

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 216 OF 2020

BETWEEN : STATE

AND : SAKIUSA SIRINATURAGA

Counsel : Ms K Semisi for the State
Mr T Varinava for the Accused

Date of Hearing : 29 – 30 June 2022

Date of Judgment : 18 July 2022

JUDGMENT

Charges

- [1] The accused is charged with one representative count of sexual assault (count 1), five representative counts of penile rape (counts 2, 4, 6, 8, 10) and five representative counts of digital rape using finger (counts 3, 5, 7, 9, 11).

Burden and standard of proof

- [2] The prosecution carries the burden to prove each charge beyond reasonable doubt. This burden never shifts on the accused. The accused is not required to prove anything.

Elements of sexual assault and rape

- [3] To prove sexual assault as alleged on count one, the prosecution must prove the following elements:
1. That the Accused on the said date and place assaulted the complainant, and
 2. That the assault was unlawful and indecent.

- [4] An assault is the deliberate touching of another person without a lawful excuse. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain.
- [5] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.
- [6] To prove penile rape as alleged on counts two, four, six, eight and ten the prosecution must prove the following elements:
1. That on the said date and place the accused intentionally had sexual intercourse with the complainant, that is, he penetrated the vagina of the complainant with his penis.
 2. That the complainant was a child under the age of 13 years.
- [7] To prove digital rape as alleged on counts three, five, seven, nine and eleven the prosecution must prove the following elements:
1. That on the said date and place the accused intentionally penetrated the vulva or vagina of the complainant, with his finger.
 2. That the complainant was a child under the age of 13 years.
- [8] Slight penetration is sufficient and it is not necessary to prove that the accused ejaculated during sexual intercourse. A person has intention with respect to conduct if he or she means to engage in that conduct. The law is that a child under 13 years is incapable of giving consent to a sexual act.

Agreed facts

- [9] The following facts are agreed:

- Name and date of birth of the accused. The accused was in his early forties at the time of the alleged offending.
- Name and date of birth of the complainant. At the time of the alleged offending she was a child under the age of 13 years.
- The relationship between the accused and the complainant. He is her stepfather.
- The accused looked after the complainant since she was 2 years old.
- The accused and the complainant's biological mother separated in 2019.
- The complainant was left behind with the accused after the separation.
- The complainant's mother took the physical custody of the complainant from the accused on 8 July 2020.

Prosecution case

- [10] The prosecution led evidence from three witnesses.
- [11] The complainant gave evidence of the alleged incidents by reference to year and place of residence. In 2015 she lived in Samabula, Suva. She was in Year 2 and was 7 years old. She recalls an incident when she was asleep with her siblings when she felt someone was touching her back and stomach from inside her t-shirt. When she turned around she saw the accused. He turned away pretending that he didn't do anything. She identified him from the light coming from the living room. He was the only adult male in the house that night. She did not tell anyone about the incident.
- [12] She said that the second time the accused tried to touch her was even worse. First it appeared to be a normal touching of the stomach like the first incident and then he pulled down her undergarments and started to put his penis into her vagina. She said that he put his penis on top of her vagina and that she felt pain on top of her vagina. She tried to push him away but he was too heavy for her. After rubbing his penis on her vagina he released a whitish liquid on her stomach which he wiped with a cloth. She did not report the incident to anyone because she was scared. She said that in 2015 the accused had also fondled her vagina with his finger on more than one occasion.

- [13] In 2016 the complainant moved to live in Votualevu, Nadi with the accused and her family. She was in Year 3 and 8 years old then. She said that the accused did the same thing to her while they were living in Nadi. He would start touching her body and breasts and then undress her and put his penis on top of her vagina in the room they slept. She said that her mother would be in deep sleep and would not know anything. She said that the accused would put his penis on her vagina and would rub it up and down until he released some white liquid stuff. She said that he was too strong for her when she tried to resist him. She did not report to anybody because she trusted him and treated him like her own biological father.
- [14] In 2017 the complainant continued to live in Nadi but in a different house. She was in year 4. The accused did the same thing over and over again. He would touch her body, remove her undergarments and fondle her vagina with his finger and then put his penis on top of her vagina. She did not report the incident to anyone.
- [15] In 2018 the complainant moved to the island of Gau with her family. She was in Year 5. The accused did the same thing to her while they were living in Gau. He would undress her and rub his penis up and down on her vagina until he would release a fluid from his penis. She was scared to tell anyone.
- [16] In August 2018 the complainant moved back to live in Suva with her family. They lived in Wailoku and she attended a primary school from there. While she was living in Wailoku the accused would touch her body, fondle her vagina with his finger and put his penis on top of her vagina. She said that she experienced pain on top of her vagina when he did that to her. She explained that the part of her vagina that was painful was the part where she urinates from. She said that sometimes he would ask her if he could put his penis inside and she would say no.
- [17] In 2019 the complainant went to live with her aunt in Lakena, Nausori with the accused. By that time her mother and her stepdad had separated and was living apart. While living in Lakena the accused had put his penis on her vagina until he would release a white liquid on top of her stomach. He would give her a cloth to wipe the liquid and would tell her to go to sleep. She said that he had put his penis

