

IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 77 OF 2022
High Court No. HAC 216 of 2020

BETWEEN : **SAKIUSA SIRINATURAGA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**

Counsel : **Appellant in person**
Ms K. Semisi for Respondent

Date of Hearing : **18 April 2024**

Date of Ruling : **30 April 2024**

RULING

1. The appellant [Sakiusa Sirinaturaga] was tried in the High Court at Suva. He was charged and convicted of 6 counts of sexual assault and 2 counts of digital rape against the stepdaughter. All the charges were representative counts covering a period of 5 years of sexual abuse from 2015 to 2020.
2. On 10 February 2022 the appellant was sentenced to 14 years imprisonment with a non-parole period of 11 years imprisonment.
3. At the trial, the prosecution led evidence from 3 witnesses and a summary of the prosecution case from the judgement is set out below:

'[11] The complainant gave evidence of the alleged incidents by reference to year and place of residence. In 2015 she lived in Samabula, Suva. She was in Year 2 and was 7 years old. She recalls an incident when she was

asleep with her siblings when she felt someone was touching her back and stomach from inside her t-shirt. When she turned around she saw the accused. He turned away pretending that he didn't do anything. She identified him from the light coming from the living room. He was the only adult male in the house that night. She did not tell anyone about the incident.

[12] She said that the second time the accused tried to touch her was even worse. First it appeared to be a normal touching of the stomach like the first incident and then he pulled down her undergarments and started to put his penis into her vagina. She said that he put his penis on top of her vagina and that she felt pain on top of her vagina. She tried to push him away but he was too heavy for her. After rubbing his penis on her vagina he released a whitish liquid on her stomach which he wiped with a cloth. She did not report the incident to anyone because she was scared. She said that in 2015 the accused had also fondled her vagina with his finger on more than one occasion.

[13] In 2016 the complainant moved to live in Votualevu, Nadi with the accused and her family. She was in Year 3 and 8 years old then. She said that the accused did the same thing to her while they were living in Nadi. He would start touching her body and breasts and then undress her and put his penis on top of her vagina in the room they slept. She said that her mother would be in deep sleep and would not know anything. She said that the accused would put his penis on her vagina and would rub it up and down until he released some white liquid stuff. She said that he was too strong for her when she tried to resist him. She did not report to anybody because she trusted him and treated him like her own biological father.

[14] In 2017 the complainant continued to live in Nadi but in a different house. She was in year 4. The accused did the same thing over and over again. He would touch her body, remove her undergarments and fondle her vagina with his finger and then put his penis on top of her vagina. She did not report the incident to anyone.

[15] In 2018 the complainant moved to the island of Gau with her family. She was in Year 5. The accused did the same thing to her while they were living in Gau. He would undress her and rub his penis up and down on her vagina until he would release a fluid from his penis. She was scared to tell anyone.

[16] In August 2018 the complainant moved back to live in Suva with her family. They lived in Wailoku and she attended a primary school from there. While she was living in Wailoku the accused would touch her body, fondle her vagina with his finger and put his penis on top of her vagina. She said that she experienced pain on top of her vagina when he did that to her. She explained that the part of her vagina that was painful was the part where she urinates from. She said that sometimes he would ask her if he could put his penis inside and she would say no.

[17] In 2019 the complainant went to live with her aunt in Lakena, Nausori with the accused. By that time her mother and her stepdad had separated and was living apart. While living in Lakena the accused had put his penis on her vagina until he would release a white liquid on top of her stomach. He would give her a cloth to wipe the liquid and would tell her to go to sleep. She said that he had put his penis on her vagina on more than one occasions in 2019 even after they had moved from Lakena and was living in Koronivia. She said that she was too scared to tell anybody.

[18] In 2020 the complainant moved to live in Tamavua. She said that from 1 January 2020 till 6 July 2020 she lived in a storeroom which was converted into a home by the accused. While living there the accused would do the same things, that is, touch her body, remove her clothes and start to put his penis on top of her vagina. She thought of leaving the place but she was concern about her siblings. Eventually in 2020 her biological mother took back custody of her with the assistance of police. When she went to live with her mother, her grandmother asked her whether something was going on between her and her stepfather. She said that she did not give details but she told her grandmother that the accused had been doing it ever since she was in year 2.

[19] The grandmother's evidence is that when the complainant moved back to live with them in 2020 she had a conversation with her regarding her relationship with her stepfather. She said that the complainant told her that the accused had tried to have sex with her. She said that the complainant cried when she told her that.

[20] On 14 July 2020, the complainant was medically examined by Dr Burua at the Medical Services Pacific. Upon examination, the doctor found that the complainant's vaginal hymen was not intact, she had a vaginal discharge and a perineal laceration. The discharge was a thick curdy like mucus at the introitus. The doctor said that the genital injuries were less than a week old and that the injuries and the vaginal discharge indicate penile penetration.'

4. The case for the defence was:

Defence case

'[22] The accused in his evidence denies the allegations. He said that the allegations surfaced only after his former partner initiated court proceedings to have full custody of their children including the complainant. They both wanted to have custody of their children. He said that when he learnt of the allegations against him he was shocked. He believes that the complainant's grandparents who are also his aunt and uncle are behind the allegations.'

The Appeal

5. The appellant by letter dated 26 July 2022 submitted his Notice of Appeal against conviction and sentence. This makes this appeal, a timely one. There was 1 ground of appeal claimed in this initial notice of appeal, namely, the trial judge erred in law when he failed to take into consideration the totality of the evidence regarding penetration in relation to digital rape counts he was convicted of.

