

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC. 177 of 2013**

**STATE**

**V**

**AK**

**Counsel** : Ms. S. Puamau with Ms. L. Bogitini for State  
Mr. M. Raza for Accused

**Dates of Hearing** : 09<sup>th</sup> – 17<sup>th</sup> November 2015

**Date of Summing Up:** 18<sup>th</sup> November 2015

**Date of Judgment** : 20<sup>th</sup> November 2015

(The names of the accused and of the complainant are suppressed. Accordingly, the accused will be referred to as AK and the complainant as MK)

**JUDGMENT**

1. The accused is charged for the following counts;

***FIRST COUNT***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) and 2(b) of the Crimes Decree 2009.

*Particulars of offence*

**AK** between the 12<sup>th</sup> day of May and the 13<sup>th</sup> day of May 2012, at Narere in the Central Division, raped **MK** a 4 year old female, by penetrating the vagina of the said **MK** with his finger.

***ALTERNATIVE COUNT***

*Statement of offence*

**Sexual Assault:** Contrary to Section 210(1)(a) of the Crimes Decree 2009.

*Particulars of offence*


**AK** between the 12<sup>th</sup> day of May and the 13<sup>th</sup> day of May 2012, at Narere in the Central Division, unlawfully and indecently assaulted **MK**.

2. The assessors have returned with a unanimous opinion that the accused is not guilty of the first count and also not guilty of the alternative count.
3. I direct myself in accordance with the summing up delivered to the assessors on 18<sup>th</sup> November 2015.
4. To find the accused guilty of Rape under section 207(2)(b) of the Crimes Decree as per the first count above, the prosecution must prove the following elements beyond reasonable doubt;
  - a) the accused
  - b) penetrated the vagina of MK to any extent with his finger
  - c) MK is below the age of 13 years
5. There was no dispute over the identity of the accused. It is an admitted fact that the complainant, MK was 4 years old at the time of the alleged incident. In terms of section 207(3) of the Crimes Decree, a child under the age of 13 years is incapable of giving consent. The only element in dispute therefore is on penetration. That is, whether or not the accused penetrated the vagina of the complainant with his finger.
6. In terms of section 23(1) of the Crimes Decree 2009, *'if the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element'*. Therefore the prosecution should also prove that the accused had the intention to penetrate the complainant's vagina. Section 19(1) of the Crimes Decree 2009 provides that a person has intention in respect of a conduct when he means to engage in the conduct in question.
7. The prosecution says that the accused inserted ice in the complainant's private part using two fingers and those fingers could have touched MK's vagina. They say that they rely on circumstantial evidence to prove penetration.
8. The accused totally denies the allegation. He says that he did not put ice as alleged by the complainant and he did not penetrate her vagina with his finger.

9. There was no direct evidence on penetration. The prosecution relied on the following circumstantial evidence to prove penetration;
- a) MK's evidence that on one night in 2012 when she was staying with the accused and while she was sleeping, she felt something and woke up to see the accused putting ice in her private part. She said the accused used 2 fingers to put the ice.
  - b) MK's evidence that she saw blood on the ice and that blood was from her private part and that she felt the pain.
  - c) MK's mother Ms. Begum's evidence that when she tried to carry MK on 13/05/2012 after the accused dropped MK at the Police Station, MK complained of a pain in her private part. Ms. Begum said that MK had told her that Papa had put ice there because it was bleeding.
  - d) Dr. Evelyn's evidence that when she examined MK on 14/05/2012, she observed bilateral abrasions on the sides of the vaginal opening and also redness of labia majora and labia minora. Dr. Evelyn was of the view that the abrasion and the redness could be caused by a blunt object.
10. I note that the medical examination was not conducted soon after MK complained to the mother. She was in Ms. Begum's custody and control for more than 12 hours before the medical examination. There was no evidence regarding the estimated age of the injuries noted in the complainant's vulva by the doctor on 14/05/2012.
11. I am not satisfied that there is evidence in this case to conclude that the injuries observed in the complainant's vulva by Dr. Evelyn on 14/05/2012 were caused by the Accused by penetrating his finger around 12<sup>th</sup> and 13<sup>th</sup> May 2012 and no one else. The evidence revealed that there could be other explanations to those injuries.
12. There were many inconsistencies in the evidence given by the complainant. The most significant one was that in her evidence she said she saw blood on the ice during the alleged incident whereas she had in a previous statement to the Police stated that "I never saw blood". Given the inconsistencies, I am compelled to form the view that the complainant's evidence is unreliable. Anyway, it is pertinent to note that she only alleges that the accused placed ice in her vulva.

13. All in all, I am not satisfied that the circumstantial evidence in this case lead to the only conclusion that the accused penetrated the complainant's vagina with his finger between 12<sup>th</sup> May 2012 and 13<sup>th</sup> May 2012. Therefore, I hold that the prosecution has failed to prove the first count beyond reasonable doubt.
14. Now I turn to consider the alternative count. The elements of the offence of Sexual assault are;
- a) Accused
  - b) Unlawfully and indecently
  - c) Assaulted MK
15. In dealing with this count, it would be relevant to first consider whether there was an assault by the accused on the complainant. Assault is the use of unlawful force.
16. As noted above, I have formed the view that the complainant's evidence is unreliable. The evidence in this case is not sufficient to prove beyond reasonable doubt, that the accused used unlawful force on the complainant between the 12<sup>th</sup> and 13<sup>th</sup> May 2012. Therefore it is not required for me to consider the other elements of this offence and I hold that the prosecution has failed to prove the alternative count of Sexual Assault beyond reasonable doubt.
17. I am convinced that the assessors' unanimous opinion was not perverse and it was open for them to reach that conclusion.
18. Accordingly I concur with the opinion of the assessors and I acquit the accused from the charge of Rape and from the alternative count of Sexual Assault.



  
**Vincent S. Perera**  
**JUDGE**

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitor for the Accused** : **M. Raza & Associates, Barrister and Solicitor, Suva.**