on her vagina on more than one occasions in 2019 even after they had moved from Lakena and was living in Koronivia. She said that she was too scared to tell anybody.

[18] In 2020 the complainant moved to live in Tamavua. She said that from 1 January 2020 till 6 July 2020 she lived in a storeroom which was converted into a home by the accused. While living there the accused would do the same things, that is, touch her body, remove her clothes and start to put his penis on top of her vagina. She thought of leaving the place but she was concern about her siblings. Eventually in 2020 her biological mother took back custody of her with the assistance of police. When she went to live with her mother, her grandmother asked her whether something was going on between her and her stepfather. She said that she did not give details but she told her grandmother that the accused had been doing it ever since she was in year 2.

[19] The grandmother's evidence is that when the complainant moved back to live with them in 2020 she had a conversation with her regarding her relationship with her stepfather. She said that the complainant told her that the accused had tried to have sex with her. She said that the complainant cried when she told her that.

[20] On 14 July 2020, the complainant was medically examined by Dr Burua at the Medical Services Pacific. Upon examination, the doctor found that the complainant's vaginal hymen was not intact, she had a vaginal discharge and a perineal laceration. The discharge was a thick curdy like mucus at the introitus. The doctor said that the genital injuries were less than a week old and that the injuries and the vaginal discharge indicate penile penetration.

[21] That is a summary of the prosecution case.

Defence case

[22] The accused in his evidence denies the allegations. He said that the allegations surfaced only after his former partner initiated court proceedings to have full custody of their children including the complainant. They both wanted to have

custody of their children. He said that when he learnt of the allegations against him he was shocked. He believes that the complainant's grandparents who are also his aunt and uncle are behind the allegations.

Analysis

- [23] The accused chose to give evidence. However, he does not have to prove anything. If the account given by him is or may be true, then he must be found not guilty. But even the account given by him is entirely rejected, that would not relieve the prosecution of its burden of making sure by evidence of the accused's guilt.
- [24] The prosecution case is substantially dependant on the truth of the complainant's evidence. I am mindful that she is a child and special measures were used to receive her evidence. The purpose of the special measures was to put the witness at ease when giving evidence and not to prejudice the accused. I approach her evidence dispassionately, without sympathy or prejudice. Her evidence need not be corroborated in order to be believed.
- [25] Evidence was led of the complaint to the grandmother to show consistency on the account given by the complainant. However, the complaint was not recent but delayed. Further, the complaint was not voluntarily made but prodded out of the complainant by the grandmother.
- [26] I am mindful that the complainants of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction. Every case is different. It is not necessary that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful.
- [27] In this case the complainant was of a tender age at the time of the first alleged incident. She was seven years old. The accused was an adult male and an authority figure over the complainant and her family. She said that she was too scared to report to anyone. She only reported after she had been removed from

her home and was placed in a safe environment with her grandmother. In these circumstances her conduct of not immediately reporting the allegations when they arose is not unreasonable.

