

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 83 of 2021

STATE

V

SENITIKI TUVOU

Appearances : Ms. Tamanikaiyaroi, U for the State
: Mr. Cakau, J for the Accused

Judgment : 3 June 2022

JUDGMENT

1. The Accused faces a count of rape and three counts of sexual assault.
2. In Count 1, it is alleged that the Accused had, between 1 January 2020 and 31 December 2020, penetrated the vagina of the Complainant with his finger. The remaining 3 counts of sexual assault involve allegations of a number of indecent assaults perpetrated by the Accused on the Complainant in the same period. The acts of sexual assault alleged are touching the Complainant's breast, rubbing his penis against the Complainant's buttocks, and forcing the Complainant to touch his penis.
3. Sexual assault is an indictable offence, triable summarily. What this means is that the offence shall be tried by the High Court or a Magistrate's Court, at the election of the Accused person. In this case, the Accused elected to be tried in the High Court.
4. He pleaded not guilty to all four counts and the matter proceeded to trial.
5. All counts were framed as representative in nature. This means that the Prosecution is alleging there were more than one separate act of offending in each count. In the case of representative counts, the Prosecution is required to prove that between the specified dates

in Count 1, at least one act of rape occurred; and in each of Counts 2-4, at least one act of sexual assault took place. (Section 70 (3) Criminal Procedure Act 2009; see also *Koro v The State* Criminal Appeal No: HAA0048 of 2002L 2 October 2002; *State v Kabaura* Criminal Case No. HAC 117/10, 9 August 2010, at [9]).

6. Based on evidence elicited at trial, the State submits that counts 1 and 2 only are representative and not counts 3 and 4 as the Complainant had given evidence that the alleged incidents in each of these last two counts had only happened once. I treat counts 3 and 4 therefore as not being representative in nature.
7. The State bears the burden of proving the Accused person's guilt beyond a reasonable doubt. The Accused has the presumption of innocence in his favor, which means he is presumed innocent until the Prosecution proves him guilty. He is therefore not obliged to prove his innocence.
8. Before the trial, parties had filed agreed facts. Amongst these are that the Accused is 44 years old and was the de facto partner of the 12 year old Complainant's mother. On or before the alleged offences, the Complainant, her mother and the Accused resided together at a flat in Narere. Also agreed is that the Complainant had been medically examined by a doctor on 17 March 2021. These facts are accepted as proved.
9. The birth certificate, a photographic booklet dated 18 March 2021 and rough sketch map of the scene dated 17 March 2021 were tendered by consent.

Elements

10. For the charge of rape in Count 1, the State is required to prove the following elements:
 1. The Accused
 2. Penetrated the vagina
 3. Of the Complainant, a child under 13 years
 4. With his finger

11. Penetrating the vulva, vagina or anus of the other person to any extent with a thing or any part of a person's body that is not a penis, without the other person's consent is rape.
12. A child under the age of 13 years is not capable of giving consent.
13. For the charges of sexual assault in counts 2 to 4, State must prove for each count that:
 1. The Accused
 2. assaulted the complainant
 3. the assault was unlawful and indecent
 4. the assault was without the consent of the Complainant
 5. the accused knew the complainant was not consenting
14. An assault is unwanted physical contact with another person. It need not be violent or aggressive, nor does it need to result in physical injury.
15. An indecent assault means unwanted physical contact with another person, of the nature which offends the recognized and accepted standards of good behavior. *The Concise Oxford Dictionary* defines it as "unbecoming, immodest or obscene".

The Prosecution case

16. The Complainant was the State's only witness at trial. The alleged incidents happened in 2020 when she was in Class 7 and staying with her mother, the Accused person, her mother's mother, and younger brother in Narere. It was during school time, she said. One afternoon, she was sitting on her bed reading a textbook in a bedroom she shared with her younger brother when the Accused came into the room, put his hand under the hem of her t-shirt, put his hand inside her bra, touched her breast and pulled his hand out again.
17. At the time, her mother was at work; her grandmother was inside her own bedroom next to the Complainant's room. Her brother had gone to play with the neighbors.

18. She was shocked and scared and did not tell anyone at home or at school about what the Accused had done to her. She was afraid to tell her mother for fear her mother might think she was telling lies.
19. The Complainant said the Accused touched her breast in this way on two or three other occasions.
20. On another occasion during school in 2020 when she was in Class 7, the Accused put two of his fingers inside her vagina. This incident happened after she returned from school around 3 o'clock in the afternoon. Her grandmother was in her own bedroom; her brother had gone out to play and her mother was at work. She said after having tea with her brother, he went back to play while she did her homework. Some of her textbooks were in her mother and the Accused person's bedroom so she went there to get her books. When she went into the room, the Accused stood up and closed the door. He made her lie down on her mother's bed, put his hands between her thighs, moved her panties and inserted two of his fingers into her vagina. The Accused did this for about a minute. It was painful. She was wearing mini shorts at the time. She was able to see the Accused with the light coming through the windows from outside. Afterwards, the Accused stayed in the bedroom while she returned to her bedroom to finish her homework.
21. She said she was really scared after this incident. She did not tell anyone and had been scared to tell her mother as sometimes her mother brought work pressures home with her and would get angry with her if the Complainant did not do anything she had been told to do.
22. The third incident the Complainant spoke of what happened when she was in Class 7. It was in the afternoon after school. Her grandmother was resting in her room. Her brother had gone out to play and her mother was still at work. The Accused was at home and was charging his phone in the kitchen. She cleaned the house and swept from inside the bedroom to the sitting room towards the passage and inside the kitchen. In the kitchen, she was bending down to collect the rubbish using the dust pan when the Accused came from behind her, lifted up her skirt and then she felt his penis on her buttocks. She was wearing a skirt and undergarments inside. The Accused was wearing only a *sulu* and no

