

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 211 of 2023

STATE

vs.

SS

Counsel: Ms. J. Fatiaki for the State
Mr. J. Prasad for Accused

Dates of Hearing: 22nd and 23rd January 2024

Date of Closing Submission: 25th January 2024

Date of Judgment: 23rd February 2024

JUDGMENT

1. The names of the two Complainants and the Accused are suppressed.
2. The Acting Director of Public Prosecution, on the 24th of July 2023, filed this Information charging the Accused with two counts of Sexual Assaults, contrary to Section 210 (1) (2) (b) (i) and three counts of Sexual Assaults, contrary to Section 210 (1) (2) (a) of the Crimes Act and one count of Rape, contrary to section 207 (1) (2) (a) (3) of the Crimes Act and one count of Rape, contrary to section 207 (1) (2) (c) (3) of the Crimes Act. The particulars of the offences are:

COUNT 1

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) and (2) (b) (i) of the Crimes Act 2009.*

Particulars of Offence

*SS on the 27th day of June 2023, at Nasimu in the Central Division, procured **JB** to commit an act of gross indecency by placing his penis in **SS**'s anus.*

COUNT 2

Statement of Offence

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

Particulars of Offence

*SS on the same occasion as in Count 1, had carnal knowledge of **JB** a child under the age of 13 years by penetrating his anus with his penis.*

COUNT 3

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) and (2) (b) (i) of the Crimes Act 2009.*

Particulars of Offence

*SS on the same occasion as in Count 1, procured **JB** to commit an act of gross indecency by making **JB** masturbate him.*

COUNT 4

Statement of Offence

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

Particulars of Offence

*SS on the same occasion as in Count 1, penetrated the mouth of **JB** a child under the age of 13 years with his penis.*

COUNT 5

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

SS on the same occasion as in Count 1, unlawfully and indecently assaulted CPT by touching his buttocks.

COUNT 6

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

SS on the same occasion as in Count 1, unlawfully and indecently assaulted CPT by touching his penis.

COUNT 7

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) and (2) (a) of the Crimes Act 2009.*

Particulars of Offence

SS on the same occasion as in Count 1, unlawfully and indecently assaulted CPT by kissing him on the cheek.

3. The Accused pleaded not guilty to all the counts, and the matter proceeded to the hearing. The hearing commenced on the 22nd of January 2024 and concluded on the 23rd of January 2024. The Prosecution presented the evidence of four witnesses, including the two Complainants. At the end of the Prosecution's evidence, the learned Counsel for the Defence

made an application under Section 231 (1) of the Criminal Procedure Act, submitting that the Prosecution failed to adduce evidence to establish that the Accused committed the third and seventh counts as charged in the Information, hence, invited the Court to dismiss those two counts and acquit the Accused from the said two counts. The learned Counsel for the Prosecution conceded to this Application. I accordingly found that the Prosecution failed to present evidence to establish that the Accused committed the third and seventh count as charged in the Information, hence acquitted the Accused of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The matter then proceeded on with the remaining five counts.

4. The Accused exercised his right to remain silent and, hence, adduced no evidence. The Court then heard the closing oral submissions of the parties. Besides the oral submissions, the learned Counsel for the parties also filed written submissions. Having carefully considered the evidence adduced during the hearing and the parties' respective oral and written submissions, I now pronounce the judgment.
5. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is 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 he is 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

6. The main elements of the two counts of Rape are that:
 - i) The Accused,
 - ii) Penetrated the anus and then the mouth of the first Complainant with his penis,
 - iii) The first Complainant was under 13 years old age,

7. The main elements of the first count of sexual assault are that:
 - i) The Accused,
 - ii) Unlawfully and indecently,
 - iii) Assaulted the Complainant by placing his penis on the Complainant's anus, touching the backside and then the penis of the second Complainant, .

8. The main elements of the fifth and sixth counts of Sexual Assaults are that:
 - i) The Accused,
 - ii) Unlawfully and indecently,
 - iii) Assaulted the Complainant by touching the backside and then the penis of the second Complainant.

Prosecution's Case

9. It is the allegation of the Prosecution that the Accused sexually assaulted the two young Complainants at his home on the 27th of June 2023. The first Complainant was nine years old, and the second Complainant was eight years old at the time of this incident. On the 27th of June 2023, the first Complainant saw the Accused was calling him, showing him a chocolate to his home. At that time, the first Complainant was at the guava tree near the Accused's house. He then went to the Accused's place. The Accused then removed his clothes, and so did his own. According to the first Complainant, the Accused had penetrated the anus of the first Complainant with his penis. He then penetrated the mouth of the first Complainant with his penis. Subsequently, the Accused had held the penis of the first Complainant and put it into his mouth.

