted of charge.

**Sentence Reduction:** None for reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Gounder* [2011] FJMC 28; Criminal Case 232 of 2011 (14 March 2011)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Sentencing:** March 14, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Victim is your wife and you treated her in bad manner. Though she is your wife you have no legal right to beat her. The innocent wife came before court and consented to reconciliation subject to condition namely you should be in sober every day."

"Since you have reconciled considering all factors, I select to adopt an alternate sentence. Thus I think it is inappropriate to consider custodial sentence in this matter."

**Sentence Received:** No custodial sentence. Probation given.

**Sentence Reduction:** No imprisonment because of reconciliation

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

\***Case:** *State v S.T* [2011] FJHC 135; HAD002.2011 (4 March 2011)

**Court:** High Court, Domestic Violence Jurisdiction, Appellate Jurisdiction

**Judge:** Daniel Goundar

**Date of Judgment:** March 4, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "This is rather an unfortunate state of affairs. The Domestic Violence Decree came into effect on 6 September 2010. But it seems to me that there is a lack of commitment to enforce the law by the law enforcement officers. This lack of commitment can defeat the clear objectives of the Domestic Violence Decree. The Domestic Violence Decree is designed to give greater protections to the victims of domestic violence who are generally women. Women victims are vulnerable. Most of them are financially depended on their spouses.

"Judicial experience has shown that they do not have equal bargaining power as their spouses. They are forced to reconcile in domestic violence cases because of cultural and social constraints placed on them. The Domestic Violence Decree is designed to take away those constraints and to empower them to live a life without violence."

"Police and judicial officers should remember that domestic violence offences are no longer reconcilable. When an accused informs the court that he has reconciled with his spouse in a domestic violence case, there is no longer a discretion to terminate the proceeding without implementing the provisions of the Domestic Violence Decree."

"In this case, by the time the application for restraining order was heard in the High Court, the victim was left with the accused without any protection against future violence on her.

In future these occurrences must not occur and the police officers and the magistrates are urged to show genuine commitment to implement the Domestic Violence Decree."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?: NO**

**Case:** *Raisoqoni v State* [2011] FJHC 32; HAA004.2011 (7 February 2011)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Daniel Goundar

**Date of Judgment:** February 7, 2011

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The learned Magistrate gave no weight to reconciliation because the victim informed the court that the appellant had previously assaulted her."

"The learned Magistrate correctly pointed out that the offence arose from a domestic relationship and therefore was not reconcilable. This, however, does not mean that reconciliation could not be taken into account in sentencing the offender."

"Under the new law, domestic violence offences are not reconcilable and therefore there is no discretion given to the courts to encourage reconciliation. However, if the victim freely reconciles with her partner and gives evidence of that effect, reconciliation is a factor that ought to be taken into account in sentencing the offender."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO**

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases?: YES**

**Case:** *State v Tikoikirisimasi* [2011] FJHC 4; HAC040.2010 (19 January 2011)

**Court:** High Court, Criminal Jurisdiction (no appellate jurisdiction)

**Judge:** Salesi Temo

**Date of Sentencing:** Jan. 19, 2011

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "In your case, the mitigating factors were as follows: (i) you're a first offender at the young age of 18 years; (ii) you pleaded guilty to the offences on the first day of trial, and as a result, saved the court's time; (iii) the complainant was not seriously injured during the offending; (iv) you have reconciled with the complainant and her family; (v) you have effectively served 16 months imprisonment, while being remanded in custody for 11 months since 10th February 2010.

"For the rape offence, I start with 7 years imprisonment. I add 2 years imprisonment, for the aggravating factors, making a total of 9 years imprisonment. For the first four mitigating factors, I deduct 2 years 8 months, leaving a balance of 6 years 4 months."

"Before I conclude the sentencing process, let me say something about reconciliation on rape cases. Reconciliation cannot be used as a method to avoid a custodial sentence. It only goes to mitigating the custodial sentence. The law requires that all those found guilty of rape must be given custodial sentences to protect the vulnerable in our society, whether they be girls or boys, children, women or men. This is so because the Crimes Decree 2009 has extended the definition of rape to include both females and males."

**Sentence Received:** 5 years of imprisonment.

**Sentence Reduction:** *Reconciliation* was one of the mitigating factors that reduced the overall sentence by 2 years and 8 months.

**Was *reconciliation* used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe *reconciliation* can be used for mitigation in sexual assault cases?: YES**

**Case:** *Maharaj v State* [2010] FJHC 467; HAA048.2010 (25 October 2010)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Daniel Goundar

**Date of Judgment:** Oct. 25, 2010

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The victim was present in the Magistrate's Court. She confirmed the reconciliation and expressed her willingness to continue with her relationship with the appellant. She told the court that the appellant had previously assaulted her and a case was pending in court."

"In her sentencing remarks the learned Magistrate treated the appellant's guilty plea and the reconciliation with the victim as mitigating factors. The aggravating factor was the use of an iron rod to cause head injury to the victim."

