

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 173 of 2015

BETWEEN : STATE

AND : FILIPE TUISAWAU KORONIBAU

Counsel : Ms Bogitini for the State
Ms Radrole for the Accused

Dates of Hearing : 23, 24 & 25 September 2019

Closing Speeches : 25 September 2019

Date of Summing up: 27 September 2019

Date of Judgment : 30 September 2019

(The Complainant's name is suppressed, and she is referred to as AF)

JUDGMENT

1. The Accused was indicted for the following offences;

Count 1

Statement of Offence

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

Particulars of Offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division, penetrated the vagina of AF with his fingers without her consent.

Alternative Count to Count 1

Statement of offence

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

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by fondling her vagina with his fingers.

Count 2

Statement of offence

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

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013 at Sigatoka in the Western Division penetrated the vagina of AF with his tongue without her consent.

Alternative Count to Count 2

Statement of offence

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

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by sucking her vagina with his tongue.

Count 3

Statement of offence

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

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division unlawfully and indecently assaulted AF by fondling and sucking her breast.

Count 4

Statement of offence

Pornographic activities involving juveniles: Contrary to Section 62A (1)(b) of the Juveniles (Amendment) Act 1997.

Particulars of offence

Filipe Koroibau between the 1st day of January and the 31st day of December 2013, at Sigatoka in the Western Division in private, participate in a video recording of pornographic activities involving AF, a juvenile.

2. The Accused pleaded not guilty to all the counts on 03 March 2016. The trial commenced on 23 September 2019 and it proceeded for three days. The prosecution called three witnesses and after the closure of the prosecution case the Accused gave evidence. The assessors, after deliberating for about one hour, returned with a unanimous opinion that the Accused is guilty in respect of the first, second, third and the fourth counts.
3. I gave directions to the assessors on the elements of each count that the prosecution must prove beyond reasonable doubt, when to consider alternative counts, how to assess credibility and reliability of witnesses, inconsistencies in evidence compared to previous statements and other general considerations. Further they were given redirections that the video footages tendered by the prosecution are also to be considered as part of evidence in this case. Having directed myself in accordance with the summing up I will now review the evidence adduced in this case.

4. There was no dispute regarding the identity of the Accused. The Accused admitted the sexual activities mentioned in the first, second and third counts. However, he contended that the acts were consensual and he did not penetrate the vagina of the complainant while doing the acts mentioned in count one and two.
5. In respect of the fourth count the Accused admitted that he recorded the video footages. He further admitted that the two persons in the videos are him and the complainant. But his argument was that those sexual activities captured in the videos are not pornographic activities.
6. As per the four counts against the Accused, it is alleged that the said offences were committed between 1 January 2013 to 31 December 2013. The Accused also admits that the alleged sexual activities took place during the year 2013.
7. However, during the cross examination of the complainant, the defence counsel highlighted a number of inconsistencies particularly, with regard to the date of the alleged incidents. It was suggested by the defence counsel that the contents in paragraph 5 of the complainant's statement to the Police are contrary to what she testified in court. The complainant gave evidence in court that the alleged sexual activities occurred on the day that she went to the Accused's house to apply lotion on the white spots on her skin. However, under cross examination she admitted that what she said in paragraph 5 of her statement is different. Yet she said that in paragraph 6 she has mentioned about the alleged incidents.
8. The complainant's explanation regarding the inconsistencies highlighted by the defence was that she was young at the time she gave the statement and she was scared. In her words she said that she was shocked and "freaked out" when the statement was recorded.
9. In my summing up I have described the inconsistencies highlighted by the defence, in detail. However, it appears that the assessors have accepted the

explanations given by the complainant regarding those inconsistencies. Further it appears that they have not considered those inconsistencies to be significant enough to render the complainant's evidence unreliable.

