

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 19 of 2016

STATE

V

ISIKELI BAINITABUA

Counsel : Mr. T. Tuenuku for the State.
: Accused in person.

Dates of Hearing : 20, 21, 22, 23, 26, 27 August, 2019
Closing Speeches : 30 August, 2019
Date of Summing Up : 30 August, 2019
Date of Judgment : 02 September, 2019
Sentence Hearing : 18 October, 2019
Date of Sentence : 25 October, 2019

SENTENCE

(The names of the victims are suppressed they will be referred to as "AV", "LM" and "RM" respectively)

1. In a judgment delivered on 2nd September, 2019 this court found the accused guilty and convicted him for two counts of indecent assault, two counts of sexual assault and two counts of rape as per the following information.

COUNT ONE

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 6th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**LM**” by pinching the nipple of the said “**LM**”.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 20th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by touching the vagina of the said “**AV**”.

COUNT THREE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 20th day of December, 2015 at Lautoka in the Western Division, penetrated the vagina of “**AV**” with his finger.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 28th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by licking the vagina of the said “**AV**”.

COUNT FIVE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 28th day of December, 2015 at Lautoka in the Western Division, penetrated the mouth of “**AV**” with his penis.

COUNT SIX

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 7th day of January, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted “**RM**” by poking his finger in between the buttocks of the said “**RM**”.

2. The brief facts were as follows:

On 20th December, 2015 the first victim “**AV**” who was 9 years of age was at the house of her uncle, the accused. After having her shower, she was on her way to get her towel from the room when she saw the accused standing at the doorway. The victim got scared when she saw the accused. At this time he came and touched her vagina.

3. The victim went into the room to wear her clothes after a while the accused called her into the sitting room. In the sitting room the accused showed her some videos in his phone of a man and a woman having sex the accused also told her for them to do what was in the video, this made the victim scared and she refused.

4. After the victim refused, the accused forcefully removed the victim's pants and panty and then poked his index finger inside her vagina she felt pain so the accused sought forgiveness.
5. The accused then licked and sucked the victim's vagina for about 5 minutes. After this, the victim wore her clothes and went to her grandmother and lay beside her. She did not tell her grandmother about what the accused had done to her because her grandmother was sick and sleeping. Since her parents were in Australia, she told her cousin, Litiana about what the accused had done to her. Litiana told the victim to wait till her parents returned.
6. The victim also recalled on 28th December, 2015 she was at the house of the accused, on this day the accused was at home with his son. When the victim was sitting on the settee in the sitting room the accused told the victim to suck and lick his penis, she refused.
7. Thereafter, the accused pushed the victim's head towards his penis, at this time the accused was not wearing his pants the victim refused so he again pushed her head towards his penis. The accused held the victim's jaws forced open her mouth and then put his penis inside her mouth for about 5 minutes.
8. After this, the accused told the victim not to tell anyone and he will give her money. On 29th December the victim left the house of the accused, at home she complained to her cousin Litiana and her sister "LM".
9. The second victim "LM" who was 15 years of age in 2015 informed the court that on 6th December, 2015 she was at home, in the afternoon the accused with his wife and their baby were returning home to Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.

10. The victim went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of the accused touch her breast. When her breast was touched she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin Litiana about what had happened.
11. The third victim "RM" who was 14 years of age in 2016 on 7th January, 2016 he was at the house of the accused babysitting Rupeni the accused's son. The wife of the accused was doing night shift from 5 pm to 12 midnight at around 9 to 10 pm the victim went to the washroom. When he returned he went to watch the TV the accused was sitting on the settee in the sitting room.
12. After a while, the victim lay on the mattress face down and fell asleep he woke up after he felt someone was touching his buttocks. When he turned around he saw the accused laughing at him, he did not like what the accused had done to him.
13. The victim was able to recognize the accused because at that time the light in the sitting room was switched on together with the TV when the accused touched the victim's buttocks he inserted his fingers inside from on top of the victim's shorts. The accused told the victim not to tell anyone and to keep it a secret. The victim told his aunt the wife of the accused and his cousin Litiana the next day at his house at Vunato about what the accused had done to him.
14. The parents of the victims were informed when they returned from Australia and the matter was reported to the police. An investigation was conducted, the accused was arrested and charged.

