

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 94 of 2019

STATE

V

SIMIONE PAKI

Counsel : Ms. Sadaf Shameem for the State
Ms. Shantel Hazelman with Ms. Lusiana Naikawakawavesi for the Accused

Dates of Trial : 24-27 August 2020

Summing Up : 31 August 2020

Judgment : 3 September 2020

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

JUDGMENT

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the accused, Simione Paki, was charged with the following offences:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 31st day of July 2018, at Nasinu, in the Central Division, unlawfully and indecently assaulted **MWM**, a child under the age of 13 years, by sucking the unclothed breast of the said **MWM**.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vulva of **MWM**, a child under the age of 13 years, with his tongue.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SIMIONE PAKI, between the 1st day of July 2018 and the 14th day of January 2019, at Nasinu, in the Central Division, penetrated the vagina of **MWM**, a child under the age of 13 years, with his finger.

COUNT FOUR

Statement of Offence

ATTEMPTED RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

SIMIONE PAKI, between the 14th day of January 2019 and the 31st day of January 2019, at Nasinu, in the Central Division, attempted to have carnal knowledge of **MWM**, a child under the age of 13 years.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 4 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 Counts 1, 2 and 4 and by a majority decision found the accused guilty of Count 3.
- [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] As could be observed the accused has been charged with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act); two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act and one count of Attempted Rape, contrary to Section 208 of the Crimes Act.
- [6] Thus during my summing up I explained to the Assessors the salient provisions of Section 210 (1) (a) of the Crimes Act; Section 207 (1) and (2) (b) and (3) of the Crimes Act and also Section 208 of the Crimes Act.
- [7] The Assessors were directed that in order to prove the first count of Sexual Assault, the prosecution must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case between 1 July 2018 and 31 July 2018);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Unlawfully and indecently assaulted MWM, the complainant.
- [8] The Assessors were directed that in order to prove the second count of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) During the specified time period (in this case between 1 July 2018 and 14 January 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Penetrated the complainant's vulva, with his tongue; and
 - (v) At the time the complainant was a child under the age of 13 years.

[9] Similarly, the Assessors were directed that in order to prove the third count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this case between 1 July 2018 and 14 January 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his finger; and
- (v) At the time the complainant was a child under the age of 13 years.

[10] The Assessors were directed that in order to prove the fourth count of Attempted Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this instance between 14 January 2019 and 31 January 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Attempted to have carnal knowledge of the complainant;
- (v) At the time the complainant was a child under the age of 13 years.

[11] Each of the above individual elements were further elaborated upon in my summing up in respect of the four counts.

[12] In support of their case, the prosecution called the complainant, MWM, and Amerita Ranadi, her class teacher. The prosecution also tendered as Prosecution Exhibit **PE1** a Rough Sketch of the complainant's residence. The accused gave evidence on his own behalf.

[13] 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 "*Amended Agreed Facts*" without placing necessary evidence to prove them:

1. The name of the person charged is Simone Paki ["Simione"].
2. The Complainant is MWM ["M"], 12 years old of Calvert Place, Davuilevu. The Complainant was born on the 26th of September, 2007. *The birth certificate is hereby tendered by consent.*

3. Simione is the brother of M's grandmother. M refers to Simione as grandfather.
4. M's siblings are Vani Morrell, Luke Morrell, Mosese Morrell, Alick Morrell and Josefa Morrell.

- [14] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as "*Amended Agreed Facts*" without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.
- [15] Based on the said agreed facts the fact that the complainant's date of birth is 26 September 2007, and as such, that she was under 13 years of age at the time of the offending, is established beyond reasonable doubt.
- [16] However, the prosecution must prove all the remaining elements of the respective offences beyond reasonable doubt.
- [17] I have summarized the evidence of all the witnesses in my summing up.
- [18] The complainant clearly testified to the incidents of Sexual Assault, Rape and Attempted Rape that the accused had perpetrated on her, during the period 1 July 2018 to 31 January 2019.
- [19] The accused testified in Court and totally denied the four charges against him. He testified that the allegations made against him are totally false. He stated that the reason why such false allegations were made against him was due to the fact that the complainant and her family wanted him to leave the house, since it was a small house and the house was crowded.
- [20] In my opinion, the defence version cannot be accepted. It is my considered opinion the complainant's evidence can be accepted as truthful, credible and reliable. There was absolutely no reason for her to make up this story against the accused, who is her granduncle.
- [21] The Assessors have found the evidence of the prosecution as truthful and reliable as they have by their unanimous decision found the accused guilty of Counts 1, 2 and 4, and by a majority decision found the accused guilty of Count 3. Therefore, it is clear that they have rejected the position taken up by the defence.

- [22] 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 Counts 1, 2 and 4 and the majority decision of the Assessors in respect of Count 3.
- [23] 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 first count of Sexual Assault, the second and third counts of Rape and the fourth count of Attempted Rape, with which the accused is charged.
- [24] In the circumstances, I find the accused guilty of the first count of Sexual Assault, the second and third counts of Rape and the fourth count of Attempted Rape as charged.
- [25] Accordingly, I convict the accused of the first count of Sexual Assault, the second and third counts of Rape and the fourth count of Attempted Rape as charged.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 3rd Day of September 2020

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