

**IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION**

CRIMINAL CASE NO. HAC 51 of 2020

STATE

v

SW

Counsel: Ms. A. Vavadakua for the State
Ms. L. Manulevu with Ms. K. Marama for the Accused

Date of Hearing: 12th January 2021

Date of Summing Up: 13th January 2021

Date of Judgment: 14th January 2021

JUDGMENT

1. The name of the Complainant and the Accused are suppressed. Hereinafter the Complainant will be referred to as **MM** and the Accused will be referred to as **SW**.
2. The accused is charged with one count of Rape, contrary to section 207 (1) (2) (b) and (3) of the Crimes Act. The particulars of the offence are that:

FIRST COUNT

(Representative Count)

Statement of Offence

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

Particulars of offence

SW, between the 1st day of March 2020 and the 31st day of June 2020, at Wainigadru, in the Northern Division, penetrated the vulva of MM, a child under the age of 13 years, with his fingers.

3. The hearing commenced on the 12th of January 2021 and concluded on the same day. The Prosecution presented the evidence of one witness, the Complainant while the accused and another witness gave evidence for the Defence. The learned Counsel for the Prosecution and the Defence then made their respective closing addresses. Subsequently, I delivered my summing up. In their unanimous opinion, the three assessors found the accused not guilty of the offence of Rape and not guilty of the alternative count of Sexual Assault.
4. Having considered the evidence presented during the hearing, the closing submissions of the parties, the summing up, and the assessors' opinion, I now proceed to pronounce my judgment as follows.
5. According to the evidence presented by the Prosecution and the Defence, I have to determine whether this alleged incident actually happened. If then, has the accused penetrated the vulva of the Complainant with his fingers?
6. I first take my attention to the last question of the evidence-in-chief of the Complainant.

"Meme that thing that you told us about what Ta SW did to you inside the room. Can you tell us is it true, or are you making it up or did someone tell you to say it?"

7. It was a question containing several issues. For that, the Complainant answered "yes". The learned Counsel did not ask any further question to clarify it. Accordingly, this question and the answer create a doubt whether the Complainant affirmed that she made up this story or someone had told her to tell this story, or this alleged incident is true.
8. However, during the cross-examination, the learned Counsel for the Defence asked the Complainant whether she had made up this story, for which the Complainant answered "no". Accordingly, the Complainant stated that she had not made up this story.
9. The Complainant had told her mother about this incident when the mother had inquired her about it. The Complainant said that there were instances where she stayed home with her stepfather alone. According to her evidence, this alleged incident had taken place in the room. No one else in the room when this incident happened. In his evidence, the accused admitted that his father-in-law sometimes goes and relax outside of the house. The Complainant's mother stated that the Complainant had stayed home with the accused and her grandfather when she was at work.
10. I observed the manner the Complainant gave evidence. She was consistent and coherent about this allegation. She consistently said that the accused fondled her "*pepe*". During the cross-examination, she said that she did not make up this allegation. In view of these reasons, I accept her evidence as credible, reliable and truthful evidence. Accordingly, I am satisfied that the accused had fondled her "*pepe*" with his fingers.
11. The learned Counsel for the Prosecution asked the Complainant to show her "*pepe*" using a toy bear. The Complainant pointed out the groin area closer to the genital between the legs of the toy bear as the place of her "*pepe*". However, the Complainant did not explain whether she was dressed up or not when the accused fondled her "*pepe*". The lack of

clarity of how the accused had fondled her "pepe" creates a doubt whether the accused had actually penetrated her vulva with his finger or had just fondled the genital area of the Complainant over her clothes.

12. In view of these reasons, I find the Prosecution has failed to prove beyond a reasonable doubt that the accused had penetrated the vulva of the Complainant with his fingers. However, I am satisfied the Prosecution has established that the accused had fondled the genital area with his fingers.
13. Accordingly, I have no cogent reasons to disagree with the opinion of not guilty given by the assessors regarding the offence of "Rape". However, I have cogent reasons to disagree with their opinion of not guilty for the alternative count of Sexual Assault.
14. In conclusion, I find the accused not guilty of the offence of Rape as charged, but I find him guilty of the offence of Sexual Assault, contrary to Section 210 (1) of the Crimes Act and convict him to the same accordingly.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

14th January 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.