

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC. 330 of 2015**

**STATE**

**V**

**SAILOSI KADANAVATU**

**Counsel** : Ms. L. Bogitini for State  
Ms. T. Kean for the Accused

**Dates of Hearing** : 17<sup>th</sup> May to 18<sup>th</sup> May 2016

**Date of Summing Up:** 19<sup>th</sup> May 2016

**Date of Judgment** : 20<sup>th</sup> May 2016

(The name of the complainant is suppressed. The complainant will be referred to as TT)

**JUDGMENT**

1. The accused is charged with the following offences;

***COUNT ONE***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

*Particulars of offence*

**SAILOSI KADANAVATU** between the 1<sup>st</sup> day of July 2014 to the 31<sup>st</sup> day of December 2014 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

***COUNT TWO***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) and (2)(b) and (3) of the Crimes Decree, No. 44 of 2009.

*Particulars of offence*

**SAILOSI KADANAVATU** on the 27<sup>th</sup> of February, 2015 at Nasinu, in the Central Division, penetrated the vagina of TT, a child under the age of 13 years with his tongue.

2. The assessors have returned with a unanimous opinion that the accused is guilty of both counts of rape as charged.
3. I direct myself in accordance with the summing up delivered to the assessors on 19<sup>th</sup> May 2016 and the evidence adduced during the trial.
4. To prove the offence of rape under section 207(2)(b) and (3) of the Crimes Decree 2009 (“Crimes Decree”), the prosecution must prove the following elements beyond reasonable doubt;
  - a) the accused
  - b) penetrated the vagina of TT with his tongue to any extent
  - c) TT is below the age of 13 years
5. The assessors were also directed in line with the provisions of section 162(1) of the Criminal Procedure Decree 2009 in that if they form the opinion that the accused is not guilty of rape they may find him guilty of the offence of sexual assault under section 210(1)(a) of the Crimes Decree.
6. In this case, the accused does not dispute his identity. It is an admitted fact that TT was born on 01<sup>st</sup> April 2006 which establishes that she was below the age of 13 years at the time of the incidents relevant to the two counts. Therefore the issue to be decided in respect of each count is whether or not the accused penetrated the vagina of TT with his tongue.
7. I have carefully observed the demeanour of the complainant when she gave evidence. I find the complainant to be a credible witness. In my view she gave honest and truthful answers. She was not evasive. Her account of the two incidents relevant to the two charges was clear and reliable. The accused did not appear to me as a credible witness. The unanimous opinion of the assessors evinces that they too have accepted the

evidence of the complainant as credible and reliable and that they have rejected the evidence of the accused.

8. However, I am of the view that the prosecution failed to establish the element based on penetration in respect of both counts, beyond reasonable doubt. I am mindful of the fact that a slightest penetration is sufficient to prove this element.
9. The complainant described the act relevant to the first count saying that "*Between July and December 2014, he licked my vagina*". Later on she further said, "*Both at Naidiridiri and Nakasi he used his tongue to lick my private part*". Unfortunately, the prosecutor failed to elicit sufficient evidence to establish that the accused penetrated the vagina of the complainant to any extent. During the act of licking the vagina, accused's tongue might have penetrated the complainant's vagina. An accused cannot be found guilty of an offence based on an assumption. The evidence presented by the prosecution is not sufficient to prove beyond reasonable doubt that the accused penetrated complainant's vagina with his tongue.
10. However, I find that this act of the accused amounts to a using of force on the complainant which is sexual in nature and this use of force is unlawful and indecent.
11. Therefore, I find that the prosecution has failed to prove the first count beyond reasonable doubt. Nevertheless, I find that the offence of sexual assault under section 210(1)(a) of the Crimes Decree is proved beyond reasonable doubt based on the evidence adduced in respect of the first count.
12. With regard to the second count, the complainant described the act by saying, "*On 27<sup>th</sup> February 2015, I was sleeping on the lower bed of the double bunk with my brother... . On that morning he licked my vagina again*".
13. Based on the same reason given above with regard to the first count, I find that the prosecution has failed to prove the second count beyond reasonable doubt. I find that the offence of sexual assault under section 210(1)(a) of the Crimes Decree is proved beyond reasonable doubt based on the evidence presented on the second count.
14. Therefore, I am unable to conform to the opinion of the assessors that the accused is guilty of the two counts of rape as charged.

15. In the circumstances, I find the accused not guilty of rape as charged on the first count and find him guilty of the offence of sexual assault under section 210(1)(a) of the Crimes Decree. I convict him accordingly.
16. I also find the accused not guilty of rape as charged on the second count and find him guilty of the offence of sexual assault under section 210(1)(a) of the Crimes Decree. I convict him accordingly.



A handwritten signature in blue ink, which appears to read "Vincent S. Perera". The signature is written in a cursive style and is positioned to the right of the court seal.

Vincent S. Perera

JUDGE

**Solicitors for the State** : **Office of the Director of Public Prosecution, Suva.**  
**Solicitor for the Accused** : **Office of the Director of Legal Aid Commission, Suva**