

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 194 of 2022

STATE

vs.

SAKARAIA BULI

Counsel: Ms. A. Vavadakua for the State
Ms. R. Nabainivalu for Accused

Date of Hearing: 09th to 10th August 2022

Date of Closing Submissions: 11th August 2022

Date of Judgment: 16th August 2022

JUDGMENT

1. The name of the Complainant is suppressed and referred to as "AB"
2. The Accused is charged with two counts of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (a) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

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

Particulars of Offence

SAKARAIA BULI between the 1st day of January 2020 and the 31st of October 2020, at Cautata, in Tailevu, in the Eastern Division, had carnal knowledge of “AB”, a child under the age of 13 years.

COUNT 2

Statement of Offence

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

Particulars of Offence

SAKARAIA BULI on an occasion other than **COUNT 1**, between the 1st day of January 2020 and the 31st day of October 2020, at Cautata, in Tailevu, in the Eastern Division, had carnal knowledge of “AB, a child under the age of 13 years.

COUNT 3

Statement of Offence

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

Particulars of Offence

SAKARAIA BULI between the 1st day of January 2020 and the 31st day of October 2020, at Cautata, in Tailevu, in the Eastern Division, unlawfully and indecently assaulted “AB”, by licking her vulva.

3. Consequent to the plea of not guilty of the Accused, the matter proceeded to the hearing. The hearing commenced on the 9th of August 2022 and concluded on the 10th of August 2022. The Prosecution presented the evidence of five witnesses, including the young Complainant. At the conclusion of the Prosecution's case, the learned Counsel for the

Prosecution conceded that the Prosecution offered no evidence in respect of the second count of Rape, hence, inviting the Court to acquit the Accused of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The Court accordingly held there was no evidence to establish the main elements of count two in the Information, hence, acquitted the Accused of the same. The Accused opted to exercise his right to remain silent and presented no evidence for the Defence.

4. Subsequent to the evidence, the Court heard the closing submissions of the parties. Further to their respective oral submissions, the learned Counsel for the Prosecution and Defence also filed their written submissions. Having carefully considered the evidence and the oral and written submissions filed by the parties, I now proceed to pronounce the judgment on this matter.

Burden and Standard of Proof

5. I first draw my attention to the burden and standard of proof. The Accused person is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused persons is on the Prosecution. It is because the Accused person is presumed innocent until he is proven guilty.
6. 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 offences without any reasonable doubt.

Elements of the Offences

7. The main elements of the first count of Rape 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.

8. The main elements of the offence of Sexual Assault are that:

- i) The Accused,
- ii) Unlawfully and indecently,
- iii) Assaulted the Complainant.

Admitted Facts

9. The Prosecution and the Defence tendered the following Admitted Facts under Section 135 of the Criminal Procedure Act.

- a) *The name of the person charged is SAKARAIA BULI [“Sakaraia”]*
- b) *Sakaraia was born on 12 July 1989 and was 31 years old at the time of the alleged incidents.*
- c) *The name of the complainant is AB [“AB”]*
- d) *“AB” was born on 23 April 2014 and was 6 years old at the time of the alleged incidents.*
- e) *Sakaraia and “AB” are known to each other as Sakaraia and “AB’s father are biological brothers.*
- f) *At the time of the alleged offending, Sakaraia and “AB” both resided in Cautata, Tailevu.*
- g) *The following document is not disputed and hereby tendered by consent:*
 - (i) *The birth certificate of “AB”.*

The Prosecution's Case

10. The Court heard the Complainant's evidence where she explained that her small father "*Ta Lailai*", had put his "*polo*" on her "*pepe*" at the banana patch. The "*Ta Lailai*" had called her to the banana patch and then put his "*polo*" in her "*pepe*" when she went there. On another occasion, "*Ta Lailai*" had put his tongue on her "*pepe*" while in the room. The Complainant further states that the same "*Ta Lailai*" put his "*polo*" in her "*pepe*" and then his tongue on her "*pepe*", and his name is Buli.
11. The Complainant was six years old in 2020. She is now only eight years old. The 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)*).
12. In evaluating the evidence, the Court must first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (*vide Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016, State v Solomone Qurai (IIC Criminal - HAC 14 of 2022)*).
13. According to the Admitted Fact filed under Section 135 of the Criminal Procedure Act, the Accused admitted that he is known to the Complainant as her father's younger brother. Moreover, the Defence admitted that the Accused was present in the village during the time material to this matter. Accordingly, the Defence has not disputed the Complainant's ability of recognizing the Accused if she had seen him.
14. In this case, the child witness gave evidence from a specially arranged child witness room with her mother and one Court Officer. The questions were not directly posed to her but through the Court Clerk, who translated them into *i-taukei*.

15. During the hearing, I observed that the name of the Accused was introduced to her by the learned Counsel for the Prosecution, asking the following question:

Q: "Do you remember your uncle by the name of Sakaraia? Uncle Buli?"

A: Yes,

Q: What do you normally call him?"

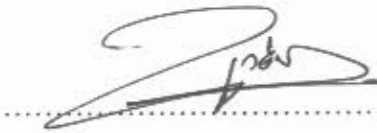
A: 'Ta Lailai' - Small Father"

16. At the conclusion of the re-examination, the learned Counsel for the Prosecution invited the Complainant to the courtroom, asking her to look around and find if Uncle Buli was in the courtroom. The Complainant initially nodded her head, indicating yes, but when the question was translated to her in i-taukei, she nodded, indicating "no". She was then taken back to the child witness room. The learned Counsel for the Prosecution again asked her whether she saw uncle Buli in the courtroom, for which she answered negatively, stating "no".
17. Even though the Defence has not disputed the Complainant's ability to recognize the Accused, the above answers of the Complainant, stating that uncle Buli was not in the courtroom, create a reasonable doubt whether she refers to someone else as uncle Buli and that someone else might have committed this alleged crime against her.
18. The learned Counsel for the Prosecution urged the Court to consider the young age of the Complainant and the circumstance under which she was invited to make the dock identification. Moreover, the learned Counsel for the Prosecution submitted that the father of the Complainant, her aunty and the cousin confirmed in their evidence that the Complainant usually refers to the Accused as uncle Buli.
19. I observed that the Complainant was accompanied by her mother when she was called to the courtroom to make the dock identification. She was holding her mother tightly when she observed the courtroom. Besides expressing shyness and encountering a new environment, I did not find any fear or uneasiness in the Complainant. Be it as it may, she was back to the comfort of the specially arranged witness room, surrounded by the toys and her mother,

when the learned Counsel asked her again whether she saw uncle Buli in the courtroom, for which she answered negatively.

20. Accordingly, the evidence of dock identification, where the Complainant specifically stated uncle Buli was not in the courtroom, creates a reasonable doubt whether the Complainant was referring to another person as uncle Buli and not the Accused. Irrespective of the evidence of the father, aunty and the cousin, where they affirmatively stated that the Complainant usually calls the Accused uncle Buli or "*Tai Lailai*" Buli, the benefit of the above doubt must be held in favour of the Accused. There is no further explanation for this fundamental contradiction in the Complainant's evidence. On this account, I do not proceed to conclude that the Complainant is not a credible witness. Still, I find her an unreliable witness, thus creating doubt about the testimonial trustworthiness of her evidence.
21. In conclusion, I find the Prosecution had failed to prove beyond a reasonable doubt that the Accused had committed these crimes against the Complainant. Wherefore, I hold the Accused not guilty of one Count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and one Count of Sexual Assault, contrary to Section 210 (a) of the Crimes Act and acquitted of the same accordingly.




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

At Suva

16th August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.