10. The Court heard the testimony of the second Complainant, where he explained that he saw the Accused coming out of the house with the first Complainant when he went to look for the first Complainant. The Accused had called the second Complainant and his other cousin, Nacanieli. The Accused had touched the penis of the Complainant when he came in. He

then took the second Complainant into a room where he removed the second Complainant's clothes and his own. The Accused tried to kiss the face of the second Complainant, but he managed to avoid it. The Accused then touched the backside of the second Complainant.

11. The two Complainants had informed the father of the second Complainant about this incident when they went back home. The matter was subsequently reported to the Police.
12. During the cross-examination of the two Complainants, the learned Counsel for the Defence suggested to them that none of this alleged incident occurred involving the Accused, which both Complainants denied, ascertaining that the Accused sexually abused them as they explained in their respective evidence.

Evaluation of Evidence

13. The first Complainant was nine years old, and the second Complainant was eight years old at the time this alleged incident occurred. The two Complainants are the main witnesses of the Prosecution. Therefore, it is prudent to briefly discuss the applicable approach in evaluating the evidence of child witnesses. The Fiji Court of Appeal in **Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018)** held that:

"In R v Powell [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.

It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) that:

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version 'Their evidence is not a video recording of events.' In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details”

14. Given the above passage of Premathilaka JA in Alfaaz v State (Supra), it is essential to note that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many reasons, such as age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what they are describing and may not have the words to describe it. They may be embarrassed to talk about incidents of a sexual nature or use words they think are bad and, therefore, find it difficult to speak.
15. A child may not fully understand the significance of sexual activities, which may be reflected in how they remember it or describe it. A child's memory is different from that of an adult. A child's memory can fade even within the short term. When recounting events later, even after a reasonably short time, a child's recall of when and in what order events occurred may not be accurate. A child may be unable to speak of the context in which those

events happened. A child may have difficulty dealing with conceptual questions such as how she/he felt some time ago or why she/he did or did not take a particular course of action.

16. Accordingly, 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).
17. Comprehending the above guidelines on evaluating the evidence of child witnesses, I shall now proceed to evaluate the evidence presented before the Court.
18. During the hearing, the two Complainants were not invited to identify the Accused in Court. The First Complainant said that he had not seen this man before. The Second Complainant had seen this man who sexually assaulted him before. In his closing submissions, the learned Counsel for the Defence took up the issue that the first Complainant had seen the Accused while he was held up in the Police cell. Since the first Complainant was not invited to make an identification of the Accused as the person who committed those alleged sexual assaults on him, I do not find any relevancy in this contention.
19. The Prosecution primarily relied on circumstantial evidence to establish the perpetrator's identity. The Prosecution adduced evidence of various incidents, acts, states of mind, and circumstances related to this incident and the accused. The Prosecution says, when taken together, will lead to a certain, indisputable, and undeniable conclusion that the accused committed this crime.
20. Keith JA in *Naicker v State* [2018] FJSC 24; CAV0019.2018 (1 November 2018) has explained the nature of circumstantial evidence and its evidential effects, where His Lordship held that:

“It is sometimes said that circumstantial evidence is less compelling than direct evidence. What better evidence can there be than that someone saw the defendant commit the crime he is accused of? But eye witnesses can sometimes be mistaken, and they have also been known to lie. That is why it is also said that circumstantial evidence can be just as compelling, if not more so. If I go to bed at night and the ground outside is dry, and I wake up in the morning to find that it is wet – true, I have not actually seen it rain, but the inference that it rained during the night is irresistible. As long ago as 1866, 8 years before Fiji became a Crown Colony, a distinguished judge likened circumstantial evidence to a rope comprised of several chords. He said that “one strand of the chord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.” One of the issues in this case is whether the circumstantial evidence was sufficient to justify the conviction of the petitioner for murder.”

21. The two Complainants said this incident occurred at the house near the guava tree. They both positively identified the house shown in the photographs as where this incident occurred. Furthermore, they pointed out the green door they used to enter the house. The fourth Prosecution witness confirmed that she was renting the house shown in the photographs. She further testified that the landlord's son also lived in one part of the house, which had a green door. The Accused admitted, in the facts tendered under Section 135 of the Criminal Procedure Act, that he was staying at the property owned by his father at Railagi Street, Delaitokatoka, till the 27th of June 2023. The Accused further admitted that the fourth Prosecution witness was residing at the same property with her two sons as tenants.
22. Notably, the fourth Prosecution witness said that she saw the Accused leaving home after she returned home from work on the evening of the 27th of June, 2023. I find no evidence to suggest or create a doubt that the fourth Prosecution witness's elder son, a secondary school student, had gone to the Accused's side of the house.