"The imprisonment sentence of the appellant is only a punitive measure. The imprisonment sentence may not operate to stop the violence against the victim after the appellant is released from prison. In my judgment, the court should impose protection orders under the Domestic Violence Decree in addition to any sentence imposed on an offender in a case of domestic violence. This interpretation is consistent with the objectives of the Domestic Violence Decree. The Domestic Violence Decree does not prevent the court from enforcing its provisions even when the offender is punitively punished for an offence of domestic violence."

**Judgment:** Appeal allowed.

**Sentence Reduction:** 1 month for remand because of error by lower court judge.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** Questionable. Did not overturn the Magistrate's reduction of 12 months for two mitigating factors: 1) "sole bread winner" and 2) reconciliation.

**Case:** *State v Wilikibau* [2010] FJMC 164; Criminal Case 885.2010 (12 October 2010)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Sumudu Premachandra

**Date of Sentencing:** Oct. 12, 2010

**Type of Case:** Domestic Violence (victim was daughter, tried to use daughter to get to mother)

**Key Opinion Excerpts:** "In mitigation, you said that you are 49 years old, married with 3 children. You are a school teacher of FNU. You reconciled with the complainant. . "

"Since you have reconciled considering all factors, I select to adopt an alternate sentence. Thus I think it is inappropriate to consider custodial sentence in this matter."

**Sentence Received:** No custodial sentence.

**Sentence Reduction:** Reconciliation considered enough of mitigating factor to warrant no custodial sentence.

**Was reconciliation used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *State v Naserani* [2010] FJHC 253; HAA015.2010 (19 July 2010)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Paul K. Madigan

**Date of Judgment:** July 19, 2010

**Type of Case:** Domestic Violence (victim was sister)

**Key Opinion Excerpts:** "In dealing with this exact question, Winter J said in Savou v State – HAA 111 of 2004 "a stay or termination of proceedings should be deemed an acquittal because it is as if the prosecution was (sic) never commenced. In appropriate circumstances where genuine reconciliation has promoted a just result the parties should be allowed to settle their differences, reconcile and move on without the baggage of accusation and conviction"."

"The point of the DPP's appeal (were it validly sanctioned) is that the Magistrate did not follow the provisions of section 154 of the Criminal Procedure Decree, 2009 in dealing with reconciliation. By section 154(2) a Court can only proceed to promote reconciliation after "ensuring that the victim of violence does not submit to any proceedings being undertaken...by reason of pressure being exerted in any form". Such requirement obviously requires hearing from the victim; her consent as it were; and this was not done. The victim had left the jurisdiction when the case was called and the accused persons merely said that they

had tried to reconcile, which suggested that their attempts had been rebuffed."

"It is a point of interest that these proceedings should have rung the "Domestic Violence" bell in the Magistrate's head – and under the provisions of the Domestic Violence Decree 2009 reconciliation is very much secondary to the wellbeing of the victim. If for this reason alone, the views of the victim should have been sought before an order of dismissal was made."

**Judgment:** Appeal dismissed. No miscarriage of justice.

**Sentence Reduction:** N/A. However, appellants were acquitted.

**Was reconciliation used as a justification to reduce the sentence in this case?:** N/A

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** Yes

**Case:** *State v. Qalia* [2009] FJHC 150; HAA017.2009 (24 July 2009)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Daniel Goundar

**Date of Judgment:** July 24, 2009

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The Magistrate adjourned the sentencing to facilitate reconciliation between the parties. On 26 June 2008, the respondent appeared in court with his grandfather and informed the Magistrate that they had presented the traditional apology of "bulubulu" to the victim. They said the victim's family had accepted the apology. The Magistrate did not seek any confirmation of the apology from the victim or her family. The Magistrate discharged the respondent stating that he was a young boy and that he should be given another chance."

"The offence of indecent assault is not an offence where the court is obliged to promote reconciliation. The Magistrate was clearly wrong to exercise her discretion to promote the accused to reconcile with the victim given the sexual nature of the offence."

"I bear in mind the principles in *Rokota* and take into account the mitigating and aggravating factors present in this case. The respondent is sentenced to twelve months imprisonment suspended for two years."

**Judgment:** Appeal allowed. 12 months imprisonment. Set aside discharge order of Magistrate and convicted respondent.

**Sentence reduction:** Suspended sentence in full.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** YES. The judge stated that he recognized the principles set out in *Rokota*, which account for mitigating and aggravating factors, including *bulubulu*.

**Case:** *Barua v. State* [2009] FJCA 12; AAU0051.2008 (8 September 2009)

**Court:** Court of Appeal, Criminal Jurisdiction

**Judge:** John E. Byrne

**Date of Judgment:** September 8, 2009

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "Both the appellants were first offenders. They both looked after an elderly parent and grandparent and said they had presented the "bulubulu" which had been accepted."

"The Learned Magistrate started at seven years imprisonment. He added a year for the group offence, and two years for consumption of alcohol. He added another two years for the pain and injury suffered by the complainant. He then reduced the sentence from 12 to 10 years for the appellants' youth and good character. They were sentenced to 10 years imprisonment."