10. The complainant gave evidence six years after the incident. She had been about 15 years of age when the alleged incidents took place. It is natural for a witness's memory of a series of incidents to fade away due to lapse of time. Further I have observed that the complainant did not possess a very expressive personality. Although she was composed while giving evidence, at one point of time the court had to inquire from her whether she is scared to give evidence. The complainant responded affirmatively. However, she said that no one has threatened her not to give evidence.
11. I am satisfied that the assessors had reasons to be convinced of the credibility and reliability of her evidence regardless of the inconsistencies highlighted by the defence. After careful consideration of the inconsistencies brought to the notice of the court, the complainant's explanations and her demeanour, I am of the view that the complainant's credibility and reliability is unaffected in view of the entirety of the evidence presented in this case.
12. I will now consider the issue of consent. The complainant's evidence was that she felt dizzy after drinking a cup of tea with white foam in it. Since she could not walk home, she had lied down on a bed at the Accused's house. She had tried to close her eyes, but she said that she could not, and she stayed awake. However, she said that the tea she drank made her body feel different and weird. According to the complainant she could not move her body when the Accused was doing the alleged acts. She said that she could not make him know that she did not like what he did, as she could not move. She described how she felt during the time the alleged incidents occurred. She said that she could not feel herself and her mind was somewhere else.
13. The prosecution tendered two video clips in a CD marked as Prosecution Exhibit 1. The videos were played before the assessors. It appears that the

complainant was non-responsive during the sexual activities performed by the Accused. She looks aimless during the episodes of sexual activities. It does not show that the complainant was fully conscious of what was happening.

14. I am satisfied that the testimony of the complainant about her mental and physical status is strengthened by what is shown in the videos. The assessors seem to have relied on the visuals of the videos to believe the complainant's evidence that she was not in a right state of mind when the sexual activities were taking place.
15. The complainant gave evidence that she did not like what the Accused did to her. However due to her impaired mental and physical condition at that time, she said that she could not express her resistance to the acts. She said that she did not say anything as she was scared of him due to the aggressive and strict nature of the Accused. Further it appears that the complainant, her grandmother and her small brother had been heavily dependent on the Accused in terms of educational, and other basic needs. The complainant said that ever since her parents were separated, her grandmother looked after her and her brother. The Accused had been assisting them as a father. She said that she respected him as her uncle and also for his social status as the son of a highly respected traditional chief.
16. According to her evidence she had been scared to complain to anyone about the incidents. She said that they were living alone with her grandmother and she thought that he would do something to her. Also, she said that she did not want to burden her grandmother with more troubles as she was already struggling to raise them. I am satisfied that her explanation is acceptable given the position of authority that the Accused had been in.
17. Section 206(1) of the Crimes Act states that the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to act of another person shall not alone constitute consent. All in all, I conclude

that the complainant had not freely and voluntarily consented to the Accused for the alleged sexual activities for the reasons discussed above.

18. I will now deal with the issue of penetration. The Accused argued that licking of the vagina and touching the vagina was non-penetrative. In this context the following paragraphs of the Court of Appeal decision in *Vilikesa Volau v State Criminal Appeal No.AAU 0011 of 2013* is pertinent to note to fathom what constitutes penetration for the purpose of establishing the offence of rape;

[13] Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva *i.e.* all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' *i.e.* a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus *i.e.* the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

[14] Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word,

could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

[15] Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the *actus reus* of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence.

19. I am satisfied that the complainant's evidence and the visuals in the videos are sufficient proof of penetration in view of the above Court of Appeal decision.
20. In respect of the third count the prosecution has to prove that the Accused unlawfully and indecently assaulted the complainant by fondling and sucking her breasts. The complainant said that when she regained her senses the Accused was sucking her breasts and then she pushed him away as she did not like it. I have no doubt that the evidence given by the complainant and also the visuals in the videos confirm that the Accused unlawfully and indecently assaulted the complainant by fondling and sucking her breasts.

21. The Accused contended that the actions depicted in the videos do not constitute pornographic activity. The Accused said that he does not know when does photography become pornography.
22. Section 62A(12) states that pornographic activity includes activity which is either indecent or obscene, or in any way judged by the standards of the time, is of a sexual nature and offensive.
23. Undoubtedly the visuals of sexual activities in the videos between the complainant and the Accused, are obscene and indecent. The age of the complainant is not disputed. Section 2 of the Juveniles Act 1973 defines a juvenile as a person who has not attained the age of 18 years and includes a child and a young person. Therefore, I conclude that the Accused in private, participate in a video recording of pornographic activity involving a juvenile.
24. In the circumstances I decide that the prosecution proved the first, second, third and the fourth counts beyond reasonable doubt. The opinions of the assessors are justifiable, and I do not find any cogent reasons not to concur with their unanimous opinion. Therefore, I accept the unanimous opinion of the assessors.
25. I find the Accused guilty to the first, second, third and the fourth counts and he is convicted of all four counts as charged.


Rangajeeva Wimalasena
Acting Judge


At Lautoka
30 September 2019

Solicitors

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