

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 49 OF 2016

STATE

V

SIMELI BARAVILALA

Counsel: Ms. S. Kiran for the State
Ms. S. Nasedra for Accused

Date of Conviction: 15th July, 2106

Date of Sentence: 27th July, 2016

SENTENCE

1. On the 30th day of May, 2016, Mr. SIMELI BARAVILALA (accused), pleaded guilty to the following counts in the presence of his counsel:

Count 1

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SIMELI BARAVILALA between the 1st of November 2015 and 30th of November 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **REIJELI LEBATABUA**.

Count 2

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree 44 of 2009.

Particulars of Offence

SIMELI BARAVILALA between the 1st of November 2015 and 30th of November 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **REIJELI LEBATABUA**.

Count 3

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SIMELI BARAVILALA between the 1st of November 2015 and 30th of November 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **REIJELI LEBATABUA**.

Count 5

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SIMELI BARAVILALA between the 18th of January 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted **REIJELI LEBATABUA**.

2. Accused was explained the consequence of the guilty plea. Counsel confirmed that accused understood the consequence of the guilty plea and that he pleaded on his own free will. I accepted the guilty plea having been satisfied that it was unequivocal, voluntary and free from any influence.
3. On the 15th day of July, 2016, summary of facts filed by the State was read over to the accused. Having understood the same, accused agreed the facts filed by the State. This

Court found that all the elements of the offences of Sexual Assault and Indecent Assault were proved on the facts agreed by the accused. Accused was convicted accordingly on the 1st representative count of Sexual Assault, 2nd representative count of Indecent Assault, 3rd representative count of Sexual Assault and 5th representative Count of Sexual Assault. Accused now comes before this Court for sentence on the conviction.

4. On the 8th July 2016, following summary of facts was read to the accused in Court:

The victim in this matter is Reijieli Lebatua born on the 10th of April 2002, resides at Bulileke Street with her father, mother Seini Naioba and 3 other siblings. They had moved to Bulileka Street after staying in Velovelo, Lautoka for a while. Attached and marked "SB1" is a copy of her birth certificate.

The accused, Simeli Baravilala is the victim's cousin and had also been residing with her family in Velovelo and also at Bulileke Street.

During the month of November 2015, whilst residing at Velovelo Lautoka, the accused would come into Reijieli's bedroom around 1am – 2am and lie beside her with his pants pulled down to his knees. He would then rub his penis on her buttocks before putting his hand inside her t-shirt and fondling her breast. After fondling her breast, he would scroll his hand down her stomach and force his hand inside her panty and then fondle her vagina for a while, Reijieli was scared when the accused did this and did not consent to the accused doing it.

This happened to her 3 times in the month of November 2015 but on all occasion it happened in the same pattern.

On the 28th of January 2016, at about 2am, whilst residing at Bulileke Street, Seini the mother of the victim was woken up by mosquitoes biting her but when she opened her eye, she saw the accused sitting beside her daughter and his hand was inside her pants on her buttocks. When she looked at him, he pulled his hand

out and started playing with his phone. She did not confront him at that time but just asked him to go and sleep. After he left, Seini slapped on Reijieli's back which woke her up. Upon looking at her as she opened her eyes, she realized that Reijieli was fast asleep.

The next morning, Seini asked Reijieli if the accused did something to her but she did not say anything. On the 6th of February 2016, whilst alone at home with her, Seini asked her again if she is okay. It was at this time when Reijieli told her what the accused had been doing to her.

Seini then reported the matter at Lautoka Police Station.

Reijieli was seen by Dr. Kelera at the Lautoka Hospital where it was noted that her hymen is intact with nil bruising. Attached and marked "SB2" is a copy of the medical report.

Accused was arrested and interviewed under caution where he voluntarily admitted at Question 32, 34, 37, 39, 41, 43, 46, 48, 49 and 52 to rubbing his penis on her buttocks, forcing his hands inside her t-shirt and fondling her breast and also fondling her vagina on all the 3 occasions. Attached and marked "SB3" is a copy of the caution interview.

Subsequently he was charged where he voluntarily made a statement and asked for forgiveness from the victim and her family and was then produced in court. Attached and marked "SB4" is a copy of his charge statement.

On the 30th of May 2016, the accused voluntarily pleaded guilty to the said first representative count of sexual assault, second representative count of indecent assault, third representative count of sexual assault the and 5th count of sexual assault before this Honorable Court.

The accused is a first offender.

Sexual Assault

5. Offence of "Sexual Assault" carried a maximum sentence of 10 years' imprisonment. There is no established tariff for Sexual Assault committed on children. In *State v Epeli Ratabacaca Laca*, HAC 252 of 2011, Justice Paul Madigan set the tariff for the offence between 2 and 8 years' imprisonment, the higher tariff being set for serious sexual assaults.
6. As defined in the United Kingdom's Legal Guidelines for Sexual offences, sexual assault is any form of non-consensual touching which ranges offending from touching of the victim over clothing to non-penetrative touching of the victim's genitals.
7. With the assistance of the said Legal Guidelines for Sentencing in the United Kingdom, Justice Madigan in the case of *State v Laca* [2012] FJHC 1414; HAC252.2011 (14 November 2012) divided Sexual Assault offending into three (3) categories.

