

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 123 of 2016
[In the High Court at Suva Case No. HAC 142 of 2018]

BETWEEN : THE STATE

Appellant

AND : MAIKELI FREYER NAWAITABU

Respondent

Coram : Prematilaka, JA

Counsel : Ms. S. Tivao for the Appellant
: Mr. M. Fesaitu for the Respondent

Date of Hearing : 12 May 2020

Date of Ruling : 15 May 2020

RULING

[1] The respondent had been indicted in the High Court of Suva on three counts of rape, one count of attempted rape and 04 counts of sexual assault under the Crimes Decree, 2009 between the 01 January, 2015 and 31 December, 2015 at Nasinu in the Central Division.

[2] The information consisted of the following counts.

COUNT ONE

Statement of Offence

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

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2014 and 31st day of December, 2014 at Nasinu in the Central Division penetrated the vagina of GN with your fingers without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of MN with your penis without his consent.

COUNT THREE

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) and (3) of the Crimes Act of 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division penetrated the mouth of JR, a child under 13 years of age with your penis.

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division attempted to have carnal knowledge of GN without her consent.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured GN to witness an act of gross indecency by displaying your penis to the said GN.

COUNT SIX

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to witness an act of gross indecency by displaying your penis to the said MN.

COUNT SEVEN

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(i) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured MN to commit an act of gross indecency by forcing the said MN to hold your penis

COUNT EIGHT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(b)(ii) of the Crimes Act 2009.

Particulars of Offence

MAIKELI FREYER NAWAITABU between the 1st day of January, 2015 and 31st day of December, 2015 at Nasinu in the Central Division procured JR to witness an act of gross indecency by displaying your penis to the said JR.

- [3] The victim in the first count of digital rape had been one GN, the victim in the second count of penile rape had been one MN and the victim in the third count of penile rape had been a child (under 13 years of age) called JR. The actual names of the victims had been suppressed.

there must be a reasonable prospect of its success in appeal. The aforesaid guidelines are as follows.

- (i) *Acted upon a wrong principle;*
- (ii) *Allowed extraneous or irrelevant matters to guide or affect him;*
- (iii) *Mistook the facts;*
- (iv) *Failed to take into account some relevant consideration.*

Grounds of appeal

1. *'THAT the learned trial judge erred in principle by imposing a cumulative sentence of 12 years of imprisonment which does not reflect the totality of the respondent's culpability and the seriousness of the crimes. The sentence imposed is unduly lenient'*
2. *'THAT the learned trial Judge erred in the exercise of his sentencing discretion by failing to consider all aggravating factors.'*
3. *'THAT the learned trial Judge erred in principle in failing to give any or any sufficient consideration to deterrence and denunciation given the prevalence of serious child sexual assault cases in Fiji.'*

[10] The learned High Court judge had summarized the evidence of JR, GN and MN in the summing-up as follows

*'20. The 1st witness for the prosecution was **JR**. A summary of his evidence is that;*

- i. He was born on 12th of January 2004. (A copy of his certificate of birth is marked and produced as PE1)*
- ii. The witness and the accused are from the same neighborhood and has seen & known him but has not spoken to him until the alleged incidents.*
- iii. One day in November 2015, he has come home after school and gone to the playground with his father's permission. He has seen Maikeli (the accused) and the accused has started a conversation with him saying 'Hello'. The accused has allegedly said that he is cold and asked the witness to scratch his penis. The witness has said 'no' and at that moment a relation having called him the witness has gone home.*
- iv. Thereafter at holidays in December, when the witness is at Pena's house the accused has come there and asked him to go down & get a wire from the spare room, which was at the basement (bottom) of the Pena's house. The witness having found the wire, when turned to come back has seen the accused behind, with his pants lowered down to his knees. The accused has asked the witness to give him a 'blow job'. The witness understood it to have meant to 'suck his penis'. When the witness said 'no' the accused has grabbed his arms and tried to pull him. The witness has managed to*

