

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

CRIMINAL CASE NO: HAC 50 of 2019

STATE

V

JALE RASUSU

Counsel : Ms. Dharshani Rao for the State
Ms. Karen Boseiwaqa for the Accused

Dates of Trial : 16-18 March 2020

Summing Up : 20 March 2020

Judgment : 24 March 2020

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

JUDGMENT

[1] According to the Amended Information filed by the Director of Public Prosecution (DPP), the accused, Jale Rasusu, was charged with the following offence:

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

JALE RASUSU, on the 17 January 2019, at Bua, in the Northern Division, penetrated the vagina of **TR**, a child below the age of 13 years, with his fingers.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days.
- [3] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [4] The Assessors were directed that in order to prove the charge of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) On the specified date (in this case the 17 January 2019);
 - (iii) At Bua, in the Northern Division;
 - (iv) Penetrated the vagina of TR, with his fingers; and
 - (v) At the time TR was a child under 13 years of age.
- [5] Each of the above individual elements were further elaborated upon in my summing up.
- [6] In support of their case, the prosecution called the complainant, TR, and her mother, Makereta Manuo.
- [7] 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 “Admitted Facts” without placing necessary evidence to prove them:

1. Background

- 1.1** TR was a class 3 student, born on 26 May 2009, and the second eldest child of Makereta and Isimeli Matasere.
- 1.2** Jale Rasusu is 34 years, Farmer of Nawailevu, Bua.
- 1.3** In the month of January 2019, TR was 9 years of age. She lived in Navai Village, Bua.

1.4 On 17 January 2019, at around 3.00 p.m., she was in the kitchen having lunch with Meli, her younger brother, Jale Rasusu, her older half-sister Mere and cousin, Nani.

1.5 The kitchen referred to above in paragraph 1.4 is a building constructed out of corrugated iron and timber.

1.6 The kitchen referred to above is the same kitchen in the police photographic booklet photographed by Sergeant 3660 Gasio Rokodulu.

1.7 The Police photographic booklet is tendered as an agreed document.

2. Incident

2.1 On 17 January 2019, close to 4.00 p.m., whilst TR was in the kitchen having lunch with Meli, Mere and Nani, Jale Rasusu walked out and saw his flip flop missing and went to TR and enquired about his flip flop.

3. Caution Interview

3.1 On 5 February 2019, the accused was interviewed under caution at the Labasa Police Station.

3.2 On 18 September 2019, the accused was formally charged.

[8] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

[9] I have summarized the evidence of TR, and her mother, Makereta Manuo, during the course of my summing up.

[10] During her testimony the complainant made no reference to the accused penetrating her vagina with his fingers. However, she testified that the accused had pinched her vaginal area. I wish to highlight that part of her testimony below:

Q. When Jale was holding you like a baby, did anything else hurt?

A. No.

Q. *You said Jale said you were chubby chubby (bani bani). What did you understand by that?*

A. *That I was chubby chubby.*

Q. *What do you understand by that?*

A. *The private part (deladela).*

Q. *You said Jale said you were chubby- what did you understand? What was he talking about?*

A. *I don't know.*

Q. *Earlier you said private part (deladela). Why did you say deladela?*

A. *No answer.*

Q. *Why did you cry? What happened?*

A. *He pinched.*

Q. *Where did he pinch?*

A. *The witness answered belebeleni bukuqu (to mean edge/tip of the bum or back side or in some dialects the vaginal area).*

When the witness was asked to show what area she was referring to she pointed towards her groin or private part.

Q. *How did he pinch?*

A. *The witness demonstrated as to how Jale had pinched her.*

Q. *When Jale pinched you where was your panty at the time?*

A. *It was down.*

Q. *What else did Jale do after that?*

A. *After that Jale went to eat.*

[11] Therefore, consequent to hearing the testimony of the complainant in this case it was clear that the prosecution had failed to establish that the accused penetrated the vagina of TR, with his fingers. Accordingly, I directed the Assessors that the prosecution had failed to establish the elements in relation to the count of Rape beyond reasonable doubt. Therefore, I directed the Assessors that the accused cannot be found guilty for the offence of Rape as charged.

[12] However, I directed the Assessors that even though the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vagina of TR, with

his fingers, but if they find from the available evidence that the accused, on 17 January 2019, at Bua, unlawfully and indecently assaulted TR by pinching her vaginal area; as an alternative, that they were then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged for that offence.

- [13] Therefore, I directed the Assessors that in order for the prosecution to prove Sexual Assault they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case 17 January 2019);
 - (iii) At Bua, in the Northern Division;
 - (iv) Unlawfully and indecently assaulted TR, by pinching her vaginal area.
- [14] Each of the above individual elements were further elaborated upon in my summing up.
- [15] In this case, the accused testified on his own behalf. He totally denies that he removed any of the complainant's clothes or that he pinched the vaginal area of the complainant.
- [16] At the conclusion of the evidence and after the directions given in my summing up, the three Assessors by their unanimous opinions found the accused not guilty of Sexual Assault.
- [17] I have carefully examined the evidence presented during the course of the trial. I have directed 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.
- [18] In my view, the Assessors' opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.
- [19] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charge of Sexual Assault against the accused beyond reasonable doubt.

[20] In the circumstances, I find the accused not guilty and accordingly acquit him of the charge.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 24th Day of March 2020

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