

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 104 of 2017

STATE

V

WISE EZEKIEL LAGILEVU

Counsel : Mr. A. Singh for the State
: Ms. J. Singh for the accused

Date of Submissions : 06 March, 2020

Date of Sentence : 06 March, 2020

SENTENCE

(The name of the victim is suppressed, she will be referred to as "MB")

1. The accused is charged with the following offences as per the information filed by the Director of Public Prosecutions dated 30th August, 2017.

FIRST COUNT

Statement of offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to section 209 of the Crimes Act 2009.

Particulars of Offence

WISE EZEKIEL LAGILEVU between the 3rd and the 4th day of May, 2017 at Lautoka in the Western Division, assaulted **MB**, with intent to commit rape.

SECOND COUNT

Statement of offence

RAPE: Contrary to section 207(1) and (2)(b) of the Crimes Act 2009.

Particulars of Offence

WISE EZEKIEL LAGILEVU between the 3rd and the 4th day of May, 2017 at Lautoka in the Western Division, penetrated the vagina of **MB**, with his tongue, without her consent.

THIRD COUNT

Statement of offence

RAPE: Contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

Particulars of Offence

WISE EZEKIEL LAGILEVU between the 3rd and the 4th day of May, 2017 at Lautoka in the Western Division, penetrated the vagina of **MB**, with his penis, without her consent.

2. On 2nd March, 2020 when the matter was for hearing the accused in the presence of his counsel pleaded guilty to the charges. Thereafter on 4th March, the accused admitted the amended summary of facts read by the state counsel.
3. After considering the amended summary of facts admitted by the accused this court was satisfied that the accused had entered an unequivocal plea of guilty on his own freewill after understanding the nature of the charges and

the consequences of pleading guilty. The amended summary of facts also satisfied all the elements of the offences the accused was charged with hence this court found the accused guilty of all the counts and convicted him accordingly.

4. The brief facts were as follows:

- (a) On 3rd May, 2017 at about 9pm the victim who was 20 years of age accompanied her sister Amelia and her two cousin sisters namely Terekita and Ana to Lautoka City from Simla.
- (b) At the internet shop the victim met the accused who introduced himself as Wise and ex-Marist student from Suva. The accused asked the victim for assistance in packing his belongings since his sister had chased him after he was caught drinking alcohol in her house.
- (c) The accused smelt of liquor, he told the victim and her sisters that his sister was staying at the Governor's house. The victim's sister Amelia did not wish to assist the accused so she left for home. The victim asked her two cousins to assist the accused so all went with the accused, they followed the directions given by him.
- (d) At Simla Park the accused told the victim's cousins to wait there for the victim to return since his sister might get angry after seeing so many people at her house. As a result only the victim went with the accused.
- (e) Whilst walking for some time the victim realized that they had walked a long distance away from the park, she asked the accused if she could call her cousins to come. The accused said no and stated that his sister's house was close by. The victim was, however, able to use

the accused mobile phone to call her cousin Terekita and informed her of her whereabouts.

- (f) Whilst walking the victim felt suspicious when she saw a notice board stating "Property of Government". When she questioned the accused he replied that they will have to wait near the property where his sister will bring the belongings. At this point, the victim wanted to run away from the accused but was unable to do so since the accused grabbed her hand and dragged her towards an isolated spot.
- (g) In the process the victim squeezed the accused's testicles, at this time the accused punched the victim on her head and mouth. The victim cried in pain, the accused threatened her to be quiet otherwise he will call his friends and they will rape her. The victim was frightened and as a result she did not fight back.
- (h) The accused removed the victim's clothes and then removed his clothes and started kissing and licking the victim's vagina by penetrating his tongue into her vagina. The victim did not consent to what the accused was doing to her.
- (i) The accused then forcefully tried to insert his penis into the victim's vagina but could not since she kept on moving and didn't allow the accused to insert his penis into her vagina, at this time the accused started to swear at the victim in the iTaukei language. The victim pleaded for the accused to take a rest to which he agreed.
- (j) Both sat down on the ground, the victim asked the accused to play music on his phone, whilst conversing the victim asked the accused about his Facebook account. The accused gave his phone to the victim, since the accused Facebook account was online the victim was able to view the accused account details. Also the victim was able to

log into her Facebook account and message her sister Lisa that she needed help.