**Judgment:** Appeal dismissed.

**Sentence Received:** 10 years imprisonment.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** NO  
Although *bulubulu* was offered and accepted, neither the Magistrate nor the Court of Appeals judge mention it as a factor for mitigation.

**Case:** *Talevakarua v State* [2008] FJHC 322; HAA100.2008 (20 November 2008)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Isikeli Mataitoga

**Date of Judgment:** October 17, 2008

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "I have difficulty accepting the claim by the appellant that there was reconciliation, but even if there was reconciliation, its value is irrelevant because it can't be pleaded to reduce a lawful sentence that a court must pass in appropriate circumstances to show society's abhorrence against certain criminal acts and to uphold moral standards."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO** However, the sentence was significantly reduced by the Magistrate. Magistrate reduced sentence by five years based on mitigating factors: age, first time offenders, reconciliation, and guilty pleas.

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?: NO**

**\*Case:** *Roko v State* [2008] FJCA 70; AAU0077.2008S; AAU0091.2008S; AAU0097.2008S (5 November 2008)

**Court:** Court of Appeal, Criminal Jurisdiction

**Judge:** Randall Powell

**Date of Judgment:** Nov. 5, 2008

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The trial judge sentenced them to five years imprisonment. He started with a sentence of 7 years, added 3 years for the girl's age, her virginity and the fact that it was rape by a gang, then deducted 5 years for mitigating factors namely their age, the fact that they were first offenders, that reconciliation had taken place and most importantly that by their pleas of guilty they had saved the

victim from giving evidence before the Court."

**Judgment:** Filing of the appeal was untimely.

**Sentence Reduction:** None. However, the lower court judge reduced sentence by 5 years because of mitigating factors, including, reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** N/A

**Case:** *Pal v The State* [2005] FJHC 456; HAA0092J.2005S (23 September 2005)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Nazhat Shameem

**Date of Judgment:**

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In this case the Appellant used a kitchen knife on his wife. Notwithstanding their continued marriage, there was no escaping a custodial term of imprisonment. In considering what weight to put on reconciliation in a case of domestic violence the courts must remember that true reconciliation can only take place when both parties are in an equal relationship. Where one party lives in fear of violence and intimidation, and is dependent on the other for financial survival, very little weight can be put on a declaration of reconciliation and forgiveness. Reconciliation cannot occur in a relationship built on fear and intimidation. As Winter J said in Rajesh Prasad (*supra*) at page 4:

"Frequently the Court gets to form a view that the reconciliation is more to do with issues of power and dominance from the domestic relationship where the victim have become so dependent on her abuser and so powerless that she has learned only helplessness and cannot make wise life choices because of that debilitation."

It is for that reason that while the Court may have sympathy for the late plea of reconciliation nonetheless this must be weight against the need for vigilance in the eradication of domestic violence. The public have a right to expect zero tolerance for any violence especially that occurring within the home. The protection of the weak and powerless in society requires a movement from rhetoric to reality."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** NO.  
Citing power imbalance in domestic violence cases, judge gives no credence to reconciliation as a form of mitigation.

**Case:** *State v Chandra* [2005] FJHC 30; HAA0005D.2005S (21 February 2005)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Nazhat Shameem

**Date of Judgment:** Feb. 21, 2005

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "It is not clear why the learned Magistrate exercised his power to stay proceedings in this case. There is nothing in the record to indicate that the proceedings were of a personal or private nature, or that the assault was not aggravated. Indeed charges under section 224 of the Penal Code are not reconcilable. The charge suggests that the alleged assault was perpetrated by a telephone wire. If the resulting injuries were serious, this would not be a suitable case for reconciliation, even if the parties were related and even if the charge had been one of common assault. In any event, we do not know if the parties were related."

"If this was a case of domestic violence then more care should have been exercised to ensure that justice was done. Even in the most serious of cases, women who are the victims of domestic violence are under considerable pressure to reconcile with the accused. It is the court's duty to ensure that such pressure does not result in an injustice because of the weak bargaining power that women have in society and in the family. In such cases, the facts must be read, medical certificates tendered, and the complainant questioned about the outcome she really desires from the court system. If she has received permanent or serious injury, the matter should proceed to trial without use of the section 163 reconciliation procedure."

**Judgment:** Appeal allowed. Case remanded.

**Sentence Reduction:** N/A

**Was reconciliation used as a justification to reduce the sentence in this case?:** N/A

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** NO

**Case:** *Seruitata v The State* [2004] FJHC 20; HAA0062J.2003 (24 August 2004)

**Court:** High Court, Appellate Jurisdiction

**Judge:** F. Jitoko

**Date of Judgment:** August 24, 2004

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The mitigating factors would have reduced the sentence by at the most 12 months."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** YES. Mitigating factors, including reconciliation, would have reduced sentence by at most 12 months, however, aggravating factors precluded such reductions in this case.