underwear. He did not say anything to her and after charging his phone, went back to his bedroom. She was scared and wondered why the Accused was doing these things to her.

23. She was scared to tell her mother what was happening to her.
24. The last incident the Complainant recounted happened on a weekend when she was in Class 7. Her mother and grandmother were at home but in their separate rooms. Her mother was sleeping. The Complainant says she was sitting on a settee in the living room with the Accused and her brother. The Accused sat in between her and her sibling. The Accused was wearing only a *sulu* on this day and was shirtless. She said that when her brother looked outside, the Accused suddenly took her left hand and put it on his penis inside his *sulu*, then took it out again. She felt her hand on his penis. Just then, her brother looked around and was shocked. He sensed the Accused had done something to her. She stood up and went to her bedroom, her brother following saying that he would tell their mother.
25. She did not tell her mother and it was her brother who had told their mother after school one day. Her mother asked her and she confirmed what the Accused had done to her. At home, her brother explained to their mother what he saw the Accused do. She also confirmed to her mother what the Accused had done to her. The Accused told her mother that the Complainant and her brother were trying to spoil their relationship.
26. The matter was reported to the Police in 2021 when she was in Class 8. They were at her aunt's place when her brother told her aunt about what he had seen the Accused do to her. Her aunt confronted her and she told her aunt everything that she was going through. Her father was informed and he reported the matter to the Police.
27. The Complainant said the things the Accused did to her affected her school work as she kept thinking about the things he had done to her.

The defence case

28. The accused choose to give evidence. He does so of his own choice though he is not obliged to do so. It is the Prosecution that bears the burden of proving his guilt.

29. The accused says he is married with eight children. From sometime in June or July 2018, he was in a *de facto* relationship with the complainant's mother.
30. In 2020, he had resided in Narere with the complainant's mother, the complainant and her younger brother. Sometimes, the complainant's mother's younger sister and her husband also resided with them. At the time, he was employed at the Forestry Department in Nasinu as a driver and machine operator.
31. That year, the Forestry Department was engaged in a project which took them to Delailasakau within the Waidina catchment. The project started from mid-January to February 2020. During this time, he would leave home on Sunday afternoon for the camp and return Friday afternoon every week. They slept in the villages which were part of the project which lasted for about 3 months.
32. After this project, they got ready for a rehabilitation assignment in Kadavu. While preparing for the trip to Kadavu, he had stayed in Narere for about one week. It was during school time. Sometimes the complainant and her brother stayed with them in Narere, and at other times, they would stay with their aunt.
33. He denies doing to the complainant any of the things she has accused him of doing.
34. He says on one occasion, he had been lying on the settee watching TV. The children were playing in the house when the complainant's brother pushed her and she fell towards him on the couch. He had pushed her away and her younger brother thought that he had touched the complainant's breasts. That evening at their family devotion, he had explained what had happened when the children were playing and how the Complainant's younger brother had thought he had touched the Complainant's breasts.
35. He says he loves the complainant and her brother and gave them everything they had asked him for.
36. The Defence also called the doctor who medically examined the Complainant on 16 March 2021. She found old and healed genital injuries which in her professional opinion

were caused by blunt force trauma by a male erect penis. The hymen was not intact. There was an old healed abrasion on the inner right part right of the labia minora, and an old healed hymenal tear. It is possible to accommodate two fingers without injury.

37. The doctor's account that the complainant had told her about the accused touching her breasts during the COVID-19 lockdown in 2020 and to having forceful sexual intercourse with her a number of times was not put to the complainant in cross-examination.

Analysis

38. The issues for the Court's determination are whether the accused had, between 1st January 2020 and 31st December 2020:

- (i) penetrated the complainant's vagina with two of his fingers while she was 13 years old;
- (ii) sexually assaulted the complainant by touching her breast;
- (iii) sexually assaulted the complainant by rubbing his penis against her buttocks, and;
- (iv) sexually assaulted the complainant by putting her hand on his penis.

39. The accused is known to the complainant. Her was her mother's *de-factor* partner from 2018 to the time of his arrest in 2021 for the charges he is on trial for. In 2020, the complainant and her younger brother had lived with an aunt in Tacirua and sometimes with the Accused and their mother in Narere where these alleged offences are said to have taken place.