- (k) After a while the victim's brother called the accused mobile phone and requested to speak with the victim, the accused lied saying the victim had gone home whilst gesturing to the victim not to utter a word.
- (l) After this, the accused had forceful sexual intercourse with the victim by penetrating her vagina with his penis for almost 30 minutes. The victim did not consent to have sexual intercourse with the accused. The victim felt blood coming out of her vagina, after wiping herself on the grass she got dressed. The victim reached home at around 1am, as soon as she arrived home she informed her sister Salote about what the accused had done to her. The matter was reported to the police and the victim was medically examined.
- (m) In the medical report the following injuries were noted by the doctor:
 - (i) Laceration on upper lip;
 - (ii) Bruises on scalp;
 - (iii) Bruises on left side of the face;
 - (iv) Vaginal examination: PV bleeding and
 - (v) Hymen not intact.

5. Upon investigation by the police the accused was arrested and charged.
6. Both counsel filed written sentence submissions, victim impact statement and mitigation for which this court is grateful.
7. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:

- (a) The accused was 28 years at the time of the offending;
 - (b) He was in a defacto relationship;
 - (c) From the defacto relationship the accused has three children;
 - (d) The accused defacto partner has left him, his children are from 2 years to 12 years of age;
 - (e) Pleaded guilty;
 - (f) Truly and genuinely remorseful;
 - (g) Seeks forgiveness from this court (letter annexed);
 - (h) Letter of support from Aunt;
 - (i) Was raised by his grandparents.
8. The accused counsel in her written mitigation as well as the letter from the accused aunt states that the accused has had a turbulent and unpleasant childhood aggravated by family problems. At a very young age (3 and 5 years) the accused was sexually abused. All the above has impacted upon the life of the accused. The accused also seeks forgiveness from the victim (letter attached with the mitigation).
9. I accept in accordance with the Supreme Court decision in *Anand Abhay Raj vs the State, CAV 0003 of 2014* that the personal circumstances and family background of an accused person has little mitigatory value in cases of sexual nature.

AGGRAVATING FACTORS

10. Breach of Trust

This is a case of gross breach of trust by the accused. Although the accused and the victim had not known each other prior to the allegations it was the accused who had approached the victim seeking assistance from her in packing his belongings at his sister's house. The victim accepted the

request of the accused, she trusted him by going with him in the middle of the night. The accused breached the trust of the victim by his actions.

11. Victim was alone and vulnerable

The victim was alone, vulnerable and naive, the accused took advantage of this. He misrepresented and/or lied about being chased by his sister from her home to get the sympathy of the victim and at the same time lure her to an isolated spot.

12. Planning and Premeditation

There is a high degree of planning and premeditation involved. The accused had carefully thought out a plan which was to lure the victim to an isolated spot away from her cousins. He lied when he told the victim and her cousins that his sister will not like it if his sister sees lot of people at her house.

Victim Impact Statement

13. In the victim impact statement the victim states that she has been physically, emotionally, socially and psychologically affected. She has started to hate herself for what has happened. The pain and experience has instilled fear which she is unable to overcome to date. The victim does not trust anyone now. From being a carefree individual the victim has become depressed, angry natured and she does not socialize with anyone. The victim hates the accused for what he has done to her.
14. This court accepts that no expert evidence was led in respect of the emotional and/or psychological effect on the victim. However the contents of the victim impact statement cannot be ignored in light of the facts and circumstances of this case. The harm caused to the victim was a direct result of what the accused had done to her. (*see State vs. Afzal Khan, criminal case no. HAC 75 of 2016*).

15. The maximum penalty for the offence of rape is life imprisonment and the accepted tariff for the rape of an adult is a sentence between 7 years to 15 years imprisonment.