**Case:** *Prasad v State* [2004] FJHC 130; HAA0058.2004 (4 August 2004)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Gerard Winter

**Date of Judgment:** Aug. 4, 2004

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "Frequently by the time of sentence and often at sentence appeal victims and offenders have made up their differences and simply want to move on in life. Perhaps this is created out of a sense of duty born out of years of companionship. Often these pleas are made because families struggle financially in the absence of the prime breadwinner. Frequently the Court gets to form a view that the reconciliation is more to do with issues of power and dominance from the domestic relationship where

the victim has become so dependent on her abuser and so powerless that she has learned only helplessness and cannot make wise life choices because of that debilitation."

"It is for that reason that while the Court may have sympathy for the late plea of reconciliation nonetheless this must be weighed against the need for vigilance in the eradication of domestic violence. The public have a right to expect zero tolerance for any violence especially that occurring within the home. The protection of the weak and powerless in society requires a movement from rhetoric to reality."

"The reality for this appellant is that he deserved an immediate custodial sentence of some length to properly punish his actions, deter him and demonstrate to potential offenders like him that anger converted into violent action particularly against the powerless will not be tolerated. The rhetoric of reconciliation has to survive the reality of the rule of law to properly influence sentence. It has not done so here."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?**: NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** NO

**\*\*Case:** *Khan v State* [2002] FJHC 239; HAM0049D.2002S (10 December 2002)

**Court:** High Court, Miscellaneous Jurisdiction

**Judge:** Nazhat Shameem

**Date of Judgment:** Dec. 10, 2002

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "I cannot accept counsel's submission that domestic violence is in a different, less serious category, to other types of assault, or that reconciliation between husband and wife would invariably lead to a non-custodial sentence. To accept these submissions, would be to accept that men are given some inherent right to beat their wives, and that all will be forgiven and forgotten if the victim has reconciled with her abuser. There is no legal basis for such a proposition."

"A husband who beats his wife must accept the same punishment that he would get if he assaulted any member of society. Further, whilst reconciliation is always relevant for the purpose of sentencing, judges and magistrates must always be aware of the considerable financial, social and emotional pressure on a

woman to reconcile with her husband despite the violence. In these circumstances, it is the court's duty to deliver a sentence which fits the crime and the offender, after taking into account not only the reconciliation but also the way in which reconciliation has been achieved, as a matter of social reality. Whilst such reality is a factor to be considered and weighed, it does not remove the responsibility of the court to punish for what is often a very serious act of violence towards the powerless and vulnerable."

"It is for this reason, that the power to promote reconciliation is a discretionary matter under section 163 of the Criminal Procedure Code. The discretion must be exercised having considered the circumstances of the case, and in particular, the seriousness of the assault. If the proceedings have not been stayed or terminated, reconciliation (and the nature of it) is a matter which may be taken into account for the purpose of sentence."

**Judgment:** Remand Grant of bail.

**Sentence Reduction:** N/A

**Was reconciliation used as a justification to reduce the sentence in this case?:** N/A

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *Kunadei v The State* [2002] FJHC 187; HAA0080J.2002S (3 December 2002)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Nazhat Shameem

**Date of Judgment:** December 3, 2002

**Type of Case:** Sexual Assault (statutory rape case)

**Key Opinion Excerpts:** "This was a case of a young man having a relationship with his girlfriend. However the victim was only 14 years old, and became pregnant as a result of the offence. Clearly, her education (and her childhood) is at an end. I therefore would choose a starting point of 18 months imprisonment. I would give 6 months discount for the guilty plea, and a further 6 months for the reconciliation, remorse and good character. I therefore arrive at a sentence of 6 months imprisonment."

**Judgment:** Appeal allowed and original sentence quashed and substituted.

**Sentence Reduction:** 30 months. 6 months reduction for reconciliation, remorse, and good character.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases? YES**

**Case:** *Sharma v The State* [2001] FJHC 106; Haa0100.2001 (30 July 2001)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Jayant Prakash

**Date of Judgment:** July 30, 2001

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "As such given the private nature of the assault which was not aggravated in degree Section 163 of the Criminal Procedure Code could have been used to promote reconciliation."

"While the Court is sensitive to the increasing levels of domestic violence cases in Fiji it cannot ignore the individualized factors relevant to sentencing. A critical balancing act is required given the circumstances of each offending. In certain situations the promotion of reconciliation may be appropriate."

"In this case the ends of justice would have been met if a conditional discharge was considered in view of the private nature of the offence. This would also fulfil the Courts obligations to promote reconciliation."

**Judgment:** Appeal allowed. Set aside sentence imposed by Magistrate.

**Sentence Reduction:** 2 year sentence, suspended in full. Big reason was to promote reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *Kadavu v State* [2001] FJHC 292; [2001] 1 FLR 180 (4 May 2001)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Marie Chan

**Date of Judgment:** May 4, 2001

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The Court is aware that neither Count 1 nor 2 are reconcilable offences. Any reconciliation can only go to mitigation."

"The Court has considered all relevant factors discussed above. It is also mindful of the facts of this case, in particular the age of the Appellant and victim and the aggravating factors. It is also sensitive to the mitigation and reconciliation, and very conscious of the disparities. The Court finds the sentence of 4 years for Count 2 out of line with authorities considered. A shorter sentence of 2 ½ years would be as just and effective given the background and circumstances of the Appellant."

**Judgment:** Appeal allowed.

**Sentence Reduction:** 18 months, partially suspended.

**Was reconciliation used as a justification to reduce the sentence in this case?:** YES

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** YES. Judge states that she is sensitive to mitigation and reconciliation.

**Case:** *Biu v The State* [2000] FJHC 120; Haa0085j.2000s (14 November 2000)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Nazhat Shameem

**Date of Judgment:** Nov. 14, 2000

Type of Case: Sexual Assault

**Key Opinion Excerpts:** "Mitigating factors would be a plea of guilty, any expression of remorse, any attempt to make reparation for the harm done, and the accused's (sic) antecedent history."

"Clearly the mitigating circumstances are less than impressive. The Appellant pleaded guilty. This saved the complainant from the additional trauma of giving evidence. He has also expressed remorse, and has reconciled with his sister. Unhappily such reconciliation cannot help the complainant in her recovery after the attempted rape."

**Judgment:** Partially quash count 1, converted from Rape to Attempted Rape, however, no change in sentencing.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** Questionable.

**Case:** *Navunigasau v State* [1997] FJCA 52; AAU0012.1996S (14 November 1997)

**Court:** Court of Appeal, Criminal Jurisdiction

**Judge(s):** Sir Ian Barker, Mr. Justice I.R. Thompson, Mr. Justice Savage

**Date of Judgment:** Nov. 14, 1997

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The final defence witness, the appellant's sister, gave evidence that the appellant came to their brother's house and asked for reconciliation in the traditional Fijian way for "tearing down" the door of the house and "for things he had done [to the complainant]". After the reconciliation ceremony the complainant told her uncle "Whatever you think is right I will follow"."

"If there are mitigating circumstances, the sentence may be for a shorter period; if there are aggravating circumstances, it should be longer. In this instance there are no mitigating circumstances but there are seriously aggravating circumstances, namely that the victim was the appellant's child residing in his home and that the offence was committed in the home during the absence of the appellant's wife. In our view, nine years' imprisonment is an entirely appropriate sentence."

**Judgment:** Appeal allowed in part. Affirm count 1 and substitute count 2,3, and 4 of rape with incest. And count 5 is quashed.

**Sentence Reduction:** Overall sentence remained unaffected.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** NO. Court specifically found no mitigating circumstances even with clear evidence of *bulubulu* being performed.

**Case:** *Singh v The State* [1997] FJHC 119; Haa0035j.97b (28 August 1997)/

*Singh v The State* [1997] FJHC 227; Haa0035.97b (28 August 1997)

**Court:** High Court, Appellate Jurisdiction

**Judge:** D. Pathik

**Date of Judgment/ Sentence:**

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "Husbands who assault their wives should not expect leniency from the Courts subject of course to certain mitigating factors. In this case, evidently because the wife was not present the fact of reconciliation was not given due consideration by the learned Magistrate. It is a reconcilable offence. On the aspect of reconciliation the following remarks of TIMOCI TUIVAGA C.J in DIVENDRA BIJAY (supra at p.6) are worth noting:

"The learned Magistrate took what appeared clearly to be an unorthodox approach to the sentencing process by virtually ignoring established principles of sentencing. Gender sensitivity is apt in a suitable case and context but it should not be allowed to unduly divert judicial officers from properly discharging their judicial function. That function requires them to judge every case according to its own particular circumstances. Or put another way each case must be assessed and evaluated on its true merits. One should not generalise and pluck pontifical sentiments from untested and unreferenced sources for sentencing purposes. This is important to safeguard against the making of artificial and unreal adjudication."

"In all the circumstances of this case bearing in mind the fact of reconciliation (which was not considered by the learned Magistrate) I do not consider that he should serve the sentence any longer."

**Judgment:** Appeal allowed.

**Sentence Reduction:** Sentence suspended in full. Reconciliation was a factor in court's decision.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *Chand v The State* [1997] FJHC 121; [1997] 43 FLR 217 (28 August 1997)/ *Chand v The State* [1997] FJHC 122; Haa0039j.97b (28 August 1997)

**Court:** High Court, Appellate Jurisdiction

**Judge:** D. Pathik

**Date of Judgment/ Sentence:** Aug. 28, 1997

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "To conclude, I have digressed a little by not sticking strictly to legal principles but I feel that for you as an Indian some of these Indian customs and traditions should be followed and the society's norms and expectations cannot be ignored if there is to be peace and happiness in one's married life. What I have said above should have far-reaching influence on those who fall foul of the good and accepted practices in one's matrimonial life."

