

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 70 of 2022

STATE

vs.

SEMESA NAULAGO

Counsel: Ms. A. Vavadakua for the State
Mr. K. Chang for Accused

Date of Hearing: 13th June 2022

Date of Closing Submission: 14th June 2022

Date of Judgment: 21st June 2022

JUDGMENT

1. The Accused is charged with two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, and one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act. The particulars of the offences are that:

Count 1

(Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern Division, unlawfully and indecently assaulted **ROSEMARY NORA ATIRA**, by touching her breasts.

Count 2

(Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st of January 2016 and the 12th of February 2022, at Koroibici Settlement, in Nausori, in the Eastern Division, unlawfully and indecently assaulted **ROSEMARY NORA ATIRA**, by rubbing his penis between her thighs.

Count 3

(Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern

Division, penetrated the vagina of ROSEMARY NORA ATIRA, a child under the age of 13 years, with his tongue.

Count 4

(Representative Count)

Statement of Offence

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

Particulars of Offence

SEMESA NAULAGO *between the 1st day of January 2016 and the 12th day of February 2022 at Koroibici Settlement, in Nausori, in the Eastern Division, penetrated the vulva or vagina of ROSEMARY NORA ATIRA, with his penis, a child under the age of 13 years.*

2. The Accused pleaded not guilty to the four offences; hence, the matter proceeded to the hearing. The hearing commenced and concluded on the same day, which was on the 13th of June 2022. The Prosecution adduced the evidence of two witnesses, including the Complainant. At the conclusion of the Prosecution's case, the Court found there was no evidence to establish two counts of Sexual Assault; hence, the Accused was acquitted of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The hearing proceeded in respect of counts three and four. The Accused opted to exercise his rights to remain silent, hence, adduced no evidence on behalf of the Defence. The Court then heard the oral submissions of the learned Counsel for the Prosecution and the Defence. They then filed their respective written submissions. Having carefully considered the evidence presented during the hearing and the respective oral and written submissions, I now pronounce the judgment as follows.

Burden and Standard of Proof

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until he is proven guilty.
4. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt. In this matter, the Accused opted to exercise his rights to remain silent and thus did not adduce any evidence for the Defence. The fact that the Accused exercised his right to remain silent must not be considered against the Accused, and it proves nothing.

Elements of the Offences

5. The main elements of the offence of Rape as charged under Count three are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his tongue,
 - iii) The Complainant was a child under the age of 13 years,
6. The main elements of the offence of Rape as charged under Count four are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant was a child under the age of 13 years,
7. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed these offences against the Complainant. There is no dispute about the correctness of the identification. The Accused and the Complainant are known to each other as the Accused is Complainant's uncle. The

Accused never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator. The dispute is whether this alleged incident happened involving the Accused.

8. The Accused admitted that the Complainant's age during the time material to these allegations was under 13 years. Hence, the law recognizes that she was not at an age where she could consent to any sexual activities.
9. Evidence of the slightest penetration of the vagina/vulva of the Complainant with the penis/tongue of the Accused is sufficient to prove the element of penetration.

Admitted Facts

10. The Prosecution and the Defence tendered the following admitted facts under Section 135 of the Criminal Procedure Act. Hence, I consider these admitted facts are proven facts beyond a reasonable doubt. The admitted facts are that:

Background facts:

1. *Mr. Semesa Naulago (herein after referred to as "Mr. Naulago") was born on the 23 March 1983 and is 39 years old, residing at Stage 2, Navutu, Lautoka, Fiji.*
2. *Ms. Rosemary Nora Atira (herein after referred to as "the Complainant") was born on 17 June 2010 and is 11 years old, residing at Koroibici Settlement, Nausori, Fiji.*
3. *That the Complainant and Mr. Naulago are known to one another. Mr. Naulago is the paternal uncle of the Complainant and the cousin brother to the Complainant's father – Mr. Apisai Atira.*

Count One, Two, Three & Four

4. *The Complainant was medically examined on 12 February 2022.*
5. *Mr. Naulago was employed at the Koroibici Investment Store in 2021.*

Ancillary Facts:

6. *Mr. Naulago was interviewed under caution on 16 February 2022 by Police Officer (DC 5475 Peceli Galuvakadua at the Crime Office Nausori Police Station, Nausori, Fiji.*
7. *Mr. Naulago was charged on 17 February 2022 by WDC 4894 Ulamila at the Nausori Police Station, Nausori, Fiji.*

Prosecution's Case

11. The Prosecution alleges that the Accused had penetrated the vagina of the Complainant, who was a child under the age of 13 years at that time, with his tongue and then penetrated her vagina with his penis. The Complainant is the niece of the Accused. According to the Complainant, the Accused had done this more than once when she was in class five. The incident that the Complainant explained in her evidence had taken place at the shop managed by the Accused.

Evaluation of the Evidence of Child Witnesses

12. The Complainant is the main witness of the Prosecution. Therefore, it is prudent to briefly discuss the applicable approach in evaluating the evidence of child witnesses. The Fiji Court of Appeal in **Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018)** held that:

“In R v Powell [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.

It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) that:

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim’s recollection but which do not shake the basic version ‘Their evidence is not a video recording of events.’ In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details”

13. In view of the above passage of Prematilaka JA in **Alfaaz v State (Supra)**, it is essential to note that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many

reasons, such as age and immaturity. Children may not fully understand what they are describing and may not have the words to describe it. They may be embarrassed to talk about incidents of sexual nature or use words they think are wrong and therefore find it difficult to speak.

14. A child may not fully understand the significance of sexual activities, which may be reflected in how they remember or describe them. A child's memory is different from that of an adult. A child's memory can fade even within the short term. When recounting events later, even after a reasonably short time, a child's recall of when and in what order events occurred may not be accurate. A child may be unable to speak of the context in which those events occurred. A child may have difficulty dealing with conceptual questions such as how she felt some time ago or why she did or did not take a particular course of action.
15. Accordingly, evidence of the child witness must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding and ability to communicate. (*vide; Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021).*)
16. Comprehending the above guidelines on evaluating the evidence of child witnesses, I shall now proceed to evaluate the evidence presented before the Court.
17. I first draw my attention to the issue of penetration. Prematilaka JA in **Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15** had meticulously defined the meaning of vaginal area and how to approach the evidence of a child in respect of the issue of penetration. Premathilaka JA held that:

“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.

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 'poked' 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.

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. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

18. The Complainant expressly stated that the Accused put his tongue inside her female private part. She then explained that the Accused put his male private part inside her female private part. The Complainant is an eleven-year-old minor. It is unreasonable to expect an eleven-year-old child to explain sexual conduct using all these technical and scientific terms. The Complainant precisely said that both the male private part and female private part are used to urinate, thus establishing that she was referring to the vaginal area of her body and the penis of the accused. Accordingly, I am satisfied that the Complainant had explained in her evidence that the Accused had penetrated her vagina, if not vulva, with his tongue and then with his penis.
19. The learned Counsel for the Defence contended that the delay in reporting the matter might affect the credibility of the evidence given by the Complainant. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
20. The Complainant was an eleven-year-old minor, and the Accused was her father's cousin's brother. He had told her not to tell anyone about this matter, which was why she had not informed anyone about this matter. Considering her tender age and her relationship with the

Accused, I accept the explanation given by the Complainant for not reporting this incident to anyone immediately.

21. The Complainant maintained her consistency about this allegation during the cross-examination. The Court observed her demeanour and deportment during the cross-examination, where she happily and promptly answered the general questions posed by the learned Counsel for the Defence. However, her facial expressions changed, and she looked scared and frustrated when asked about this incident, though she still managed to answer promptly and coherently.
22. Having considered the above-discussed reasons, I find the Complainant's evidence is credible and reliable, hence I accept them as the truth. I hold the Prosecution has successfully proven beyond reasonable doubt that the Accused had penetrated the vagina, if not the vulva of the Complainant, with his tongue and then with his penis.
23. In conclusion, I find the Accused guilty of one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and convict to the same accordingly.




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

At Suva

21st June 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.