

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2016

STATE

V

JOSEFA VODONAYALEWA

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Mr. Lisiate Qetaki for the Accused

Dates of Trial : 26-28 June 2018

Summing Up : 2 July 2018

Judgment : 4 July 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "JK"

JUDGMENT

[1] The accused Josefa Vodonayalewa is charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, unlawfully and indecently assaulted JK by fondling her breasts.

COUNT 2

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of August 2013 and the 31st day of August 2013, at Gau Island in the Central Division, penetrated the vagina of JK with his finger, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of JK with his tongue, without her consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

JOSEFA VODONAYALEWA between the 1st day of December 2013 and the 31st day of December 2013, at Gau Island in the Central Division, penetrated the vagina of JK with his penis, without her consent.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of all four charges.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the provisions of Section 212 of the Crimes Act No. 44 of 2009 (Crimes Act), which deals with the offence of Indecent Assault. For the purpose of convenience, the said Section is re-produced below,

212. — (1) A person commits a summary offence if he or she unlawfully and indecently assaults any other person.

(2) It is no defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.

(3) It shall be a sufficient defence to a charge for an indecent assault on a boy or girl under the age of 16 years to prove that —

(a) the boy or girl consented to the act of indecency and that the person so charged had reasonable cause to believe, and did in fact believe, that the boy or girl was of or above the age of 16 years; or

(b) that the offender was of a similar age to the boy or girl and that consent to the act of indecency was given in the context of a continuing friendship between the offender and the boy or girl.

(4) No person who is in a relationship of control or trust over the boy or girl may rely on a defence provided for in sub-section (3).

- [6] Accordingly, I directed the Assessors that in order for the prosecution to prove the first count of Indecent Assault, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case between the 1 August 2013 and 31 August 2013);

- (iii) At Gau Island, in the Central Division;
 - (iv) Unlawfully and indecently assaulted JK, the complainant, by fondling her breasts.
- [7] The above individual elements were further elaborated upon in my summing up.
- [8] I explained to the Assessors that in terms of Section 212 (2) of the Crimes Act, it is no defence to a charge for an Indecent Assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency.
- [9] Furthermore, during my summing up I explained to the Assessors the salient provisions of Section 207 (1), (2) (a) and (2) (b) of the Crimes Act.
- [10] The Assessors were directed that in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (In this case between the 1 August 2013 and 31 August 2013);
 - (iii) At Gau Island, in the Central Division;
 - (iv) Penetrated the complainant's vagina, with his finger;
 - (v) Without the consent of the complainant; and
 - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11] Similarly, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (In this case between the 1 December 2013 and 31 December 2013);
 - (iii) At Gau Island, in the Central Division;
 - (iv) Penetrated the complainant's vagina, with his tongue;
 - (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[12] In a like manner, in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case 1 December 2013 and 31 December 2013);
- (iii) At Gau Island, in the Central Division;
- (iv) Penetrated the vagina of JK with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[13] The above individual elements, in relation to counts 2, 3 and 4 were further elaborated upon in my summing up.

[14] The Assessors were also directed that in the event they have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which was explained to them, beyond reasonable doubt and therefore the offence of Rape, in count four is not established, as an alternative, they may consider whether the accused is guilty or not guilty of the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age, in respect of the said count, though the accused is not formally charged in the Amended Information for that offence.

[15] The Assessors were directed that in order for the prosecution to prove the charge of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, between the 1 day of December 2013 and the 31 day of December 2013, at Gau Island in the Central Division, penetrated the vagina of the complainant, who is between the age of 13 and 16, with his penis.

[16] The prosecution, in support of their case, called the complainant, JK, an Assistant Pastor (lay Pastor), Semi Vueti and Waisake Yavala Dakai, a Minister of the Methodist Church.

