

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 024 OF 2020S

STATE

VS

WALTER WISE

**Counsels : Ms. W. Elo and Ms. A. Devi for State
Ms. L. Ratidara for Accused**

Hearings : 3, 4 and 5 May, 2022.

Judgment : 6 May, 2022.

JUDGMENT

1. On 3 May 2022, in the presence of his counsel, the following information was read over and explained to the accused:

"Count 1

Statement of Offence

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

Particulars of Offence

WALTER WISE sometimes in November, 2019 at Wailoku in the Central Division, penetrated the vagina of L.G, a 7 year old child, with his fingers without her consent.

Count 2

Statement of Offence

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

Particulars of Offence

WALTER WISE, on the 7th day of December 2019 at Wailoku in the Central Division, attempted to penetrate the vagina of L.G, a 7 year old child, with his fingers without her consent.”

2. He said, he understood the two counts in the information and he pleaded not guilty to the same. So, the questions that needed to be answered in this case were as follows:
 - (i) On count no. 1, did the accused rape the complainant (PW1) sometime in November 2019, at Wailoku, in the Central Division?
 - (ii) On count no. 2, did the accused attempt to rape the complainant (PW1) on 7 December 2019, at Wailoku in the Central Division?

3. For the accused to be found guilty of “rape” (count no. 1), the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) penetrated the complainant’s vagina with finger;
 - (iii) without her consent; and
 - (iv) he knew, she was not consenting to 3 (ii), at the time.

4. The slightest penetration of the complainant’s vagina by the accused’s finger (count no. 1), is sufficient to satisfy element 3 (ii) above.

5. “Consent” is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. In this case, we are dealing with a 7 year old female complainant. In law, any child under 13 years

old, the prosecution does not need to prove non-consent by the child. The law presumes that a child under 13 years old cannot, consent to her vagina been penetrated by anyone's finger. This law was put there to protect children.

6. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. The court will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child under 13 years old, it is a presumption in law that, everyone are presumed to know that a child under 13 years old cannot consent to her vagina been penetrated by anyone's finger. Again, the law was put there to protect children.
7. For the accused to be found guilty of "attempted rape" (count no. 2), the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) attempted
 - (iii) to rape
 - (iv) the complainant.
8. The elements of the offence of "rape" are discussed in paragraphs 3, 4, 5 and 6 hereof. For the person to be guilty, the person's conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
9. After the accused pleaded not guilty to both counts on 3 May 2022, the prosecution opened her case. She then called the 10 year old female complainant (PW1) as her first witness. She said, she was born on 22 January 2012. She said, in 2019, she resided with her father, mother, brother and sister, in a house in Wailoku. She said, the accused, whom she called her uncle, also resided in their house. She said, Uncle Walter was her father's best friend.

10. On count no. 1, she said, she recalled sometimes in November 2019. She said, she was watching a cartoon movie on a laptop in their sitting room. She said, she was 7 years old at the time. She said, her mother had gone out of the house to take her father's dinner to work. She said, her father was still at work. She said, her sister was asleep in the bedroom, while her brother was out of the house. She said, it was night time and she and Uncle Walter were watching the cartoon movie on the laptop. She said, Uncle Walter was sitting behind her. She said, they were both sitting on the floor. She said, Uncle Walter told her to sit on his lap. His legs were crossed. She said, she sat on his lap, on top of his crossed legs.
11. The complainant said, when her mother left the house to take her father's dinner, Uncle Walter began to touch her vagina. She said, he touched the inside of her vagina. She said, her vagina is where she urinates from. She said, before Uncle Walter touched her vagina, he first touched her thighs with his hand. She said, after touching the inside of her vagina, Uncle Walter poked her vagina with his left finger after her thumb. She said, when Uncle Walter poked her vagina, it was painful. She said, as Uncle Walter poked her vagina, he was hugging her from the back. The complainant said, she told him to stop, but he ignored her. She said, she cried. She said, her father's brother, Uncle Tui then arrived. She said, only then Uncle Walter stopped poking her vagina.
12. The complainant said, although it was night time, the sitting room was lighted by a light in front of her sister's bedroom. This light, according to the complainant, enabled her to see Uncle Walter. Only she and Uncle Walter were in the sitting room, at the time. She said, she was sitting on Uncle Walter's lap. He was an arm's length away from her. She said, she had known Uncle Walter well as he was her father's friend. She pointed Uncle Walter out in the courtroom as the person who allegedly poked her vagina, at the material time. It appeared that this was a case of recognition, than a case of first time identification.

13. As to count no. 2, the complainant said, she recalled December 2019. She said, she recalled having dinner in the sitting room. She said, Uncle Walter later began to touch her thighs. She said, he only stopped touching her thighs when her mother came out of the bedroom. She said, she later told her mother about the above. The matter was reported to Samabula Police Station. A police investigation was carried out. The complainant was medically examined, and her medical report was tendered into evidence as Prosecution Exhibit No. 1. The prosecution next called Doctor Nikotimo Bakani (PW2) and the complainant's mother (PW3) as their next two witnesses. The above therefore was a summary of the prosecution's case.
14. At the end of the prosecution's case, the court, after considering the parties' submission, found that the accused had a case to answer on count no. 1, but he had no case to answer on count no. 2. The reasons for the court's ruling are in the court record, and accordingly, the accused was found not guilty of count no. 2 and acquitted accordingly. On count no. 1, the standard options were put to him. He chose to exercise his rights to remain silent and called no witness. That was his constitutional right, and nothing negative whatsoever should be imputed to him, for choosing to remain silent.
15. The question now was, whether or not the prosecution had proven the accused's guilt on count no. 1 beyond a reasonable doubt? I had outlined the complainant's evidence on count no. 1 in paragraphs 10, 11 and 12 hereof. She said, Uncle Walter told her to sit on his lap. She said, his legs were crossed. She said, she sat on his lap, facing the laptop. She said, Uncle Walter was behind her, also watching the laptop. She said, Uncle Walter then touched the inside of her vagina and then poked the same with his left finger. She said, she felt pain in her vagina when Uncle Walter did the above. I had carefully listened to the complainant's evidence, as given in court. I had also carefully examined her demeanour. In my view, I find the 10 year old child complainant a credible

witness and I accept her evidence. I accept her version of events. I find, as a matter of fact, that the accused, sometime in November 2019, at Wailoku in the Central Division, penetrated the vagina of the child complainant with his finger.

16. Given the above, I find the prosecution had proven the accused's guilt on count no. 1 beyond a reasonable doubt. I find him guilty as charged on count no. 1 and I convict him accordingly.



Solicitor for State
Solicitor for Accused

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Office of the Director of Public Prosecution, Suva
Legal Aid Commission, Suva

A handwritten signature in blue ink, appearing to read "Salesi Temo".

Salesi Temo
JUDGE