

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 43 of 2021

BETWEEN: STATE

PROSECUTION

AND: SERU DIGITAKI

ACCUSED PERSON

Counsel: Ms. Thaggard E. for State
Ms. Diroiroi V. for Accused

Date of Trial: 07 - 08 November 2022

Date of Sentence: 10 November 2022

JUDGMENT

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

[COUNT 1]

Statement of Offence

RAPE: *Contrary to section 207 (1) and (b) of the Crimes Act 2009.*

Particulars of Offence

SERU DIGITAKI, on the 2nd day of July, 2021, at Savusavu in the Northern Division, penetrated the vulva of VASITI MAIDREKETI, with his finger, without the consent of the said VASITI MAIDREKETI.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

SERU DIGITAKI, on the 2nd day of July, 2021, at Savusavu in the Northern Division, unlawfully and indecently assaulted ***VASITI MAIDREKETI***, by fondling his breasts.

[COUNT 3]

Statement of Offence

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

Particulars of Offence

SERU DIGITAKI, on the 2nd day of July, 2021, at Savusavu in the Northern Division, unlawfully and indecently assaulted ***VASITI MAIDREKETI***, by licking her vulva.

2. Consequent to the plea of not guilty entered by the Accused, the matter proceeded to the hearing. The hearing commenced on the 7th of November, 2022 and concluded on the 8th of November, 2022. The Prosecution called four witnesses, including the Complainant. Subsequently, the Accused gave evidence for the Defence. At the conclusion of the hearing, the Court heard the submissions of the learned Counsel for the Prosecution and the Defence. Further to that, two learned Counsel filed written submissions. Having carefully considered the evidence adduced during the hearing and the respective written and oral submissions of the parties, I now pronounce the judgment as follows.

Burden and Standard of Proof

3. The Accused is presumed to be innocent until 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 proven guilty. 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.

Elements of the Offences

4. The main elements of the offence of Rape as charged are that:

- i) The Accused,
- ii) Penetrated the vagina of the Complainant with his fingers,
- iii) The Complainant did not consent to the Accused to penetrate her vagina with his fingers,
- iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his fingers in that manner.

5. 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. The Accused never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator.

6. Evidence of the slightest penetration of the vagina of the Complainant with the fingers of the Accused is sufficient to prove the element of penetration.

7. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom

and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered as consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.

8. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent is not the same as the hope or expectation that the Complainant was consenting.

9. The main elements of the Sexual Assault are that;

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

Admitted Facts

10. The Prosecution and the Defence tendered the following Admitted Facts pursuant to Section 135 of the Criminal Procedure Act; they are that:

- 1) *THAT the Accused's identity is not disputed.*
- 2) *THAT the Complainant is Vasiti Maidreketi, 16 years old (at time of offence), Student of Naverea, Savusavu.*
- 3) *THAT at the time of the alleged offence, the Complainant and the Accused lived in the same neighbourhood, namely, Naverea Settlement, Savusavu.*

- 4) *THAT the Complainant and the Accused are known to one another.*
- 5) *THAT the date of the alleged offending is 2nd July, 2021 at Naverea Settlement, Savusavu.*
- 6) *THAT on the date of the alleged offence the Accused admits to fondling the complainant's breast.*
- 7) *THAT on the date of the alleged offence the Accused admits to licking the complainant's vulva.*

Prosecution's Case

11. The Complainant was sixteen years old in 2021 and residing in Naverea village with her parents. On the afternoon of the 2nd of July 2021, she went to her uncle's house, which is about 8 meters away from her home. While she was at her uncle's house, the uncle had asked her to go and bring him the charger from her house. When she returned with the charger, she found the Accused and one Nasa standing just in front of her uncle's house. She gave the charger to Nasa. The Accused then asked her whether she would like to go somewhere for them to talk, which she refused. The time was around 8 to 8.30 p.m. She then tried to walk to her uncle's house, which the Accused stopped by standing in front of her. He then pulled her to the bathroom, which was just a few steps away from the house.
12. According to the Complainant, she did not shout or alarm the occupants at her uncle's house because there was loud music coming from another nearby home. Besides that, she was scared of the Accused, thinking he would slap her if she tried to shout. The Accused then kissed her on her lips and touched her breasts. He put his finger through her undergarment and penetrated her vagina with his fingers. He then pulled her skirt, pants and undergarments down. Having done that, the Accused went down on his knee and started to lick her vagina. The Court heard the evidence of the Complainant, stating that she was afraid that someone would find her and kept asking the Accused to stop it. The Accused pulled her out of the bathroom and then took her to the nearby vacant house, about seven meters from her uncle's

house. While they were at the empty home, the Complainant told the Accused strongly that she did not want to go to the vacant house. At the vacant house, the Accused removed his pants. She looked away while he was removing his pants. At that time, Uncle, Livai came to the vacant house. The Complainant then pushed the Accused towards uncle Livai and ran away. She returned to Uncle's house and told Josie that the Accused had taken her away when Josie asked her where she was.

13. Meanwhile, a fight started between the Accused and Livai over this incident and the Complainant's aunty, namesake of the Complainant, came to the uncle's house to take the Complainant back home. The namesake asked the Complainant what happened to her, but she did not tell her namesake about this incident. However, her namesake insisted on asking her what happened; then, she related to her namesake what the Accused did to her.

