

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**Criminal Appeal No. 55 of 2018**  
**(on appeal from Ba CC246 of 2009)**

**JOHN WILLIAM MICHEL**

**v**

**STATE**

Miss V. Diroiroi (L.A.C.) for the appellant

Miss L. Latu for the State

**Date of Hearing** : 28<sup>th</sup> November 2018

**Date of Judgment** : 6<sup>th</sup> December 2018

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**JUDGMENT**

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- 1.] The Appellant was convicted at the Magistrates' Court at Ba of 5 charges of indecent assault and 2 charges of attempted rape. He was sentenced to a term of imprisonment of 6 years, 7 months and 17 days.
- 2.] He now appeals both conviction and sentence.

3.] His grounds against conviction are:

- “The Magistrate erred in law and fact in not taking into account the fact that the appellant was out of the country at the time that the first and third charges of indecent assault occurred. He had an alibi witness.”
- “The learned Magistrate misdirected himself in para 35 of his judgment in offering a personal opinion on the appellant’s marriage status and therefore failed to canvas the entirety of the defense case in an objective, fair and balanced manner for all counts thus causing a miscarriage of justice.”

4.] His grounds against sentence are:

- “The learned trial Magistrate erred in law and in fact in imposing a sentence of 4 years for counts 6 and 7 which is a harsh and excessive in circumstances of the case.
- “The learned Magistrate erred in law and in fact when he failed to consider section 22(2) of the Sentencing and Penalties Act which therefore lead the learned Magistrate to impose a consecutive sentence for Counts 5 and 6.

**5.] Facts**

The prosecution called two young girls and a young lady to give evidence of their own sexual abuse at the hands of the accused. This court will not give real names to the girls in order to protect both their identity and their dignity.

6.] Girl “A” was in Class 8 in 1997. She would go at times to stay with her Aunt in Rakiraki. Her aunt’s husband is the accused. She told of indecent assaults on her in 1997 and 1999 and in

September 2008, he woke her during the night trying to sexually force himself on to her.

- 7.] Girl "B" said that in 1997, when she was in class 4, she was living with her family in Ba. Her uncle, the accused, came to stay. While sleeping, she was awoken with the sensation that somebody was touching her breasts, then later she was woken fully when the accused was licking her vagina. She was shocked when she saw who was doing that and she never told anybody until 2009. Again, in 1999, she and her family went to Rakiraki to stay and he indecently assaulted her when they were the only two in the house; everybody else having gone out. When she eventually told her mother, the matter was reported to the Police. She came to learn that he had done the same things to her young cousins.
- 8.] Lady "C" said that in March 2002 she was living with the accused and his family in Rakiraki. Her mother is related to the accused's wife. She would do baby sitting duties. She was 24 when he asked her to iron his uniform which she did, leaving it on the bed. He called her into the room and he was wearing only a bath towel. He pushed her onto the bed, removed the towel and tried to rape her. He covered her mouth with a pillow.
- 9.] In 2008, "C" was staying in Ba when the accused and his wife were also visiting. She slept alone in a bunk room. She woke up to find the accused fondling her breasts and he later forced her to touch his penis.
- 10.] In a lengthy comprehensive judgment, the learned Magistrate gave reasons for finding the prosecution case proved and for convicting the accused on all charges.

**11.] Sentence below**

For each of the 5 indecent assaults, the Magistrate sentenced the accused to 2 years imprisonment and for the two rapes a sentence of 4 years for each.

- 12.] He made each attempted rape consecutive to the other meaning a total term of 8 years. The indecent assault sentence were made to be concurrent with each other and concurrent to the attempted rape sentences, arriving at a total sentence of 8 years imprisonment, with a minimum of 5 years before entitlement to parole.

**13.] The Appeal Against Conviction**

The accused relies on an alibi for the time said to be the relevant time of the first and third charges. (That is September 1997 and July 1997 respectively) .

He claims to have been on active service in The Sinai at the time. He says that he left the country in September 1996 and did not return until October 1997.

- 14.] In addressing this particular issue, The learned magistrate said:

*“(para.25) According to him, the alleged offences for Counts 1 and 3 couldn’t have taken place because he was serving on peacekeeping duties at Sinai in the middle east at that time. The statement of the immigration Officer and the travel history of the accused tendered by consent, clearly shows that accused had not left the country during the said period.”*

15.] The Magistrate then went on to discredit the accused's alibi witnesses who he said were unreliable and not corroborating the alibi of the accused; and on this matter he concluded:

*"I find the evidence of the Immigration officer and the travel history of the accused tendered by the Prosecution as reliable and believable."*

16.] In any event, time is not of the essence in the Particulars of Offence.

17.] This ground has no merit and is dismissed.

18.] The second ground of appeal against conviction prays that the Magistrate made unnecessary comment on the accused's private life which was prejudicial and irrelevant.

The impugned passage reads:

*"para 36 – If anything , for the accused to be raising issues about his infidelity and unfaithfulness to his wife, that goes to show how dishonest a person he is. A person that cannot be trusted or believed."*

19.] Counsel for the appellant submits that this shows a judicial officer who has based his finding of guilt on the accused's extra marital affairs without regard to the facts and the evidence.

20.] While this utterance of the Magistrate may have been unfortunate, it must be seen in context. The accused himself raised the issue of infidelity when giving evidence of what he said were consenting sexual connections between him and Girl "A" and Lady "C".

21.] After analyzing the demeanour of the two ladies in Court, he said that he found them to be entirely credible and truthful and he accepted that there was no truth to the claim of consensual sex.

22.] The Magistrate devoted a large part of this long and detailed judgment to analyzing all the evidence in the trial and it is on the basis of this careful measured analysis that he finds the accused guilty beyond reasonable doubt. There is no room for any suggestion that he was biased because of the accused's professed life-style.

23.] There is no merit to this ground and it is dismissed.

24.] The appeal against conviction is dismissed.

**25.] The Appeal against Sentence**

The maximum penalty for attempted rape is 8 years imprisonment and the tariff has been held in **Joji Aumina** HAA033 of 2001 (Shameem J.) to be from 2 months to two years.

26.] In the light of the recent decision of the Supreme Court in **Gordon Aitchison** CAV 002.2018 (2 November '18) the tariff for an attempted rape of a child must be extended beyond Shameem J.'s general tariff. The attempted rape of a child should attract a sentence of between 3 to 8 years depending on the circumstances and the use of force or surprise.

27.] The learned Magistrate has committed no error of law in his sentence, nor has he acted on wrong principles nor mistaken the facts. The sentence is a little higher than usual but the crime committed here was heinous. There were attacks on a sleeping girl who was a guest in the houses of the a mutual relative where the accused was also a guest; the second assault was on a young woman who was a guest of the accused again while she was sleeping at night. To sexually abuse guests in a home is a very serious breach of trust and the added unexpected night time attack must have been profoundly traumatic for the victims.

28.] The sentences for attempted rape will not be disturbed. One of the offences was in in 2002 and one in 2008. They are not part and parcel of the same transaction and quite properly were made consecutive for the reasons given by the learned Magistrate.

29.] The appeal against sentence is dismissed.

**30.] Orders**

1. The appeal against conviction is dismissed
2. The appeal against sentence is dismissed.
3. The sentences passed on the appellant below stand uncorrected.



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**Paul K. Madigan**

**Judge**

**High Court Lautoka**