16. In *Mohammed Kasim v The State (unreported) Cr. Case No. 14 of 1993; 27 May 1994*, the Court of Appeal had stated:

“We consider that at any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than the starting point.”

17. 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.”

18. I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are 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 three offences.

19. It is the duty of the court to protect women from sexual violations of any kind that is the reason why the law makers have imposed life imprisonment for the offence of rape as the maximum penalty.
20. Bearing in mind the objective seriousness of the offences committed I take 8 years imprisonment (lower end of the tariff) as the starting point of the aggregate sentence. I add 6 years for the aggravating factors, bringing an interim total of 14 years imprisonment. The accused does not come to this court with a clean record he brings with him 12 active previous convictions although none of them are for sexual offences still the accused does not receive any discount for good character. For the mitigation the sentence is reduced by 1 year. The sentence is now 13 years imprisonment.
21. The accused pleaded guilty on the day of the hearing which was not at the earliest opportunity. In *Gordon Aitcheson vs. The State, Criminal Petition No. CAV 0012 of 2018 (2 November, 2018)* the Supreme Court has offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In ***Mataunitoga -v- The State*** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15] The principle in ***Rainima*** must be considered with more flexibility as ***Mataunitoga*** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.


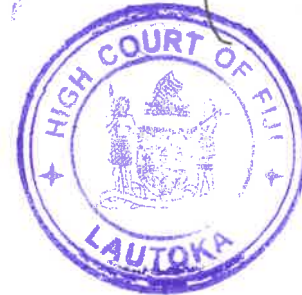
23. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (*see Manoj Khera v The State, CAV 0003 of 2016 (1 April, 2016)*).
24. This court does not agree that the accused has shown any genuine remorse when he pleaded guilty on the day of the hearing. The date of allegations is May, 2017 the accused did not plead guilty until the date of the hearing on 2th March, 2020 nearly 3 years later.
25. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se*. A guilty plea is part of that process but the sentencing court then has the responsibility to assess the guilty plea along with other pertinent factors such as the

timing of the plea, the strength of the prosecution case etc. before arriving at a conclusion.

26. Since the allegation is of sexual nature, the accused by pleading guilty has not only saved the court's time but also prevented the victim from reliving her experience in court. In this regard the accused ought to receive at least some reduction in his sentence. The sentence is reduced by further 6 months, the interim sentence is now 12 years and 6 months imprisonment.
22. I note the accused has been in remand for one year. In accordance with section 24 of the Sentencing and Penalties Act I deduct the remand period as a period of imprisonment already served.
23. Under the aggregate sentencing regime of section 17 of the Sentencing and Penalties Act the final sentence of imprisonment for one count of assault with intent to commit rape and two counts of rape is 11 years and 6 months imprisonment.
24. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim 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.
25. Under section 18 (1) of the Sentencing and Penalties Act, I impose 9 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.

26. Mr. Lagilevu you have committed serious offences against the victim who wanted to help you and had trusted you to the extent that she left her two cousins to sit and wait for her to return upon your false representation in the middle of the night. The victim accompanied you to pick your belongings from your sister's house which obviously did not exist.
27. You misrepresented and/or lied to the victim that your sister's house was nearby and you continued to walk her to an isolated spot. I am sure it will be very difficult for the victim to forget what you had done to her. Your actions towards the victim were cowardly when you assaulted her in order to make her submit to you.
28. This court will be failing in its duty if a long term deterrent custodial sentence is not imposed. The victim was alone, naive and vulnerable and you took advantage of this. According to the victim impact statement the victim is emotionally and psychologically affected and she is unable to lead a normal live now, the experience she has endured is still is very much alive in her mind.
29. I am satisfied that the term of 11 years and 6 months 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.
30. In summary I pass an aggregate sentence of 11 years and 6 months imprisonment for one count of assault with intent to commit rape and two offences of rape that the accused has been found guilty and convicted of with a non-parole period of 9 years to be served before he is eligible for parole.

31. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka

06 March, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.