6. The appellant on 18 December 2023 filed 3 additional grounds of appeal and submissions, in lieu of the initial grounds of appeal. In total 4 grounds were filed by the appellant and they are as follows:
 - i) That the quality of evidence upon which the trial court convicted the appellant was flawed, inadequate and insufficient for the court to safely convict
 - ii) That the trial judge erred in law and fact in not taking into consideration the credibility gap unreported case as foolproof to the accusation
 - iii) That under all circumstances and consideration of all the evidence of the case, the finding of the trial judge is unsafe, unfair and unsatisfactory
 - iv) The trial judge erred in law when he failed to take into consideration the totality of the evidence regarding penetration in relations to digital rape.

Leave Application – relevant law

7. Under Section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is ‘reasonable prospect of success’ [see Caucu v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Wagasaga v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and Naisua v State [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from

non-arguable grounds [see Nasila v State [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

Grounds of Appeal Assessment

8. **Ground 1 & 2:** alleges the evidence relied upon the trial judge was flawed, inadequate and insufficient to safely to convict the appellant. In support of this ground of appeal, the appellant makes the following submission:
- a. The investigation irregularities that led to the charges was not rigorously scrutinised before arriving at the ruling. No irregularities were specified.
 - b. The lack of trial judge's consideration that 5 years of alleged sexual abuse, was likely to lead to fabrication of the evidence by the complainant
 - c. The evidence of the complainant was not voluntarily made, instead it was "prodded out of her"
 - d. Trial judge should have been more careful not to accept the evidence of the delayed complaint of the victim.
9. This submission if believed would suggest that the appellant was being tried of totally different case. The analysis of the trial judge of the evidence and why he believed the complainant is set in the judgement as follow:

"25] Evidence was led of the complaint to the grandmother to show consistency on the account given by the complainant. However, the complaint was not recent but delayed. Further, the complaint was not voluntarily made but prodded out of the complainant by the grandmother.

[26] I am mindful that the complainants of sexual offences can react in different ways. Some may complain immediately. Others may feel, for example, afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction. Every case is different. It is not necessary that a late complaint is bound to be false, any more than an immediate complaint would definitely be truthful.

[27] In this case the complainant was of a tender age at the time of the first alleged incident. She was seven years old. The accused was an adult male and an authority figure over the complainant and her family. She

said that she was too scared to report to anyone. She only reported after she had been removed from her home and was placed in a safe environment with her grandmother. In these circumstances her conduct of not immediately reporting the allegations when they arose is not unreasonable.

[28] If the complainant's account that the accused had rubbed his penis on top of her vagina in 2015 is true, then the accused is guilty of sexual assault as charged in count one. Clearly the act of rubbing the penis on top of the vagina of a child without a lawful excuse is contrary to the ordinary standards of respectable people in the community. But if the complainant's account is false or may be false then the accused must be found not guilty

[29] I believe the evidence of the complainant. I do not believe that the complainant had fabricated the allegations as suggested by the accused. The complainant struck me as an honest and truthful witness. She had a simple and non-evasive demeanour when she gave evidence. She was not able to remember every detail of the alleged incidents, which is understandable given her age at the time, but she was able to recall some of the incidents

[30] On count one, I believe the account of the complainant and I am satisfied beyond reasonable doubt that in 2015 the accused without lawful excuse and indecently assaulted the complainant by rubbing his penis on her vagina."

10. The failure of the appellant to identify the specific aspects of the judgment in this case, preferring instead to make general remarks that are not substantiated by the evidence at the trial is reason why this ground of appeal have no merit. At the trial all he could advance in his defence is denial of the acts the subject of the charge. He did not raise any of the issues now submitted as grounds of appeal.
11. **Ground 3:** On the basis of the trial judge's analysis of the evidence set out in paragraph 9 above, there is nothing unfair or unsafe by the verdict. There was sufficient evidence properly adduced at the trial to support the verdict.
12. **Ground 4** – alleges that the trial judge failed to consider the evidence of penetration in the totality of the evidence. I have some difficulty understanding exactly what is the exact ground of appeal here. The trial in dealing with the issue of penetration stated as follows

"[39] On counts five, nine and eleven, the prosecution concedes that there is no evidence of penetration as alleged in those charges.

[40] On counts two, four, six, eight and ten, I believe the accounts of the complainant but I am not satisfied beyond reasonable doubt that the accused had sexual intercourse with the complainant as alleged by the prosecution. The complainant consistently said that the accused had put or rubbed his penis on top of her vagina and at times when the accused asked her whether he could put his penis inside her vagina she would say no. The medical opinion is not conclusive. It does not implicate the accused in anyway.


[41] On counts two, four, six, eight and ten, I am satisfied beyond reasonable doubt that the accused without lawful excuse and indecently assaulted the complainant by rubbing his penis on top of the complainant's vagina. On these counts, I find the accused not guilty of rape but guilty of the lesser offence of sexual assault contrary to section 210 (1) (a) of the Crimes Act

[42] On counts three and seven, I believe the accounts of the complainant that the accused fondled her vagina with his finger. On these counts I am satisfied beyond reasonable doubt that there was a slight penetration of the complainant's vagina or vulva by the accused using his finger. On counts three and seven I find the accused guilty of digital rape as alleged."

13. The above assessment is clear and correct in law. The issue of penetration is considered and explains why the appellant was not found guilty of any of the rape charges. Ground 4 is dismissed as having no merit.
14. The appeal against sentence was abandoned by the appellant when the case was mentioned on 18 April 224, and is therefore not addressed here.

ORDER

Leave to appeal against conviction refused.



Isikeli U Mataitoga
Resident Justice of Appeal