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

- (i) Contact between the naked genitalia of the offender and another part of the victim's body;
- (ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

- (iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between parts of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)

- 8. Rubbing of penis of a man on buttocks and fondling of the vagina with fingers come within Category 2 and fondling of buttocks and breast with fingers come within category 3 mentioned above.
- 9. The Sentencing Guidelines of the United Kingdom had identified 3 "categories" of offending based on quantum of "harm" to the victim and "culpability" factors of the offender. It has recommended the tariff to be from "high level community Orders to 9 years imprisonment." The higher end of the range is obviously for serious offending with use of violence, abduction or detention of the victim and forced entry into victim's house. A sentence of middle range is recommended when the offending takes place with touching of genitalia, prolonged or sustained incident, additional degradation or humiliation and in a context of habitual sexual abuse. The lower range of sentencing is suggested when the "harm factors" and the "culpability factors" identified are not in existence.

Indecent Assault

- 11. Maximum sentence for Indecent Assault is 5 years' imprisonment.
- 12. In *State v Mario*, [2014] FJHC 935; HAC 70& 71.2013 (19 December 2014) the tariff for the offence of Indecent Assault as between 1 - 4 years' imprisonment.

13. In *Rokota v The State* [2002] FJHC 168; HAA0068J.2002S (23 August 2002) Madam Justice Shameem observed:

Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

14. After a careful consideration of the legal background on sentencing for the offences of Sexual Assault and Indecent Assault, I now turn to identify the aggravating and mitigating factors in this particular case. The learned State Counsel submitted a comprehensive Sentencing Submission and the learned Counsel for the Defence filed extremely helpful and pertinent submissions in Mitigation.

Aggravating factors

15. Victim being a child in itself is an aggravating factor. There is no doubt that a unique set of issues and sensitivities do exist in a sexual offence when the victim is a child. *State v. Yavala* [2013] FJHC 333 (9 July 2013).
16. There is a domestic familial relationship between the offender and the victim. Offending gives rise to a domestic violence under the Domestic Violence Decree.
17. Victim, no doubt, trusted the offender and his position as her cousin. Accused betrayed that trust.

Mitigating Factors

18. Accused is 21 years' of age. At the time of the offences, he was only 20. He is from a broken family. His parents have been separated for years. He has been pushed around from relative to relative and ended up being placed with her grandmother. During the period of offending he resided in victim's house. Lack of parental guidance seems to have brought about this sad predicament to this young person.
19. Accused is a first and young offender. He confessed to the crimes and cooperated with police. At the first available opportunity, he pleaded guilty. He is remorseful and saved precious time and resources of this Court.
20. Accused is employed at a cinema as an usher earning \$ 100 per week. He resides with his grandmother and uncle both of whom look for his support.
21. There is no evidence of injuries or pre planning.
22. Accused had been in remand for one month.

Sentence

23. Having considered the degree of culpability and the circumstances existed at the time of offending, I take a starting point of 4 years' imprisonment for each Count of Sexual Assault. I add 2 years for all the aggravating factors mentioned earlier and deduct 3 years for all the mitigating factors. Final sentence for each Count of 'Sexual Assault' is 3 years' imprisonment.
24. I impose a 12 months' imprisonment for the Second Count of Indecent Assault.
25. Accused's final sentence is 3 years' imprisonment. Having considered the 'totality' and 'one transaction' principles, I order the sentences to be concurrent.

26. The Counsel for the Defence asks for leniency on account of Mr. Baravilala's young age, clear record, early guilty plea and his family commitments.

27. Justice Madigan has noted in *State v Epeli Ratabacaca Laca* (supra):

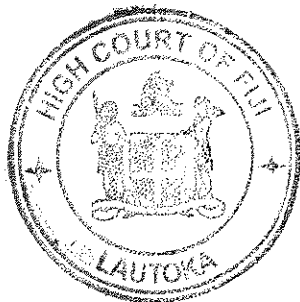
"such leniency can only be afforded to a convict who expresses remorse by way of a guilty plea or some other expression of regret."


28. In *Rokota* (supra) Madam Shameem J observed:

"A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these".

29. Having considered Mr. Baravilala's youth, his desire for rehabilitation and his clean record, I suspend part of his sentence. Accused will serve a term of imprisonment only of two years and the rest of the sentence is suspended for a period of two years from the last date of his prison term.

30 days to Appeal to the Fiji Court of Appeal.




Aruna Aluthge
Judge

At Lautoka

27th July, 2016

Counsel: - Office of the Director of Public Prosecution for State
- Office of the Legal Aid Commission for Accused