23. The father of the second Complainant confirmed, pointing to the house in the photographs, that it was the same house that he went to check on the person who allegedly abused the two Complainants. He further affirmed that he met a lady renting there, which was confirmed by the fourth witness in her evidence, stating that she met the boys' father.
24. Considering the description given by the two Complainants about the person who committed these alleged crimes and the above-discussed circumstantial evidence, I could safely conclude that, that circumstantial evidence leads to an indisputable inference that it was the Accused who committed these offences to the two Complainants in his house on the 27th of June 2023.
25. The Court observed certain inconsistencies *per se* and *inter se* in the evidence adduced by the Prosecution witnesses, which the learned Counsel for the Defence argued in his closing submissions in detail. The Complainants said they went home after the incident and specifically mentioned that they did not meet anyone before leaving the compound. The fourth Prosecution witness stated that when she returned home, she saw a few boys near the gate. According to the two Complainants, a few of their cousins were present when they left the place. There is no clarity on whether the fourth witness met those cousins or the two Complainants. Even though she met the two Complainants, the inconsistent nature of the evidence between the two Complainants and the fourth witness is not materially relevant to the alleged event that occurred inside the house.
26. It was submitted by the learned Counsel for Defence that there is a significant discrepancy between the evidence given by the fourth witness and the two Complainants with respect to the timing of this alleged incident. According to the fourth witness, she came home after 7 p.m. According to the two Complainants, it wasn't still dark when they left the Accused's house. This time discrepancy has not affected the credibility of any of these witnesses as there is no clarity on whether the fourth witness met the two Complainants on her return home from work.

27. The first Complainant said that one of his cousins burst into the house when the Accused was allegedly abusing him. He then clarified that his cousin stayed outside and did not come inside the house. I do not find any significant discrepancy or inconsistency between the evidence of the two Complainants regarding the incidents.
28. The learned Counsel for the Prosecution conceded in her closing submissions that there is no compelling evidence to support the first count of sexual assault, which I concur. Hence, I conclude that the Prosecution failed to prove the first count of sexual assault beyond reasonable doubt.
29. In respect of the second count of rape, the first Complainant testified that the Accused put his balls in his bum bum. The two Complainants used dolls to explain the incidents that occurred inside the Accused's house. The first Complainant pointed out the backside closer to the anus of the doll as the place where the Accused put his balls. Moreover, the first Complainant pointed out the male genital area of the body map as the place of the balls of the Accused.
30. Premathilaka JA in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15 has meticulously outlined how to approach the evidence of a 14-year-old child in respect of the issue of penetration. Premathilaka JA held that:

"Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina.

People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.


Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the

age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

31. The two Complainants in this matter were nine and eight years old, respectively. Hence, the Court must carefully evaluate their evidence, considering the strengths and weaknesses related to their age, mental development, understanding, and communication ability. The Court could not expect them to explain all these details using the words and terms that adults usually employ. Considering the evidence of the first Complainant that the Accused put his ball in his bum bum and that he felt pain in his anal area, I am satisfied there was an intrusive penetration of the first Complainant's anus with the penis of the Accused, thus establishing the element of penetration.
32. The first Complainant further explained in his evidence that the Accused then put his balls in his mouth. Subsequently, the first Complainant demonstrated how the Accused put his genital part in his mouth using the dolls and the body map. Considering this evidence, I am satisfied that the Accused had penetrated the mouth of the first Complainant with his penis.
33. In respect of the fifth and sixth counts of sexual assault, the second Complainant testified that the Accused touched the front side of his genital area when he got into the house. He then removed his clothes, and the Accused touched his backside. The second Complainant demonstrated these incidents using the dolls and body map.
34. Considering the reasons discussed above, I am satisfied that the evidence given by the four Prosecution witnesses is credible and reliable; hence, I accept them as the truth. Accordingly, I find the Prosecution has proven beyond reasonable doubt that the Accused had penetrated the anus of the first Complainant with his penis and then penetrated the mouth of the Complainant with his penis. The Accused then indecently and unlawfully touched the penis and backside of the second Complainant. I further find that the Prosecution failed to prove the first count of sexual assault beyond a reasonable doubt.

35. In conclusion, I find the Accused not guilty of the first count of Sexual Assault, contrary to section 210 (1) (2) (b) (i) of the Crimes Act and acquitted of the same. Furthermore, I find the Accused guilty of second count of Rape, contrary to Section 207 (1) (2) (a) (3) of the Crimes Act, fourth count of Rape, contrary to Section 207 (1) (2) (c) (3) of the Crimes Act and fifth and sixth counts of Sexual Assault, contrary to Section 210 (1) (2) (a) of the Crimes Act, and convict to the same accordingly.




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

At Suva

23rd February 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

John Prasad Law for the Accused.