"The following words of Chief Justice in Mosese Gaunavou and State (Crim. App. No. HAA0011J.96B) are pertinent and I would apply them here:

"It is always a concern for the court to try and help any family experiencing domestic difficulties to resolve its problems as much as possible. It is for that reason that this court believes that it would be in the best interest of this family if the appellant, the man of the house in this case, is not kept away from his family for too long."

"In the outcome, bearing in mind the fact of reconciliation and the wife's plea, I consider that the appellant has already served sufficient time in prison. He has paid for the folly of his ways and has as a consequence inflicted long enough punishment on his two infant children."

**Judgment:** Appeal allowed. Set aside 18 month sentence and substituted with 9 month sentence.

**Sentence Reduction:** 9 months, suspended in full.

**Was reconciliation used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

\*\***Case:** Bijay v The State [1997] FJHC 87; [1997] 43 FLR 144 (16 July 1997)/ Bijay v The State [1997] FJHC 218; Haa0030j.97b (16 July 1997)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Chief Justice T. Tuivaga

**Date of Judgment/ Sentence:** July 16, 1997

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In a 4 page Ruling on the application the learned Magistrate expressed his views on the affidavits in these terms:

"I am in complete agreement with the contents of paragraphs 9 and 10 of Davendra Bijay's affidavit that the Courts, which includes this Court, have always promoted reconciliation in domestic matters and that upon reconciliation, proceedings have been terminated and the accused ordered to pay costs."

"But after expressing those free sentiments the learned Magistrate refused the application for bail and set out fervently his reasons for refusing bail as follows:

"However, strong voices have been raised recently in some forums that the public is most dissatisfied with the meagre sentences which are being imposed on offenders guilty of domestic violence and that the magistrates pay scant regard to gender sensitivity in such cases. It is being advocated that custom, tradition or culture should not be used as an excuse or reason for promoting reconciliation in matters of domestic violence and that a husband's assault on his wife should be treated no different from a man assaulting any other woman in the street or outside a night club. In other words if reconciliation is not proper in the latter case then it is equally improper in the former."

"The offence is within the category of cases in which the courts are encouraged to promote reconciliation between the affected parties."

**Judgment:** Appeal allowed.

**Sentence Reduction:** 4 months imprisonment suspended; set aside because of reconciliation.

**Was reconciliation used as a justification to reduce the sentence in this case?**: YES

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *Bijay v State* [1997] FJMC 2; Criminal Case No 0482 of 1997 (6 June 1997)

**Court:** Magistrate's Court, Criminal Jurisdiction

**Judge:** Anirudh Kuvar

**Date of Judgment:** July 6, 1997

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "In the present case, in spite of the fact that this court was fully conscious of the retrograde steps it was taking, in the light of the standard set out above, it had no choice but to impose a custodial sentence of 4 months imprisonment because if anyone had subject a woman to that kind of assault out in the street or outside a night club which resulted in injuries such as those received by Uttra Kumari, a 4 month sentence would be somewhat off the lighter side."

"This test was advocated by brains better than mine and I applied that the test and sentenced the applicant to 4 months imprisonment. I feel it will not be proper for me to depart from it although I am clearly of the view that in a husband and wife situation greater emphasis must be put on the promotion of reconciliation particularly where there are young children, than in cases involving two or more strangers. I am firmly of the view that custodial sentence, if it threatens a breakdown of the marriage, or if there is a likelihood that such a move may adversely affect the welfare of the family, should be avoided."

**Judgment:** 4 months imprisonment.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?**: NO. Judge was struggling with movement toward enforcing stricter custodial sentences on perpetrators of domestic violence, however, he himself was partial to reconciliation as an appropriate means to address the subject matter.

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?** YES

**Case:** *Guanavinaka v State [1995] FJCA 12; AAU0014u.94s (26 May 1995)*

**Court:** High Court, Appellate Jurisdiction

**Judge:** D.V. Fatiaki

**Date of Judgment:** May 26, 1995

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "As for the so-called 'reconciliation' [ground (3)] that the appellant claims has been accepted by his wife, it is noteworthy that on the trial date 30th June 1998 (barely 5 days after the assault and 2 days after her discharge from hospital), the appellant when asked by the trial magistrate: 'Have you reconciled?' replied: 'No. She is angry and won't.' As well she might be."

"At this juncture it ought to be noted that if a court is minded to accept reconciliation as a mitigating factor then it is duty bound before acting upon such a plea to personally verify its authenticity and acceptance by the complainant and to record the same in the court record. Unilateral declarations from an accused person is wholly unsatisfactory and ought to be disregarded."

"I am hopeful that the appellant has learnt a valuable lesson from his period of incarceration and am willing to extend to him some leniency so as to enable him to rejoin his family should they be willing to accept him back."

**Judgment:** Appeal allowed.

**Sentence Reduction:** 16 months. The calculations made by the court are incorrect. Appellant was given a 24 month prison sentence, which he had only served 8 months of, when his case came before the High Court. The High Court ordered immediate conditional release, which suspended the remaining 16 months of the Appellant's sentence.