- escape and run out. When JR went back to Pena's house, the accused also come up and has asked him to take the wire to the back of the Church.
- v. When JR took the wire to the Church, the accused has followed him behind. At the back of the Church, the accused has grabbed the arms of the witness, tightly and asked him to suck the accused's penis. The accused has made the witness to go down on his knees and suck the accused's penis. When the witness was sucking his penis, the accused had said some words in Fiji (I-Taukei), which the witness had not understood. After a while the accused has ejaculated in the mouth of the witness, which the witness has spat out. Having done so, the accused has gone away asking the witness also to go. The witness has stayed there for about 10 to 15 minutes and cried, feeling weak, helpless and like committing suicide. Thereafter JR has gone home cried some more, and slept.
 - vi. After a couple of weeks JR has told these incidents to Mitieli, Grace and Elanoa. He has told them when he heard their stories, only. Until then he has not told anyone because he was feeling shy and scared. At that time Grace has told him that the accused has locked her in a room and showing her his penis had wanted her to do a 'blow-job'. Further, as for the witness, Grace has told that she has seen the witness giving a 'blow-job' to the accused. Then Elanoa advised them to tell their parents.
 - vii. Thereafter, his parents has come to know of it and gone and complained to the Nakasi Police Station. The Police has recorded his statement at about 9 – 10 in the night.
 - viii. In cross examination, the witness states that he has been there in Davuilevu housing for 6 years since 2012, and by 2015, he is familiar with the neighborhood. He has seen Maikeli (the accused) only at the playground before. When asked that he had the opportunity of running away if he felt scared after the 1st incident at the bottom of the Pena's house, the witness while conceding that he had the opportunity, states that he did not run away.
 - ix. When confronted with his statement to the police and queried of the place of the 2nd incident, the witness states that he is sure that it happened outside the Church and attributes the discrepancy to the sleepiness he had when he gave the statement to the police, late at night.
 - x. When suggested that this was a story invented, to take revenge from the accused, the witness denies, stating that the Grace's issue regarding an Indian boy took place much later and the accused had no involvement with it.

21. The 2nd witness was GN. The summary of her evidence is that:

- i. She was born on the 13th of November 2000. (A copy of her certificate of birth is marked and produced as PE2)
- ii. She has been living in the Davuilevu housing which is also known as Cargill Street Squatters, since 2007.
- iii. The accused is an uncle of hers, as the accused's mother is a younger sister of her maternal Grandmother's.
- iv. In 2014, when once she went to the accused's house to clean the accused's mother's room, Maikeli (the accused) entered the room, pulling his pants down, showed his penis to the witness and asked her to suck it & satisfy him. The witness has refused and gone home.
- iv. After about 3 days later, when the witness has gone again to the accused's house on his mother's request to clean her room, the accused has come there with a bottle of

- oil and wanted the witness to play with his penis. The accused has shown his penis to the witness, there. The witness having refused it has gone home.
- v. At about a week, thereafter the witness has gone back to the house of the accused, & while cleaning his mother's room, the accused has come there and tried to pull down the Sulu she was wearing and poked his finger into her vagina. Further, as for the witness, the accused has scratched her vagina and his hand has gone into her vagina at that moment. The witness has pushed away the accused has ran straight home. That has been painful to the witness and she has not agreed with the accused to commit such an act.
- vi. Thereafter, one day the accused having pulled Cassava, has asked her to come and get it. When the witness is picking the Cassava, the accused has pushed her down and pulling his pants down has tried to pull the witnesses Sulu, down. When she has fallen on the ground the accused has knelt down and tried to lie down on top of her. At that moment, the witness had screamed and ran home pushing the accused away.
- vii. She has not informed any of these incidents to the mother of the accused as she was scared. However, she is said to have informed of these incidents to her Friends JR and Elanoa. The witness further admits that JR told her of certain incidents alleged to have done by the accused to JR; however, she did not witness any such being done.
- viii. In cross examination, the witness admits that there are four rooms in the accused's house, the living area being in the middle and two each on the sides. She also admits that there are many people living in the accused's house. The witness further admits that she maintains a close friendship with JR and MN and known them since 2012.
- ix. When shown her statement to the police and queried upon the witness concedes that she did not describe the first two incidents which happened at the accused's house to the police in detail. She further admits that there were many people in the living room when the alleged third incident happened at the accused's house. However, they could not have seen it as the curtains were down at the time of the said incident. The witness also states that though she could have screamed, she did not do so, as she was shy and did not want the others to know about it.
- x. It was suggested that the witness was having an affair with an Indian boy and her father having found it out queried her. The witness denies it, on two grounds. Firstly that she never had an affair and secondly that her father never queried her on any such. When it was suggested that she has made this up, the witness promptly denies it.

22. The PW3 was MN. The summary of his evidence is that;

- i. He was born on 25th of March 2002. (A copy of his certificate of birth is marked and produced as PE3)
- ii. He has been living in the Davuilevu Housing, which is also known as Cargill Street Squatters, since birth.
- iii. Somewhere in 2015, once when he was going by the accused's house, the accused has called him from the window. He was shocked to hear someone calling and when he turned he has seen the accused inside his mother's room touching his penis. The witness has clearly seen the penis of the accused and the accused while holding it, has said that it is itching.
- iv. After a while, the accused has come around and asked the witness to help him to carry a wood to the Pena's house. While inside the basement or the tool room of the Pena's house, the accused has closed the door and has asked the witness to suck his