15. State counsel and the accused filed their sentence submissions, victim impact statement and mitigation submissions for which this court is grateful.
16. The following personal details and mitigation was presented by the accused:
 - a) The accused is a Carpenter by profession;
 - b) He was 34 years of age at the time of the offending;
 - c) Married with 2 children also has the responsibility to maintain his elderly parents;
 - d) Although his wife is employed she is going through financial difficulties in looking their children.
17. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj v The State, CAV 0003 of 2014 (20 August, 2014)* that the personal circumstances of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

18. The aggravating factors are:
 - a) Breach of Trust

The accused is the maternal uncle of the three victims. The accused took advantage of the victims he breached their trust by his actions. The manner in which the accused committed the offences was a gross breach of trust.
 - b) Age Difference

The victims were 9, 14 and 15 years of age respectively at the time of the offending whereas the accused was 34 years of age. The age difference is substantial.

c) Vulnerable Victims

All the victims were alone, vulnerable and unsuspecting their parents were in Australia and the wife of the accused was given the care of the children, instead of protecting them the accused sexually abused them.

d) Exposing children to sexual abuse

The accused had exposed all the victims to sexual abuse in different ways. He basically robbed the victims of their innocence and exposed them to an unexpected sexual experience which they will not be able to forget for many years. The accused exposed the victims to sexual activity at a very young age which is shocking and unforgiveable.

e) Victim Impact Statement

According to the victim impact statement the victims have suffered psychological and emotional harm as follows:

a) First Victim "AV"

- (i) She is afraid to go to the wash room alone;
- (ii) After the incidents her school work was affected;
- (iii) Gets flashbacks of what has happened;
- (iv) Is embarrassed, keeps blaming herself for what has happened;
- (v) Wants to be alone and is lost in her thoughts.

b) Second Victim "LM"

- (i) After the incident she became fearful and gets emotional easily when she thinks about what the accused had done to her;
- (ii) Stays away from men.

c) Third Victim “RM”

- (i) Feels embarrassed most of the time;
- (ii) Fearful at times, school work was affected.

19. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victims. However the contents of the victim impact statement cannot be ignored in light of the evidence given by the victims and the other prosecution witnesses. The harm caused to the victims was a direct result of what the accused had done to them (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).
20. The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in the recent judgment of *Gordon Aitcheson vs. The State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* has confirmed that the new tariff for the rape of a juvenile is now a sentence between 11 years to 20 years imprisonment.
21. There has been an increase in sexual offences involving offenders who are known to the victim and are mature adults. It is shocking, and sickening to note the manner in which the accused had committed the offences on the three victims.
22. Section 17 of the Sentencing and Penalties Act states:

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

23. I am satisfied that the offences for which the accused stands convicted are offences founded on the same facts and is of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the six offences.
24. Rape of a child is one of the most serious forms of sexual violence and offenders should be dealt with severely. Children are entitled to live their lives free from any form of physical or emotional abuse. When family members sexually abuse children, violating the Domestic Violence Act, they should not expect any mercy from this court. The punishment ought to be such that it takes into account the society's outrage and denunciation against such conduct. A long term imprisonment becomes inevitable in such situations.
25. The Supreme Court in *Mohammed Alfaaz v State* [2018] FJSC 17; CAV0009.2018 (30 August 2018) has stated the above in the following words at paragraph 54 that:

"It is useful to refer to the observation expressed by the Fiji Court of Appeal in Matasavui v State; Crim. App. No. AAU 0036 of 2013: 30 September [2016] FJCA 118 wherein court said that "No society can afford to tolerate an innermost feeling among the people that offenders of sexual offenders of sexual crimes committed against mothers, daughters and sisters are not adequately punished by courts and such a society will not in the long run be able to sustain itself as a civilised entity."

26. Madigan J in *State v Mario Tauvoli* HAC 027 of 2011 (18 April, 2011) said:

"Rape of children is a very serious offence indeed and it seems to be very prevalent in Fiji at the time. The legislation has dictated harsh penalties and courts are imposing those penalties in order to reflect society's abhorrence for such crimes. Our nation's children must be protected and they must be allowed to develop to sexual maturity unmolested. Psychologists tell us that the effect of sexual abuse on children in their later development is profound."

27. The Supreme Court in *Felix Ram v State* [2015] FJSC 26; CAV12.2015 (23 October 2015) mentioned a long list of factors that should be considered in punishing the offenders of child rape cases. Those factors would include:

- (a) *whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) *whether there had been a breach of trust;*
- (c) *whether committed alone;*
- (d) *whether alcohol or drugs had been used to condition the victim;*
- (e) *whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*
- (f) *whether the impact on the victim had been severe, traumatic, or continuing;*
- (g) *whether actual violence had been inflicted;*
- (h) *whether injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
- (i) *whether the method of penetration was dangerous or especially abhorrent;*
- (j) *whether there had been a forced entry to a residence where the victim was pre sent;*
- (k) *whether the incident was sustained over a long period such as several hours;*
- (l) *whether the incident had been especially degrading or humiliating;*
- (m) *If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
- (n) *Time spent in custody on remand.*
- (o) *Extent of remorse and an evaluation of its genuineness;*

(p) If other counts or if serving another sentence, totality of appropriate sentence.