**Was reconciliation used as a justification to reduce the sentence in this case?: NO.**

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases? YES**

**Case:** *State v Naitokarua* [1994] FJHC 87; HAM0006t.1994s (29 July 1994)

**Court:** High Court, Criminal Jurisdiction (no appellate jurisdiction)

**Judge:** S.W. Kepa

**Date of Sentencing:** July 29, 1994

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "There appears to have been reconciliation between the victim's family and those of the two accused persons through Fijian customs and tradition but that has no legal force except that the court could recognise it as a mitigating factor and nothing more. Having said that I cannot, however, ignore

the importance of reconciliation in any case within any community as it serves as a vehicle for defusing tension, ill feelings and want of retaliation."

"In arriving at the sentence which I consider to be appropriate in this case I've taken into account all the mitigating factors available to the accused I am also guided by the learned authors of The Principles of Sentencing, Second Edition by D.A. Thomas at page 113:

*"The fact that the victim has forgiven the offender is not necessarily relevant." Pritchard (1973) 57 Cr. App. R 492 (the complainant's subsequent attitude..... to the sentence is a completely irrelevant consideration)."*

**Sentence Received:** Accused 1: 7 years; Accused 2: 6 years

**Was reconciliation used as a justification to reduce the sentence in this case?: YES.** Judge states he used all mitigating factors available to the accused.

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?: YES**

**Case:** *Kevetibau v The State* [1992] FJHC 84; [1992] 38 FLR 110 (22 June 1992)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Jesuratnam J.

**Date of Judgment:** June 22, 1992

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "In this case the accused was charged in the Magistrate's Court of Nausori with having broken into the house of Salote Naimawi with intent to commit a felony namely rape"

"This case brings to the fore the question of the extent to which the wishes of the complainant and the reconciliation of parties should be countenanced by a court in a criminal case. In this case the complainant Salote Naimawi was present in Court and moved to withdraw the case as she stated that she and the accused had reconciled with each other and that they were related to each other. But the learned Magistrate had refused that application with the remark that this was not a reconcilable offence."

"It seems to me that in the circumstances of this case the learned Magistrate should have taken the wishes of the complainant into consideration in sentencing. If indeed it was considered necessary that the appellant should undergo an immediate custodial sentence it should have been for a short period. It is my view that the nature and circumstances of the offence should be taken into consideration at the stage of sentencing

when parties have reconciled".

**Judgment:** Appeal allowed.

**Sentence Reduction:** 9 months, partially suspended. Judge believed Magistrate should have taken into consideration that the parties have reconciled.

**Was reconciliation used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?: YES**

**Case:** *Saga v The State* [1990] FJHC 89; [1990] 36 FLR 42 (20 April 1990)

**Court:** High Court, Appellate Jurisdiction

**Judge:** D.V. Fatiaki

**Date of Judgment:** April 20, 1990

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The second letter in Fijian however has been translated for the court and details how the appellant's parents have reconciled with the complainant and her grandparents according to Fijian customary practices and tradition. This is a relevant factor for the consideration of the court in assessing sentence. Its significance and weight however will vary from case to case and this court does not seek to fix any limitations."

"However, it will be obvious that traditional reconciliation has a greater social impact in a village context than say an urban one. Personal participation and confirmation by the victim may also be significant considerations."

"But it must be remembered that a crime is much more than a personal private matter between victim and offender. It is a public wrong which must be punished in the public interest notwithstanding that the parties may be reconciled. That is not to say that the courts or the criminal law seek to intervene in the private lives of the citizens of this country but rather the courts have a duty to safeguard against exploitation and corruption of others, particularly those who are specially vulnerable."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in domestic violence cases?:** YES.

**Case:** *Josefa v The State* [1990] FJHC 33; HAA0002j.1990b (16 March 1990)

**Court:** High Court, Appellate Jurisdiction

**Judge:** D.V. Fatiaki

**Date of Judgment:** Mar. 16, 1990

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "The appellant raised several grounds in his petition of appeal including his plea of guilty and a traditional Fijian **reconciliation** that had taken place between members of his family and the victim."

"The victim whom the appellant claims to have been a "long time lover" of his turned out to be a 50 year old mother of 4 children. The **rape** of such a woman in the confines of her own home is an offence that must attract an immediate custodial sentence."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** Questionable. Nothing in the decision hints at the judge's view.

**Case:** *State v Mocerakaca* [1990] FJHC 87; [1990] 36 FLR 19 (14 February 1990)

**Court:** High Court, Revisional Jurisdiction

**Judge:** D. V. Fatiaki

**Date of "Reasons for Decision":** Feb. 14, 1990

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "I am satisfied that such traditional **reconciliation** is a relevant and appropriate factor to be taken into account in sentencing."

