

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 346 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ALANI TUBUNAVAU

Counsel : Mr. M. Vosawale the State
Ms. L. Ratidara with Mr. Gade for the Accused

Hearing on : 10 - 12 September 2019

Summing up on : 12 September 2019

Judgment on : 13 September 2019

[[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "TC". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ALANI TUBUNAVAU on the 9th of September 2018 at Naimataga

Settlement, Lami, in the Central Division, penetrated the vagina of TC, with his finger without her consent.

SECOND COUNT

Statement of Offence

Sexual Assault: contrary to Section 210 (1) (a) of Crimes Act, 2009.

Particulars of Offence

ALANI TUBUNAVAU on the 9th of September 2018 at Naimataga Settlement, Lami, in the Central Division, unlawfully and indecently assaulted TC, by fondling her breasts.

2. The assessors have returned with the unanimous opinion that the accused is guilty of both counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 12/09/19 and the evidence adduced during the trial.
4. The prosecution called three witnesses including the complainant and the accused opted to remain silent.
5. I accept the evidence of the complainant. She was a credible and a reliable witness. I believe her when she said that she did not consent for the accused to touch her breasts and then her vagina. I accept the evidence of PW2 and therefore that the complainant made a prompt complaint to PW2. The evidence of PW2 enhances the complainant's credibility. I accept the evidence of PW3.
6. I will first deal with the second count. I accept the evidence of the complainant that the accused touched the complainant's breasts by putting his hand under her clothes, without her consent. Therefore, this touching was unlawful and it amounts to an assault. Touching of a girls breasts in this manner is indecent. The accused started touching the complainant's breasts after kissing her on her mouth and he

also touched the complainant's vagina from the other hand at the same time. Given these circumstances under which the accused touched the complainant's breasts and also the purpose he did that which is for his sexual pleasure as clearly evident, it is manifestly clear that the touching of the complainant's breasts in this case was in fact sexual. In the circumstances, I am satisfied that the prosecution has established the second count beyond reasonable doubt.

7. With regard to the first count, the allegation is that the accused penetrated the complainant's vagina with his finger, without her consent. The complainant first said that the accused fondled her vagina with his fingers and she said that the accused put his finger in and took it out. The complainant was medically examined on the same day. PW3, the doctor who medically examined the complainant said that he observed fresh superficial bruises around the vaginal introitus and he described the introitus as the entrance to the vagina.
8. Therefore, according to PW3, there were no injuries noted by him consistent with the penetration of the complainant's vagina. The injuries he had observed were clearly outside the vagina. He also did not explain whether it is possible according to the medical literature not to find any injuries consistent with vaginal penetration even if there had been such penetration, depending on the circumstances.
9. Accordingly, on the face of it, not only that the medical evidence does not support the evidence of the complainant, it is also inconsistent with the evidence of the complainant who clearly said that the accused penetrated her 'vagina'.
10. Section 207(2)(b) of the Crimes Act, the subsection under which the accused is charged, reads thus;
(2) A person rapes another person if -

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;

11. In the case of *Volau v State* [2017] FJCA 51; AAU0011.2013 (26 May 2017) Prematilake J succinctly explained the difference between the words 'vulva' and 'vagina' as follows;

[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. [Emphasis added]

12. His Lordship Prematilake J in the above dictum clearly emphasized the need for the prosecution to use the term vulva in the particulars of the offence depending on the complainant's statement and the medical report. It is clear that this is a case where the particulars of the offence should have included the word 'vulva' so that it would have read '*... penetrated the vulva or vagina ...*'
13. Given the evidence in this case, there is no doubt that the 15 year old complainant was simply referring to her sexual organ when she used the word 'vagina' and not the medical definition of that word. Therefore, I am satisfied beyond reasonable doubt that the complainant's vulva was penetrated by the accused and that it was done without her consent. Accordingly, the evidence in this case is sufficient to prove the first count of rape beyond reasonable doubt.
14. However, I am compelled to state that it is high time for the prosecution to lift their standards and to become meticulous when drafting charges that falls under section 207(2)(b) of the Crimes Act and also when leading evidence.
15. In the circumstances, I agree with the unanimous opinion of the assessors and I find the accused guilty of both counts as charged.
16. I hereby convict the accused for both counts as charged.



Vinsent S. Perera

JUDGE

Solicitors:

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