28. After assessing the objective seriousness of the offences committed I take 13 years imprisonment (lower range of the scale) as the starting point of the aggregate sentence. I add 6 years for the aggravating factors, bringing an interim total of 19 years imprisonment. The personal circumstances and family background of the accused has little mitigatory value. I also note that the accused has a previous conviction for damaging property dated 20th August, 2013. For the purposes of this sentence I disregard this previous conviction and I consider the accused as a first offender. The sentence is reduced by 1 year for the accused good character and mitigation. The sentence is now 18 years imprisonment.
29. I note from the court file that the accused was remanded for 1 year, 6 months and 5 days, in accordance with section 24 of the Sentencing and Penalties Act the remand period is deducted as a period of imprisonment already served. The final aggregate sentence is 16 years 5 months and 25 days imprisonment.
30. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for two counts of indecent assault, two counts of sexual assault and two counts of rape is 16 years 5 months and 25 days imprisonment.
31. This court is satisfied that the term of 16 years and 5 months and 25 days imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.
32. Mr. Baintabua you have committed serious offences against your two nieces and one nephew who you were supposed to protect and care. The victims were unsuspecting and vulnerable in fact the victims were without

the supervision of their parents who were in Australia at the time you were abusing the victims. The three children were under the care of your wife and you. You cannot be forgiven for what you have done to these victims who were 9, 14 and 15 years of age at the time.

33. As a result of your actions as per the victim impact statements the victims were psychologically and emotionally affected for some time even to the extent that their school work was affected. Rape is not only a physical act, it not only destroys the very soul of the victims, but also brings about a sense of hopelessness and anxiety which cannot be measured or repaired by anyone.
34. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the three victims who were the accused's nieces and nephew compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
35. Under section 18 (1) of the Sentencing and Penalties Act, this court has a discretion to impose a non-parole period. During the sentence hearing the accused was asked to submit on whether a non-parole period should be imposed or not. The accused submitted that no non-parole period be imposed since he is a person of good character since his previous conviction is unrelated to this offending which ought to be disregarded and that he has a family to support.
36. The state counsel submits that this is an exceptional case where it is absolutely necessary that a non-parole period be imposed to act as deterrent for the accused and the other would be offenders. There are three victims all below the age of 18 years, one victim was 9 years at the time of the offending she was raped twice, and sexually assaulted twice while the other two victims were indecently assaulted.

37. In a recent judgment the Supreme Court has offered guidance for the sentencing court whether to impose a non-parole period or not in *Nacani Timo vs. The State, criminal Petition No. CAV 0022 of 2018 (30th August, 2019)* at paragraphs 10 and 11 (per Gates J.):

Paragraph 10

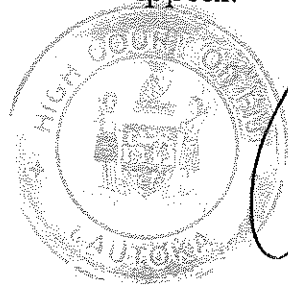
“The two issues for consideration under that sub-section are “the nature of the offence” and “the past history of the offender.” These terms may indicate first a consideration of the gravity of the offence. A less serious form of the offence may lead to a less severe approach and thus a decision by the court not to order a longer term to be served closer to the head sentence. Similarly a person with a previous good character or with minor prior offending may be an appropriate candidate to be allowed the benefits of the one third remission alone without an order for a period of ineligibility for parole.


Paragraph 11

“The courts require submissions on these two issues. They affect the right to freedom and need therefore to be specifically addressed. Judicial officers need to justify the imposition of non-parole periods close to the head sentence, or indeed for the decision not to impose one at all, for section 18(1) speaks in terms of “must fix a period...”

38. This is a case where three children aged 9, 14 and 15 respectively have been sexually abused by the accused who was their uncle. The accused knew the children were alone and vulnerable yet he committed the offences which are very serious. This court agrees with the state counsel that the nature of the offences committed is serious and there is a need for the court to impose a non-parole period which will act as a deterrent to the others and for the protection of the community as well. On the other hand this court cannot ignore the fact that the accused whilst being punished should be accorded every opportunity to undergo rehabilitation considering his good character.

39. Considering the above, I impose 13 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused and also meet the expectations of the community which is just in the circumstances of this case.
40. In summary I pass an aggregate sentence of 16 years and 5 months and 25 days imprisonment with a non-parole period of 13 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victims a permanent non-molestation and non-contact orders are issued to protect the victims under the Domestic Violence Act.
41. 30 days to appeal to the Court of Appeal.




Sunil Sharma
Judge

At Lautoka

25 October, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused in person.