"The Honourable Chief Justice whilst recognising a lacuna in our laws as long ago as 1982 sanctioned this factor when he said:

"..., the main factor which has given rise to this Court exercising its revisional powers in this case is that the sentencing court did not with respect give sufficient credit to the customary sanctions which from time immemorial have always been available within a village community for regulating the social behaviour and conduct of its people...Though these have no legal force *as such they* are nevertheless entitled, in a suitable case, to recognition by the courts in such a manner so as to uphold their sanctity and moral force within the Fijian society. As observed above all the respondents had been dealt with appropriately in the Fijian customary way and whatever potential strife that might, have resulted between the two villages because of the incident had also been taken care of appropriately in the Fijian customary way. One could not wish for a more civilised way of sorting out a potentially explosive situation."

"Additionally, the victim herself has affirmed this reconciliation to the Court and says that she has forgiven the defendant. In the face of such magnanimity should the Court nevertheless insist on retributive punishment? I think not. Indeed it is difficult to imagine how in the particular circumstances of this case the "public interest" could be served or advanced by the destruction a long prison sentence would almost certainly have, of this young man's future prospects.

**Judgment:** Appeal allowed. Charge thrown out.

**Sentence Reduction:** 5 years, suspended in full.

**Was *reconciliation* used as a justification to reduce the sentence in this case?: YES**

**Does the judge believe *reconciliation* can be used for mitigation in sexual assault cases?: YES**

**Case:** *Senikudra v The State* [1988] FJHC 5; [1988] 34 FLR 114 (18 November 1988)

**Court:** High Court, Appellate Jurisdiction

**Judge:** Palmer, J.

**Date of Judgment:** Nov. 18, 1988

**Type of Case:** Sexual Assault

**Key Opinion Excerpts:** "It is noted that the accused had traditionally reconciled with the parents of the victim. I am of the view that the parents' reconciliation should not be used by the accused to his own advantage. The victim is 19 years of age. Yet, the accused has four (4) children and is a very mature person who it would appear was under the influence of Indian hemp at the time of committing this offence. The offence is a very serious one and presentation of the Tabua wouldn't lessen the brutal experience that the victim had gone through. In my view all it did was to lessen the period of custodial sentence of the accused which is warranted in cases as these. People shouldn't take advantage of the Fijian customs merely because it is to their own advantage as attempted by the accused in this instance. In view of plea of guilty and mitigation, you are sentenced to three years 6 months imprisonment for this offence."

"I note that notwithstanding the deprecating remarks made about it by the learned Magistrate he clearly gave weight to the reconciliation in reducing what would otherwise have been the sentence. I do not believe that a further reduction is warranted. It has been said many times that Rape must attract severe sentences. The forcible invasion of a woman's body and the violation of her integrity as well as the aspect of frequent long lasting psychological damage require this. These factors place the crime of Rape in a different class from other crimes."

**Judgment:** Appeal dismissed.

**Sentence Reduction:** None.

**Was reconciliation used as a justification to reduce the sentence in this case?:** NO, but at the lower court level it was applied.

**Does the judge believe reconciliation can be used for mitigation in sexual assault cases?:** NO

\***Case:** *Koro v Reginam* [1977] FJSC 161; Criminal Appeal 112 of 1977 (18 November 1977)

**Court:** Supreme Court, Appellate Jurisdiction

**Judge:** (Sgd.) J.T. Williams

**Date of Judgment:** Nov. 18, 1977

**Type of Case:** Domestic Violence

**Key Opinion Excerpts:** "The appeal was filed along with an affidavit sworn by the appellant's de facto wife explaining that she has had seven children to the appellant between 1961 and 1975; that he has expressed remorse in Fijian style and has been a good husband; that the entire family depend upon him for maintenance, education, fees and so forth. A reduction of sentence is urged on those grounds."

"At p. 94 of Principles of Sentencing, the learned author, D.A. Thomas, refers to "domestic woundings". He says that the Court normally regards a deterrent sentence necessary in this kind of case even where the wife has been reconciled and wishes to have the husband back."

"Paradoxically, it is not uncommon for such an incident to lead to an improvement in their relationship and the wife will often write to the Court asking for leniency. Generally the Court takes the view that despite these factors, and the probability that the marriage will be re-established on a sounder basis, a substantial sentence is necessary as a general deterrent against violence."

"In fact, it seems to be thought that if the wife and family absolutely depend on the aggressor husband his chances of avoiding punishment are greatly enhanced."

"It would be wrong for the Courts to permit such notions to be canvassed. Aggressive husbands may be tempted to regard themselves as privileged from punishment for assaults upon their wives by reason of the latters' dependency on their husbands. Who will suffer most from the imprisonment? The husband would like to impress upon the Court that it will be the husband's family. Such an approach on the part of the Courts could be tantamount to giving licence to bullying husbands."

"The responsibility for his conduct must rest upon the husband. If by reason of his crimes his family may be reduced to poverty the blame cannot be laid at the door of the Court which imprisons him."

**Judgment:** Appeal dismissed

**Sentence Reduction:** None. Refused to reduce sentence based on reconciliation.

**Was *reconciliation* used as a justification to reduce the sentence in this case?: NO**

**Does the judge believe *reconciliation* can be used for mitigation in domestic violence cases? NO**