- penis. The witness says that he was scared and frightened and therefore, sucked the penis of the accused, there. Having sucked the penis of the accused for few minutes the witness has told to the accused that he wants to go home. At that moment the accused has offered to suck the penis of the witness, which the witness has refused. The stance of the witness is that he did not suck the penis of the accused willingly; he did it because he was scared and frightened. Thereafter, the accused has opened the door, peeped around to see whether any one was around, and seen no one around, has let the witness go.
- v. When queried why he didn't run away at the first time, the witness replies that he never expected it to end up in such a way.
- vi. Few weeks afterwards, once when the witness was returning after playing, he has seen the accused on the sea wall. The accused has called him and when gone, the accused has taken the hand of the witness and put it inside his underwear. The hand of the witness has touched the penis of the accused and the witness has pulled his hand out. The witness further testifies that he has not been agreeable to such an act and the accused knew it.
- vii. The witness says that he has told of these incidents to JR and Elanoa after a few weeks. When he told JR, JR told him that he also has sucked the penis of the accused. The witness further says that he told these to JR and Elanoa because they share secrets.
- viii. In cross examination witness says that he and JR are cousins as his mother and JR's mother are sisters. When suggested that the accused chases children home when it's getting dark, the witness denies. When referred to the statement made by the witness to the police, he states that the order of events was incorrectly recorded by the police. The witness further admits that certain events were also incorrectly recorded by the police.
- ix. The witness states that he did not inform the first incident of seeing the accused touching his penis to the police as the witness got scared when the police suddenly came and asked him to come to the police station to record a statement.
- x. When confronted with his statement, the witness admits that it differs from what he has said in evidence, about the incident alleged to have happened at the sea wall. Later, the witness says that these were two separate incidents. According to the witness, on second time the accused has come behind him while he was in the church yard and taken his hand and put it inside his underwear. However, witness contradicts his earlier stance of once accused taking his hand and putting it inside his underwear by stating that such an incident having happened twice.
- xi. In re-examination, the witness clarifies that he, JR and GN did not like the accused not for anything else but for the alleged incidents. Further it was pointed out that the statement of the witness was recorded very late at night (commencing from 10.50pm) and was hurriedly recorded with in a very short time span (20 minutes).

[1] The learned trial judge in his sentencing order had referred to several decisions of the High Court and the Court of Appeal which highlight the surge of sexual offences in Fiji, particularly against children over the years, devastation they cause to the victims

and therefore the gravity of such offence demanding deterrent punishments to the offenders. He had specifically cited **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) where it was held

*'[25] The tariff previously set in **Raj v The State** [2014] FJSC 12 CAV0003.2014 (20th August 2014) should now be between 11-20 years imprisonment. Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the demunciation of the courts in the strongest terms.*

- [12] The trial judge had also cited **Koroivuki v State** [2013] FJCA 15; AAU0018.2010 (5 March 2013) where it was held

'[27] In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.'

- [13] However, the trial judge had picked 11 years as the starting point for rape, increased the sentences by 02 years for two aggravating factors namely breach of trust and psychological harm to the victims and reduced the sentence by 01 year for the appellant 'being a first offender' and an unspecified 'other mitigating factors'.

- [14] In the first place the objective seriousness of the offences involved demanded a starting point in the middle range of the sentencing tariff. Secondly, the learned judge had failed to consider some of the other aggravating factors set out in **Ram v State** [2015] FJSC 26; CAV12.2015 (23 October 2015) such as planning, degrading and humiliating nature in which the offences were committed. In addition the repetitive nature of the offences and deception practiced in the commission of them along with multiple victims and disparity of age too should have been treated as aggravating features. The appellant seems to be clearly a danger to the society and particularly to the children and deserves a long incarceration than he was subjected to by the trial judge (see **Kumar v State** [2018] FJSC 30; CAV0017 of 2018 (02 November 2018) and **Subramani v State** [2018] FJCA 82; AAU0112 of 2014 (01 June 2018).

- [15] The learned trial judge had not specified what the 'other mitigating factors' were and in any event, in my view, the appellant did not deserve to be considered a 'first offender', for he had committed a series of offences spanning a period of time against multiple victims. Such offenders should not be treated as first offenders. Having no previous convictions or pending cases is not the conclusive criteria to be treated as a first offender. Therefore, the learned trial had accorded the appellant a leniency which he did not deserve in mitigation.
- [16] Thus, I allow leave to appeal against sentence as it has a reasonable prospect of success in appeal. The trial judge has failed to apply the sentencing principles correctly in the matter of the starting point, failed to take into relevant matters in aggravation and taken into consideration matters that should not have been considered in mitigation in arriving at the final sentence.

Order

1. Leave to appeal against sentence is allowed.




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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL