

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 238 of 2024

STATE

vs.

JIMILAI VOLAU

Counsel: Ms. S. Bibi with Mr. J. Vaurasi for the State
Mr. S. Ravu with Ms. G. Volavola for Accused

Dates of Hearing: 28th and 29th January 2025

Date of Closing Submission: 10th February 2025

Date of Judgment: 07th March 2025

JUDGMENT

1. On 27 January 2025, the Director of Public Prosecutions filed this amended Information, charging the accused, Mr. Jimilai Volau, with one count of Rape, contrary to Section 207 (1), (2) (b), and (3) of the Crimes Act. The particulars of the offence are as follows:

COUNT 1

Statement of Offence

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

Particulars of Offence

JIMILAI VOLAU on the 12th day of September, 2024 at Vugalei Settlement, Lami, in the Central Division, penetrated the vulva of ANI SAVIKA OISALI RATAVO, a child under the age of 13 years, with his finger.

2. Following the Accused's plea of not guilty, the matter proceeded to the hearing, which began on 28 January 2025 and concluded on 29 January 2025. The Prosecution presented the evidence of two witnesses, including the Complainant, while the Accused testified for the Defence. The Court then heard the closing submissions of the Learned Counsel of the Prosecution and the Defence. In addition to their oral submissions, both Counsel filed written submissions. Considering the evidence presented by the parties and respective oral and written submissions, I now pronounce the judgment on this matter.

3. I begin by addressing the burden and standard of proof. The Accused is presumed innocent until proven guilty. The burden of proof for the charge against the Accused lies with the Prosecution, as the Accused is presumed 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.

Main Elements of the Offences

4. The main elements of Rape are:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his finger,
 - iii) The Complainant was a child under the age of 13 years at the time of the alleged penetration,

5. The first element is the identity of the Accused. It is the Prosecution's responsibility to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant.

6. Evidence of even the slightest penetration of the Complainant's vagina by the Accused's finger is adequate to establish the element of penetration.
7. The Defence did not dispute the Complainant's age. At the time of this incident, the Complainant was five years old.

Admitted Facts

8. The Accused tendered the following facts as the admitted fact pursuant to Section 135 of the Criminal Procedure Act.
 1. *The Accused person's name is Jimilai Voau alias Jim (hereinafter referred to "Jim").*
 2. *That the Complainant's name is Ani Saviko Oisali Ratavo (hereinafter referred as Ani").*
 3. *That Jim and Ani are not related.*
 4. *Ani resides at Vugalei Settlement, Lami where CDP is located.*
 5. *That Jim's usual place of residence is Tovata Settlement, Nasinu.*
 6. *It is agreed that the admissibility and the contents of the following document in dispute and the same is tendered by consent and annexed as follows:*
 - (i) *Birth Certificate of Ani Saviko Oisali Ratavo.*

Prosecution's Case

9. On 12 September 2024, the Complainant was playing with her younger brother on their porch, just a few steps away from her grandfather's house. Her mother was at work, and her father was not home at that time. The Accused came and sat on a chair, and then the Complainant went and sat on him. The Complainant knew the Accused, as he had stayed with them and was a good friend of her uncle.

10. While she was sitting on the Accused, he put his hand through her grey coloured pants and the undergarment and put his finger inside her vagina. According to the Complainant's testimony, she experienced pain and found blood on her undergarment after the incident. She consistently refuted the suggestion made by the Learned Counsel for the Accused, asserting that the Accused did not touch her as he left the premises after handing the key to her grandfather. She firmly stated that her grandfather was not weeding the cassava plants when the Accused arrived, but was instead watching adult films on his mobile phone inside the house.

11. The Complainant confided her mother about this incident when she returned home in the evening. The mother subsequently reported the matter to the Police on the same day. In her testimony, the mother asserted that the Complainant had informed her about this incident upon returning home.

Defence's Case

12. The Accused denied the allegation but acknowledged being at the scene of the incident that day. He had spent the previous night at the container home belonging to the Complainant's grandfather. After completing his morning chores, he went to the grandfather's house to return the key before heading into town. He noticed the Complainant and her younger brother playing near the porch. However, he firmly stated that he neither spoke to nor touched the Complainant.

Evaluation of Evidence

13. The Complainant was five years old in 2024. The evidence provided by the child witness must be evaluated by considering factors relevant to her strengths and weaknesses concerning her age, mental development, understanding, and ability to communicate. (*vide*; **Nalawa v State [2021] FJCA 188; AAU014.2016** (25 June 2021)).

14. In evaluating the evidence, the Court must first examine the credibility and veracity of the evidence presented by the witness and then proceed to assess its reliability and accuracy. In doing so, the Court should take into account the promptness or spontaneity, probability or improbability, consistency or inconsistency, contradictions or omissions, interest or bias, as well as the demeanour and conduct in Court, along with any corroborating evidence where relevant. (vide **Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**
15. The Court needs to consider two aspects in deciding the testimonial trustworthiness of the evidence: the credibility of the witness evidence and the reliability of the evidence. Credibility is linked to the correctness or the veracity of the evidence, while reliability is related to the 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 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**
16. The Accused is not required to give evidence and does not have to prove his innocence, as it is presumed by law. However, the Accused provided evidence for his defences in this case. Therefore, the evidence presented by the Accused must be considered when determining the facts of this case.
17. The Accused bears no legal burden to prove his innocence by supplying evidence. The archaic yet highly esteemed passage of Lord Reading C.J. in **Abramovitch (1914) 84 L.J.K.B. 397** states that:

"If an explanation has been given by the Accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the Accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch

as the crown would then have failed to discharge the burden impose upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the Accused. The onus of proof is never shifted in these cases; it always remains on the Prosecution.”

18. If the Court believes that the evidence presented by the Accused is either true or may be true, it must find the Accused not guilty of the offence. Even if the Court dismisses the Accused's account, this does not necessarily imply that the Prosecution has proven the Accused's guilt. The Prosecution must demonstrate that it has established, based on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed the offence outlined in the information. (**vide; Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022), Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Abramovitch (1914) 84 L.J.K.B 397)**)

Identification

19. The Learned Counsel for the Defence submitted that the credibility of the Complainant's evidence is undermined by her failure to correctly identify the Accused as the person who committed this crime during the dock identification, as well as the fact that the description provided by the Complainant does not match the physical features of the Accused.
20. When asked to identify the Accused during the dock identification, the Complainant pointed to an empty space in the courtroom. She explained that the Accused had long hair, was tall, and had a fair complexion. Nevertheless, the Accused admitted that he was at the location where the Complainant and her younger sibling were playing. The Accused had lived with the Complainant's family in the same compound for several months. The Complainant, her mother, and the Accused confirmed that the Accused is known as Jim. According to the Complainant, she sat on the Accused when he was seated on a chair, and then he committed this crime. Considering the very young age of the Complainant and the limitations associated with her youth in observation and communication, I do not find that her failure to correctly

identify the Accused at the dock identification, as the person she referred to as Jim, who committed the crime, adversely affected the credibility and reliability of her evidence.

21. Aside from the long hair, I do not find any other physical descriptions provided by the Complainant that are manifestly different from the actual appearance of the Accused. Therefore, it does not adversely affect the credibility and reliability of the Complainant's evidence.

Penetration

22. I shall now turn my attention to the issue of penetration. Premathilaka JA, in **Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15**, meticulously defined the meaning of the vaginal area and how to approach the evidence of a child regarding the matter 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."

23. The Complainant expressly stated that the Accused touched her "Pepe" with his hand, and she felt his finger inside her "Pepe". She then pointed out the female genital area of the diagram given to her, indicating the location of the Pepe". He did so through her clothes.

24. The Complainant is a five-year-old minor. It is unreasonable to expect a five-year-old child to explain sexual conduct using all these technical and scientific terms. There is no doubt that she was referring to the vaginal area of her body when she explained that he put his fingers inside her “Pepe”. Accordingly, I am satisfied that the Complainant explained in her evidence that the Accused penetrated her vagina with his finger.

Recent Complaint

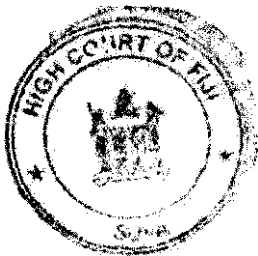
25. The Prosecution presented the evidence of the mother of the Complainant as a witness of the recent complaint. The mother explained that the Complainant related to this incident when she returned home. She promptly reported the matter. The Complainant had told her that the accused had “drank her Pepe”, explaining that he penetrated her vagina with his finger.
26. The Supreme Court in **Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)** enunciated the purpose and scope of the evidence of a recent complaint, where Gates CJ outlined that:

“[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant’s evidence.”

27. The Complainant informed the mother about the nature of the sexual assault allegedly committed by the Accused, using her own words. Therefore, the mother’s testimony enhances the credibility and reliability of the Complainant’s evidence.

28. The reasons I outlined above have persuaded me to conclude that the Complainant's evidence is credible and reliable; therefore, I accept her evidence as the truth.
29. I will now turn to the Defence's evidence. The Accused denied this allegation, asserting that the incidents alleged by the Complainant had never occurred. As discussed previously, I do not believe the Complainant fabricated this allegation. Therefore, I do not consider the Accused's evidence to be true or even potentially true. Consequently, the Accused's evidence did not create any reasonable doubt regarding the Prosecution's case.
30. In conclusion, I find that the Prosecution has proven beyond reasonable doubt that the Accused committed the offence of Rape as charged in the Information. Therefore, I hold the Accused guilty of one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act and convict him accordingly.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe".

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

At Suva

07th March 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.