Defence's Case

14. The Accused denies this allegation, stating it was a consensual physical encounter for consensual intimacy. According to the Accused, they had been in a relationship since early 2021 and met a few times privately before this incident. He met the Complainant in front of Levi's house. The Complainant suggested to him that they should go somewhere and talk. It was her idea to go to the bathroom, where they kissed each other, and then went to the vacant house. While they were at the vacant house, Livai came and found them.

15. In view of the evidence, the Prosecution and the Defence presented a different versions of events. In such circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible between the Complainant and the Accused. (vide: *Liberato and Others v The Queen* ((1985) 159 CLR 507 at 515), *R v Li* (2003) 140 A Crim R 288, at 301, *Goundar v State* [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015),)

Credibility and Reliability of Evidence

16. Kulatunga J in **State v Solomone Ourai (HC Criminal - HAC 14 of 2022)** has explained the test of determining the testimonial trustworthiness of the witness on the basis of credibility and reliability of the evidence, where His Lordship held that:

“In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness’s sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness’s testimony. The accuracy of a witness’s testimony involves considerations of the witness’s ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness’s veracity, one speaks of the witness’s credibility. When one is concerned with the accuracy of a witness’s testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]”

17. Consequently, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. 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 Ourai (HC Criminal - HAC 14 of 2022)*).

Evaluation of Evidence

18. I shall first proceed to analyse the evidence of the Complainant. The Complainant was sixteen years old at the time this alleged incident occurred. She was a young adolescent in 2021. Hence, her evidence 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)*).

19. I observed certain contradictions, *inter se* and *per se*, in the evidence given by the Prosecution witnesses, mainly concerning the events of significant consequences that took place during that day. During the evidence in chief, the Complainant said that she did not shout, asking for help from the occupants in her Uncle's house because of the loud music from a nearby home. However, during the cross-examination, the Complainant said that she called Joesi and Joesi responded to her from the house. Moreover, the Complainant demonstrated how she called Joesi and her response during the re-examination. In addition, the Complainant has not stated in her statement made to the Police that loud music prevented her from shouting and asking for help from the occupants inside the house. The Prosecution provided no explanation for this contradiction.

20. The Court further heard the Complainant's evidence stating that the Accused closed the bathroom door when he pulled her inside. Accordingly, she was certain the door was closed. Despite that, the Complainant said during the cross-examination that she was unaware whether the bathroom door was ajar or not. Hence, the Complainant is not consistent about whether the bathroom door was closed when she was inside it with the Accused.

21. In her evidence, the Complainant testified that the Accused removed his pants at the vacant house and then uncle Livai came to them. Interestingly, Livai, in his evidence, did not mention that he found the Accused without his pants. According to Livai, the Accused and the Complainant were standing when he found them inside the vacant house. Further, the Complainant said she ran away when she saw Uncle Livai coming towards them. She pushed

the Accused towards Uncle Livai and then ran away. According to Livai, the Complainant stayed until he punched the Accused. She then ran away from the scene.

22. The Prosecution provided no explanation or reasons for these contradictions and omissions, which are essentially linked to the main dispute of this matter. Hence, these contradictions and omissions adversely affect the credibility and reliability of the evidence given by the Complainant.

23. The bathroom was just a few steps away from Uncle Livai's house. The Complainant said that she did not shout asking for help because she was scared of the Accused, and also, loud music came from a nearby house. Yet, the Complainant admitted during the cross-examination that she shouted at Josie and Josie responded to her. If she was scared of the Accused, it was impossible to shout at Josie, who was inside the house. The response came from Josie, confirms that the music was not that loud. These facts create reasonable doubt about the credibility of the evidence given by the Complainant, stating that she was scared of the Accused and that the loud music prevented her from calling for help.

24. In respect of the third count, the Complainant explained that the Accused pulled her skirt, pant and undergarment down and then went down on his knee to lick her vagina. The Complainant did not explain further how she was standing or whether the Accused forcefully moved or spread her legs to reach her vagina, thus creating doubt whether it was probable for a person to reach the vagina of a woman with his tongue when the woman was standing.

25. The Complainant had not promptly reported this matter to her namesake. She related to her namesake about this incident upon the insistence of the namesake. At that time, the incident of finding the Accused and the Complainant at the vacant house had led to a commotion in the village as the Accused and Livai started to a fight over this incident. Considering the above-discussed contradictory nature of the evidence, there is a doubt whether the Complainant made this allegation against the Accused to save her from the scandal involving the Accused at the vacant house.

26. In view of the above-discussed reasons, there is reasonable doubt about the credibility and reliability of the evidence given by the Complainant. Hence, it is not safe to accept the Complainant's evidence as trustworthy and credible. Based on the above findings, I further conclude that the Prosecution has failed to prove beyond reasonable doubt that the Accused had penetrated the vagina of the Complainant with his fingers without her consent and also indecently and unlawfully fondled her breast and then licked her vulva with his tongue.

27. In conclusion, I hold that the Accused is not guilty of the one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act and two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act as charged in the Information and acquit him of the same accordingly.

28. Both parties have thirty (30) days to appeal to the Fiji Court of Appeal.




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

At Labasa
10 November 2022

Solicitors

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused