

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 195 of 2018

STATE

V

JOVESA RAISEU

Counsel : Ms. S. Swastika for the State.
: Ms. S. Ali for the Accused.

Dates of Hearing : 30, 31 August, 2022
Closing Speeches : 01 September, 2022
Date of Judgment : 02 September, 2022

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "S.M")

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

(Representative Count)

Statement of Offence

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

Particulars of Offence

JOVESA RAISEU between 1st day of March 2017 to 31st day of March 2017, at Lautoka in the Western Division, penetrated the vagina of “S.M” with his penis without her consent.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (c) of the Crimes Act, 2009.

Particulars of Offence

JOVESA RAISEU between 1st day of March 2017 to 31st day of March 2017, at Lautoka in the Western Division, penetrated the mouth of “S.M” with his penis without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

JOVESA RAISEU between 1st day of March 2017 to 31st day of March 2017, at Lautoka in the Western Division, unlawfully and indecently assaulted “S.M” by kissing her breasts.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

JOVESA RAISEU between 1st day of March 2017 to 31st day of March 2017, at Lautoka in the Western Division, unlawfully and indecently assaulted “S.M” by touching her vagina.

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

JOVESA RAISEU between 1st day of July 2017 to 31st day of July 2017, at Lautoka in the Western Division, penetrated the vagina of “S.M” with his penis without her consent.

SIXTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (c) of the Crimes Act, 2009.

Particulars of Offence

JOVESA RAISEU between 1st day of August 2017 to 31st day of August 2017, at Lautoka in the Western Division, penetrated the vagina of “S.M” with his penis without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer as follows:
- a) Count one – Rape;
 - b) Count three – Sexual Assault; and
 - c) Count four – Sexual Assault.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.
4. The accused now faces three counts, the evidence in respect of each count will be considered separately from the other if the accused is guilty of one count, it does not mean that he is guilty of the other counts as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

RAPE

5. In respect of the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
6. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis

without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

7. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element of the offence is not in dispute.
8. The second element is the act of penetration of the complainant's vagina by the penis.
9. The third element is of consent, which means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
10. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
11. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
12. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his

penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.

13. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
14. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.

SEXUAL ASSAULT

15. To prove counts three and four the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by touching or sucking her breast and touching her vagina.
16. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
17. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

18. The final element of assault is the unlawful use of force on the complainant by touching or sucking her breast and touching her vagina.

In this regard this court has to consider:

- (a) whether the force used in touching or sucking the complainant's breast and touching her vagina were sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
19. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching or sucking her breast and touching her vagina.
20. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.
21. Furthermore, the law also provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence.
22. I have directed myself in respect of the above two counts that if the accused is not guilty of sexual assault then I should consider the lesser offence of

indecent assault. To prove the offence of indecent assault the prosecution must prove the following elements of this offence beyond reasonable doubt:

- (a) The accused;
- (b) Unlawfully and indecently;
- (c) Assaulted the complainant by touching her breast and her vagina.

23. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accept it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

24. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.

25. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

26. The complainant informed the court that she was born on 10th February, 2003 and she is educated up to year 11 (Form 5). In March 2017 she was living in Lololo with the accused who is her step father, her mother and siblings.

27. One day between 1st to 31st March, 2017 the complainant was asked by the accused to accompany him to the river to bathe their horse. After this, both went to the bush near the house, in the bush the accused told the complainant to remove her clothes. At this time the complainant was scared of the accused and she asked him *“why I should take off my clothes”*.
28. The complainant was scared that the accused might do something to her so she removed her shorts and lay on the ground after she was told by the accused. The accused removed his clothes and went on top of the complainant after a while he told the complainant not to tell anyone about what he was doing to her.
28. The complainant was lying face up, the accused went on top of her and touched her vagina. The complainant was ashamed and scared the accused had touched her vagina for about 1 minute with both his hands. The complainant did not do anything, when asked by the state counsel *“why didn’t you do anything?”* The complainant did not answer after this, the accused told her to get up and wear her clothes when the accused was touching her vagina she did not say anything as well. The complainant was 14 years old at the time. After this the complainant walked home followed by the accused.
29. In the same month the complainant after having her shower went into the living room she did not expect the accused to be there. The complainant had wrapped herself with a towel. The lights in the room were switched off the accused told the complainant to lie on the bed. The complainant did as she was told at this time she was scared. The accused was naked and he went on top of the complainant and touched her breast.

30. Upon further questioning, the complainant said that she was lying face up and the accused was standing beside her. When asked which version was correct the complainant said when she said the accused laid on top of her. After this, the complainant stood up and wore her clothes. According to the complainant the door in the living room was open when questioned why she did not leave the sitting room when the accused had asked her to lie down the complainant did not answer.
31. The complainant stated when she was lying down she was naked because she was lying down on her towel. When the accused touched her breast she did not say anything he had touched her breast for 1 minute with his hand. After wearing her clothes the complainant went to the house where her mother was having her dinner she did not tell anything to her mother because she was afraid the accused might do something to her. The complainant identified the accused in court.
32. In cross examination, the complainant denied the accused had touched her vagina in the bush. When questioned further she stated that she cannot answer the question why she did not do anything to the accused in the living room or leave the room. The complainant did not answer when it was put to her that she did not do the above because nothing had happened. However, the complainant maintained that the accused had touched her breast that night.
33. The final witness D/Sgt. Paulo Cata informed the court that on 20th October, 2018 he had caution interviewed the accused in the Itaukei language at the Crime Office of the Lautoka Police Station. The interview was conducted in question and answer format by the use of a computer. After the interview had ended the pages were printed and signed by the accused, the witnessing officer and the witness. The witness also prepared the English translation, the Itaukei version of the caution interview of the

accused and the English translation were marked and tendered as prosecution exhibit no's. 1 (a) and 1(b).

34. In cross examination, the witness stated that the answers in the caution interview were given by the accused voluntarily without any intimidation to admit the allegation. The witness also stated that it was not true that he had made up the answers in the caution interview. According to the witness it was the accused who had made those admissions during the interview.

CAUTION INTERVIEW

35. The answers in the caution interview is for this court to consider as evidence but before the admissions are accepted, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for this court to accept or reject the answers given in the caution interview.
36. It is for this court to decide whether the accused made those admissions and whether those admissions are the truth. If this court is not sure whether the accused made the admissions in his caution interview then those admissions will be disregarded. If this court is satisfied that those admissions were made by the accused, then this court should consider whether those admissions are the truth. What weight is to be given to those admissions is a matter entirely for this court.
37. This was the prosecution case.

DEFENCE CASE

38. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
39. From the line of cross examination the defence took the position that the complainant did not tell the truth in court of what had happened. The accused did not at any time have forceful sexual intercourse with the complainant or touch her vagina, touch or suck her breast as alleged. The complainant in cross examination had stated that the accused did not touch her vagina. In respect of touching the complainant's breast in the living room the complainant went to her mother immediately after but did not tell her mother is very unusual and does not make sense.
40. In respect of the admissions in the caution interview the defence is saying that it is a fabrication by the interviewing officer which is at odds with the evidence of the complainant. The accused did not make those admissions and they are not the truth. The defence is asking this court not to believe the complainant and also not give any weight to the admissions in the caution interview. The complainant's evidence is not only impossible but they do not make sense thus making it obvious that the complainant did not tell the truth.
41. Finally, the defence is asking this court to consider the fact that the complainant did not tell anyone about what the accused had done to her or about any threats made to her by the accused. The complainant was not restrained by the accused and there was nothing for the complainant to be afraid of.

42. This was the defence case.

ANALYSIS

43. The prosecution alleges that the complainant and the accused are known to each other. The accused is the step father and they were living in the same house. In the year 2017 the complainant was 14 years of age.
44. Between 1st March, and 31st March, 2017 the accused had forceful sexual intercourse with the complainant without her consent. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time. The acts of the accused did not stop there but continued with the accused one day taking the complainant to the bushes away from the house making her remove her clothes and he also removed his clothes and lay on top of the complainant and touched her vagina.
45. In the same month, when the complainant after having her shower wrapped in a towel went into the living room did not expect to see the accused naked in the living room. He made the complainant lie down on the towel she was wearing, went on top of her and touched her breast. On all occasions the complainant did not consent to what the accused was doing to her.
46. The accused had warned the complainant at the bush not to tell anyone about what he was doing to her. The complainant was so scared of the accused that she did not tell anyone about what the accused was doing to her. The complainant has no motivation to falsely implicate the accused.

47. Although the complainant was taking her time to answer the questions asked she was able to recall and relate what the accused had done to her. The prosecution further states that passage of time 5 years now from 2017 also played a part including the age of the complainant which cannot be ignored.
48. The accused was caution interviewed and he told the truth about what he had done to the complainant during his interview. The admission cannot be fabricated by the police because the police officers could not have known the answers other than the accused. The accused made the admissions voluntarily during the caution interview. The complainant was staying with the accused and was afraid of him therefore she did not complain to anyone about what he had been doing to her.
49. On the other hand, the defence says the allegations are a made up allegation narrated in court by the complainant. A close scrutiny of the evidence given by the complainant would show that whatever she told the court is improbable and it does not make sense, there is a doubt on how the accused would have abused the complainant in the manner described by her she did not say anything or provide any resistance whatsoever. If what the complainant told the court had happened she would have told the court of even a slight resistance but she did not because nothing had happened.
50. In respect of the admissions in the caution interview the defence submits that the accused did not make the admissions and it was a fabrication by the interviewing police officer which is not the truth. This is the reason why the admissions cannot be compared with the evidence of the complainant.

51. The defence is asking this court to consider the evidence of the complainant and the admissions and see if they do make any sense. The narration by the complainant and the admissions noted in the caution interview are at odds with each other.
52. Finally, the defence is asking this court not to give any weight to the evidence of both the prosecution witnesses and the caution interview.

DETERMINATION

53. I would like to once again remind myself that the burden to prove the accused guilty beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
54. In this case the complainant was 14 years of age at the time of the allegations.
55. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I do not accept the evidence of the complainant as truthful and reliable. From my observations the complainant was an uncooperative witness despite understanding the questions asked by the state counsel she did not want to answer the crucial ones.
56. The state counsel had to endure the complainant's mannerism in not being coherent and forthright about what had happened. The demeanour of the complainant was such that no reliance can be placed on her evidence. I have taken note of the complainant's age at the time and the passage of time, however, when the evidence of the complainant is looked at

holistically I am unable to give any weight to her evidence. The complainant when in a tight corner whether questioned by the state counsel or the defence counsel refused to answer the questions posed.

57. In my considered judgment the complainant did not give an honest narration in court. The evidence of the complainant has many doubts which makes her allegations against the accused not worthy of belief. The complainant was also not consistent in her evidence as well.
58. In respect of the caution interview, this court is satisfied that the admissions in the caution interview were not given by the accused and are not the truth of what had happened. Furthermore, the answers in the caution interview do not have an evidentiary basis and/or is not supported by the evidence of the complainant hence it is unfair and prejudicial to give any weight to those admissions.

LATE REPORTING

59. It is obvious that there is an issue of late reporting by the complainant to the police. The delay is about one year and 7 months from the date of the allegations in March, 2017. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*“[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuuford** 186, N.W. 2d at 548 it was decided that:-*

“The mere lapse of time occurring after the injury and the time of the

complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

60. Firstly, I would like to state that there is no evidence before this court as to who had reported the matter to the police and the reason for the delayed reporting to the police. The complainant did not say anything about telling anyone about what she was going through or whether she had gone to the police on her own.
61. Secondly, I do not accept the complainant was told by the accused not to tell anyone and I do not believe she was threatened by the accused at the time she alleged the accused had touched her vagina. In cross examination the complainant on two occasions made it clear that the accused had not touched her vagina hence there was no reason for the accused to threaten the complainant at all.
62. The late reporting in my view is substantial the complainant was a free agent who could have told someone or reported the matter to the police earlier. Although the accused was living with the complainant there is no evidence before the court that he had threatened the complainant at any time or restrained her from reporting anything against him.
63. I accept that the complainant was not restrained by circumstances beyond her control in failing to inform someone including her mother and/or report the matter to the police.
64. There is a reasonable doubt in the prosecution case and therefore it is unsafe to find the accused guilty and convict him of any offences alleged. The accused is acquitted of all counts as charged.
65. This is the judgment of the court.*

*Before I leave it is noted that the sixth count mistakenly has subsection 2 (c) mentioned under the statement of offence which should be 2 (a). There is no prejudice caused by this omission.



Sunil Sharma

Judge



At Lautoka

02 September, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.