[17] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Agreed Facts*” without placing necessary evidence to prove them:

1. That JK (hereinafter referred to as “the complainant”) is the granddaughter of JOSEFA VODONAYALEWA (hereinafter referred to as “the accused”).
2. That the complainant and her sister reside in accused’s house with his wife at Navuikailagi in Gau Island in 2010 until the accused was arrested by police. The complainant’s father passed away and her mother has remarried which is the reason why they are residing with their grandparents.
3. That the house is made of corrugated iron roof and coconut thatched walls.
4. That the complainant was attending Year 9 (Form 3) at Gau Secondary School in 2013. She had spent the school term breaks for Term 1 to Term 3 at the accused house.
5. That on 29 November 2015, the accused confessed to Semi Vueti (a lay Pastor) that he had sexual intercourse with the complainant. He further stated that he had no sex with his wife for about 8 months to 10 months in 2013.
6. That the matter was reported to the police.
7. That the complainant was taken for medical examination on 17 December 2015 at Qarani Health Centre.

[18] Since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*”, without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.

[19] The complainant testified that her date of birth is 25 October 1998. Therefore, as at August 2013, she was 14 years and 9 months old, and she would have been four months older in December 2013. During the time she was living in Gau Island. She was staying there with her grandfather, Josefa Vodonayalewa, and her grandmother, Sera Yabaki. She was attending Gau Secondary School and was in Year 9 (Form 3). During the year 2013, the complainant had spent the school term breaks for Terms 1, 2 and 3 at the accused’s house.

- [20] The complainant clearly testified that during the month of August 2013, the accused unlawfully and indecently assaulted her by fondling her breasts. She testified that during the course of the same incident the accused had penetrated her vagina, with his finger, without her consent.
- [21] The complainant further testified that during the month of December 2013, the accused had penetrated her vagina, with his tongue, without her consent. During the course of the same incident the accused had penetrated her vagina, with his penis, without her consent.
- [22] She explained that she did not complain to anyone about what the accused did to her due to fear and embarrassment.
- [23] The matter only came to light on 29 November 2015, when the accused confessed to a lay Pastor, Semi Vueti, that he had sexual intercourse with the complainant. The accused had further stated that he had no sex with his wife for about 8 months to 10 months in 2013. Only at that stage was the matter reported to the police.
- [24] The lay Pastor, Semi Vueti, and his superior Waisake Yavaia Dakai, a Minister of the Methodist Church, also testified on behalf of the prosecution.
- [25] The accused takes up the position that he fondled the complainant's breasts with her consent. He also takes up the position that he had sexual intercourse with her consent. The accused denies that he penetrated the complainant's vagina with his finger and also denies that he penetrated her vagina with his tongue.
- [26] As I have stated before, in terms of Section 212 (2) of the Crimes Act, it is no defence to a charge for an Indecent Assault on a boy or girl under the age of 16 years to prove that he or she consented to the act of indecency. The accused is not taking up the defence, in terms of Section 212 (3) (a), that he had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years of age. In any event, in terms of Section 212 (4): *"No person who is in a relationship of control or trust over the boy or girl may rely on a defence provided for in sub-section (3)"*. Since the accused is the grandfather of the complainant, and as such is clearly in a relationship of control or trust, he would not be in a position to take up such a

defence. Therefore, by admitting that he fondled the complainant's breasts, the accused has admitted to the charge of Indecent Assault.

- [27] The Assessors have found the evidence of prosecution as truthful and reliable, as they have by a unanimous decision found the accused guilty of the four charges. Therefore, it is clear that they have rejected the version put forward by the accused.
- [28] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of all four counts.
- [29] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences of Indecent Assault and Rape with which the accused is charged in counts one to four.
- [30] In the circumstances, I find the accused Josefa Vodonayalewa guilty of Indecent Assault and Rape as charged, in counts 1, 2, 3 and 4.
- [31] Accordingly, I convict the accused for the offences of Indecent Assault and Rape in counts 1, 2, 3 and 4.



A handwritten signature in blue ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 4th Day of July 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.