40. The prosecution case rests solely on the evidence of the complainant. If I accept as true her account of rape and sexual assault against the accused, then I must find the accused guilty.

41. The evidence of the medical doctor does not, on its own, incriminate the accused. The injuries found on the complainant are consistent with penile rape. The doctor said the injuries could not have been caused by fingering and it is possible for the vagina accommodate two fingers without injury.

42. The accused is not charged with penile rape. The allegation is that he had digitally raped the complainant by inserting two of his fingers into her vagina. It is evidence in respect of this charge that I consider.
43. The defence has pointed out a number of inconsistencies in the complainant's evidence in support of the rape charge. In a statement given to the Police, she stated that she had wanted to scream but the accused had closed her mouth with his hands. She had also told the Police that she had cried but the accused was not bothered by this.
44. She did not say this in her evidence and when asked about it, said that she forgot to mention it.
45. I accept it is possible to forget some of the facts with the passage of time. It might be difficult to believe that one can recount word for word a statement given to the Police and it would be equally suspect if one regurgitated with accuracy the contents of an account earlier given.
46. In *R v B (G)*, [1990] 2 S.C.R. 30, the Supreme Court of Canada stated:

While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean, that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children,

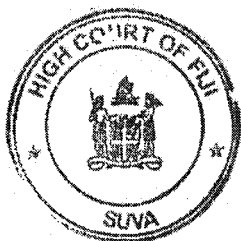
47. The Court in *R v B* (supra) also stated that

... this is not to say that the courts should not carefully assess the credibility of child witnesses [or] that the standard of proof must be lowered when dealing with children...

48. An out of Court statement such as that given to the Police is not evidence. The complainant's Police statement tendered on the basis of prior inconsistency goes only to an assessment of credibility and whether her evidence ought to be believed in light of the omissions the defence has pointed out.
49. On the other hand, her sworn evidence in Court can be relied on as it is made on oath. I have considered this evidence together with what the defence says are inconsistencies between her evidence in Court and her statement to the Police. In assessing her credibility, I consider that the omissions do not shake her basic evidence that the accused had penetrated her vagina with his two fingers. I believe her evidence and explanation for not including some of the things she had told the Police.
50. The inconsistency as to whether she had told her mother about the things she says the accused had done to her, in respect of the rape and sexual assault allegations are in my respectful opinion, peripheral. I do not consider them material to proof of these charges.
51. I make no adverse inference from the long pauses in the complainant's evidence. The intimidating Court environment and the giving of evidence of a sexual nature before strangers cannot be a pleasant one for any witness, let alone a child.
52. The Complainant said she had not told anyone as she had been scared. She said she was scared of her mother who sometimes came home from work and got angry with her for not doing the things she had been told to do. She also said that she was afraid that her mother would think she was telling lies.
53. When they had a family discussion after her brother told her mother about what he had seen the Accused do to her, the Accused had told her mother that her children were trying to spoil their relationship.
54. In this case, it was not until the Complainant's brother told their aunt what he had seen the Accused do that the matter came to light. It seems the Complainant's mother had not reported or done anything even after being told by the Complainant's brother of what he had seen the Accused do to his sister. It is possible the Complainant's mother did not believe her own children.

55. I accept as reasonable the Complainant's evidence for not telling her mother about what the Accused was doing to her.
56. I have considered the defence. I accept there would have been days in 2020 when the accused would camp and not be at home. But the accused person does admit that he had been at Narere for about a week while waiting to go to Kadavu for another work project. He also agrees to being in Narere sometimes when the complainant and her brother were going to school. I accept the complainant's evidence that the accused had been at home in Narere when they were going to school with her brother, and when they returned in the afternoon.
57. I decide the allegations against the Accused and the evidence before the Court dispassionately and without partiality or emotion.
58. On the evidence at trial, I found the complainant to be truthful and credible. I accept her evidence that sometime in 2020 when she was in Class 7, the accused had penetrated her vagina with two of his fingers. At the time, she was under 13 years old and incapable of giving consent to such an act.
59. She said this happened once or twice. This was not clarified. I hold the uncertainty in favour of the Accused and find Count 1 to be not a representative count.
60. I feel sure that in the same year, the accused had touched her breasts on more than one occasion and had also rubbed his penis against her buttocks, and placed her hand on his penis on two separate occasions. Each of these incidents happened when the Complainant was under 13 years old and therefore incapable of giving consent to such acts.
61. The acts of touching the complainant in this manner on these occasions comprising Counts 2-4 were unwanted physical acts and therefore unlawful. They were indecent and offend on all levels of recognized and accepted standards of propriety. They were unbecoming and immodest as they were obscene.

62. I reject as untrue and Accused's denial of the charges against him. I feel sure of his guilt in all of the charges against him and convict him accordingly.




Stainiu F. Bull
Acting Judge

Solicitors:

Office of the Director of Public Prosecutions for the State
Vosarogo Lawyers for the Accused