- [28] If the complainant's account that the accused had rubbed his penis on top of her vagina in 2015 is true, then the accused is guilty of sexual assault as charged in count one. Clearly the act of rubbing the penis on top of the vagina of a child without a lawful excuse is contrary to the ordinary standards of respectable people in the community. But if the complainant's account is false or may be false then the accused must be found not guilty.
- [29] I believe the evidence of the complainant. I do not believe that the complainant had fabricated the allegations as suggested by the accused. The complainant struck me as an honest and truthful witness. She had a simple and non-evasive demeanour when she gave evidence. She was not able to remember every detail of the alleged incidents, which is understandable given her age at the time, but she was able to recall some of the incidents.
- [30] On count one, I believe the account of the complainant and I am satisfied beyond reasonable doubt that in 2015 the accused without lawful excuse and indecently assaulted the complainant by rubbing his penis on her vagina.
- [31] On counts two, four, six, eight and ten the prosecution has expressly alleged that the accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis.
- [32] On counts three, five, seven, nine and eleven the prosecution has expressly alleged that the accused had penetrated the vagina or vulva of the complainant with his finger.
- [33] The age of the complainant is not an issue. It is not in dispute that at all material times the complainant was under the age of 13 years. The issue is whether the

accused had penetrated the complainant on the dates and places as alleged in the charges.

[34] Counts two and three incidents allegedly took place in Nadi between 2016 and 2017. On count two, the complainant's account is that the accused had put his penis on her vagina and had ejaculated on her stomach. On count three, the complainant's account is that the accused had fondled her vagina.

[35] Counts four and five incidents allegedly took place on the island of Gau in 2018. The complainant's account is that the accused rubbed his penis up and down on top of her vagina until he ejaculated (count four). She did not say anything about the accused penetrating her vagina with his finger as alleged in count five.

[36] Counts six and seven incidents allegedly took place in Wailoku in 2018. The complainant gave an account of the accused fondling her vagina with his finger and putting his penis on top of her vagina at the part where she urinates from. She said that she experienced pain on her vagina.

[37] Counts eight and nine incidents allegedly took place in Nausori in 2019. The complainant's account is that the accused put his penis on her vagina until he ejaculated. She did not say anything about the accused penetrating her vagina with his finger as alleged in count nine.

[38] Counts ten and eleven incidents allegedly took place in Tamavua in 2020. The complainant's account is that the accused removed her clothes and started to put his penis on her vagina. She did not say anything about the accused penetrating her vagina with his finger as alleged in count eleven.

[39] On counts five, nine and eleven, the prosecution concedes that there is no evidence of penetration as alleged in those charges.

[40] On counts two, four, six, eight and ten, I believe the accounts of the complainant but I am not satisfied beyond reasonable doubt that the accused had sexual

intercourse with the complainant as alleged by the prosecution. The complainant consistently said that the accused had put or rubbed his penis on top of her vagina and at times when the accused asked her whether he could put his penis inside her vagina she would say no. The medical opinion is not conclusive. It does not implicate the accused in anyway.

[41] On counts two, four, six, eight and ten, I am satisfied beyond reasonable doubt that the accused without lawful excuse and indecently assaulted the complainant by rubbing his penis on top of the complainant's vagina. On these counts, I find the accused not guilty of rape but guilty of the lesser offence of sexual assault contrary to section 210 (1) (a) of the Crimes Act.

[42] On counts three and seven, I believe the accounts of the complainant that the accused fondled her vagina with his finger. On these counts I am satisfied beyond reasonable doubt that there was a slight penetration of the complainant's vagina or vulva by the accused using his finger. On counts three and seven I find the accused guilty of digital rape as alleged.

Verdict

[43] The verdict of the Court is:

Count 1 – Guilty – Convicted of Sexual Assault.

Count 2 – Not Guilty of Rape but guilty of a lesser offence – Convicted of Sexual Assault.

Count 3 – Guilty – Convicted of Digital Rape.

Count 4 – Not Guilty of Rape but guilty of a lesser offence – Convicted of Sexual Assault.

Count 5 – Not Guilty – Acquitted of Digital Rape.

Count 6 - Not Guilty of Rape but guilty of a lesser offence – Convicted of Sexual Assault.

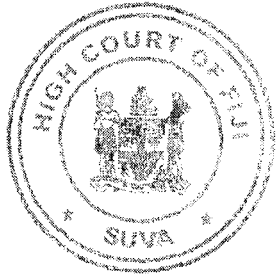
Count 7 – Guilty – Convicted of Digital Rape.

Count 8 - Not Guilty of Rape but guilty of a lesser offence – Convicted of Sexual Assault.

Count 9 – Not Guilty – Acquitted of Digital Rape.

Count 10 - Not Guilty of Rape but guilty of a lesser offence – Convicted of Sexual Assault.

Count 11 – Not Guilty – Acquitted of Digital Rape.



A handwritten signature in black ink, appearing to be "D. Goundar", written over a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused