

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 295 of 2016

[CRIMINAL JURISDICTION]

STATE

V

WAQA NAITINI

Counsel : Ms. K. Semisi for State  
Mr. S. Valenitabua & Ms. B. Malimali for Accused  
Hearing on : 26<sup>th</sup> - 29<sup>th</sup> June 2017  
Summing up on : 03<sup>rd</sup> July 2017  
Judgment on : 04<sup>th</sup> July 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AV".)

JUDGMENT

1. The accused is charged with the following offences;

**FIRST COUNT**

**Representative Count**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of February 2012 and the 28<sup>th</sup> day of February 2012 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV, a child under the age of 13 years by touching her buttocks.

**SECOND COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2012 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV, a child under the age of 13 years by touching her vagina.

**THIRD COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2012 at Makoi, Nasinu in the Central Division on an occasion other than that mentioned in Count 2, unlawfully and indecently assaulted AV, a child under the age of 13 years by pressing his penis against her buttocks.

**FOURTH COUNT**

**Representative Count**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** between the 1<sup>st</sup> day of January 2013 and the 31<sup>st</sup> day of December 2013 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV by touching her thighs and back.

**FIFTH COUNT**

*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**WAQA NAITINI** on the 3<sup>rd</sup> day of July 2016 at Makoi, Nasinu in the Central Division unlawfully and indecently assaulted AV by sucking her breasts.

## SIXTH COUNT

### *Statement of Offence*

**RAPE:** contrary to section 207 (1) and (2)(a) of the Crimes Decree No. 44 of 2009.

### *Particulars of Offence*

**WAQA NAITINI** on the 3<sup>rd</sup> day of July 2016 at Makoi, Nasinu in the Central Division had carnal knowledge of AV without her consent.

2. The assessors have returned with the unanimous opinion that the accused is not guilty of the above charges. They also unanimously found the accused not guilty of the alternative offences of indecent assault they were directed to consider in respect of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 03<sup>rd</sup> July 2017 and the evidence adduced during the trial.
4. The prosecution led the evidence of five witnesses including the complainant. The accused gave evidence and called three witnesses.
5. Considering all the evidence led in this case, I find that the evidence given by the complainant on the first four counts is credible and reliable. Her account of what took place on 03<sup>rd</sup> July 2016 is not reliable.
6. The prosecution relied on the evidence of the second prosecution witness to establish that there was a recent complaint. In my view, the relevant evidence of the complainant and of the second prosecution witness do not establish that there was a recent complaint in respect of the first four counts. However, the evidence of the second prosecution witness supports the reason given by the complainant for not informing anyone about what was happening to her since 2012. The reason given by the complainant was that she thought that no one would believe her mainly because of how the accused treated the others in the house including her parents.
7. According to the complainant, the incidents relevant to the first three counts had taken place in the year 2012. The time of offence in count one is the period

from 01<sup>st</sup> February 2012 to 28<sup>th</sup> February 2012. The time of offence in counts two and three is the same and that is the period from 01<sup>st</sup> January 2012 to 31<sup>st</sup> December 2012. However, the complainant said that from mid-2012 to mid-2013, she lived in Sakoca. Therefore, the incidents pertaining to the second and third counts should have taken place before mid-2012. It is an agreed fact that the complainant was born on 29/11/99. Given the above, it is clear that the complainant was below the age of 13 years at the time the alleged incidents relevant to the first three counts had taken place.

8. The complainant said in her evidence that the first incident where the accused touched her buttocks without her consent took place after she came back from Levuka in January 2012 and before she started going to school in 2012. Given the fact that the schools usually start in the third week of January, on the face of it, the alleged first incident should have taken place in January 2012 and not in February 2012. Unfortunately, the prosecution did not make any attempt to ensure that the time of offence pertaining to the incident on count one is properly established or at least any discrepancy regarding same is explained.
9. The principle that any variance between the charge and the evidence with respect to date or time of offence is not material unless time is of the essence of the offence (see Archbold 2010, 1-127) should not be taken as an excuse by the prosecution to totally ignore the time of offence stated in the charge when leading evidence.
10. The accused's evidence was that he was not there at the place of offence, that is, the house at Lot 27, Poorva road, Makaoi in 2012. I did not find the accused as a credible witness. Further, the third witness for the defence who is living in the aforementioned house since birth said that she is having a relationship with the accused since 2008. Their first child was born on 02/02/10 and the second child on 02/02/11. The second defence witness could not remember many things including who lived in the house in 2012 and also in 2016. But she said that the accused came to live in the said house in March 2013. She also admitted the

suggestion that she was told to come to court and say that the accused moved to the house in March 2013 though she changed that version subsequently. Considering the above evidence, I cannot accept the accused's version that it was not possible for him to commit the offences in 2012 because he was not there in the house in question in 2012.

11. I believe the evidence of the complainant with regard to the first count though there is a variance between the charge and the evidence regarding time of offence.
12. A right-minded person would consider the touching of the complainant's buttocks in the manner she explained as indecent. Therefore, I find that the accused had unlawfully and indecently assaulted the complainant by touching her buttocks without her consent in 2012.
13. It is pertinent to note that the elements of the offence under section 210(1)(a) and 212(1) of the Crimes Act are exactly the same. The short title of the offence under section 210(1)(a) is "sexual assault" and that of the offence under section 212(1) is "indecent assault". However, the punishment for sexual assault under section 210(1)(a) is 10 years imprisonment if the offending does not come within the aggravating circumstances provided under section 210(2) and 210(3). The punishment for indecent assault under section 212(1) is 5 years imprisonment. Given the fact that the lawgivers had decided to identify the offence under section 210(1)(a) of the Crimes Act as 'sexual assault', I am of the view that, in order to constitute the offence of sexual assault under section 210(1)(a), the unlawful act should not only be indecent, but also sexual.
14. Coming back to the evidence on the first count, I am not convinced that touching of the buttocks in the manner the complainant described is a sexual act. Therefore, the evidence on count one does not satisfy the elements of the offence of sexual assault. However, the said evidence proves the elements of the offence of indecent assault under section 212(1) of the Crimes Act beyond reasonable doubt. Accordingly, I find the accused not guilty of the first count as

charged, but I find him guilty of the alternative offence of sexual assault under section 212(1) of the Crimes Act.

15. The complainant's evidence on the second count was that the accused touched her vagina when she was sleeping on the top bunk inside the second bedroom in 2012. She said she saw the accused when she opened her eyes through the light coming from the TV that was in the sitting room and then she pretended to be sleeping. Though I have no reason to doubt the complainant's evidence regarding this incident, in my view, the evidence on identification is not sufficient to prove beyond reasonable doubt based on the *Turnbull* guidelines that the complainant made a proper identification. For this reason, I find that the prosecution has failed to prove the second count. I find the accused not guilty of the second count.
16. The evidence on the third count is that the accused hugged the complainant from behind where she felt that the accused pressed his penis against her buttocks. Then the accused made her sit on him. According to the complainant, this incident took place in the third bedroom on one night in 2012 and she did not consent.
17. I believe the evidence of the complainant on the third count. I am convinced that this was an unlawful assault and I am of the view that a right-minded person would consider this assault indecent and also sexual.
18. Therefore, I am satisfied that the third count is proven beyond reasonable doubt. I find the accused guilty as charged on the third count.
19. The fourth count is a representative count. The complainant said that the accused would stand behind her and touch her buttocks when she washed the dishes after she came back to Makoi in 2013. She also said that one night she felt that someone is rubbing her buttocks with the leg while she was sleeping and then she saw that it was the accused. She said the accused was there for less than one minute.

20. With regard to the accused touching her while she was washing the dishes, the complainant did not give evidence on a specific incident. I am not satisfied that the fourth count can be established on that evidence.
21. With regard to the evidence on the second incident above; considering the nature of contact, the duration which the contact was made and the time the complainant observed the accused for the purpose of identification, I am not satisfied that the elements of the offence of sexual assault or that of indecent assault are proved beyond reasonable doubt.
22. I find that the prosecution has failed to prove the fourth count. I find the accused not guilty of the fourth count.
23. Though I am convinced based on the complainant's evidence that the accused penetrated the complainant's vagina on 03<sup>rd</sup> July 2016, I am unable to accept that the incident happened in the manner the complainant recounted. Given the evidence about the condition of the floor, the layout of the house and the number of people occupied the house in the night on 03<sup>rd</sup> July 2016, the complainant's evidence that she struggled and she tried to shout is not probable. In my view, the complainant's evidence about the pillow that was used to cover her mouth was a fabrication.
24. Taking into account all the circumstances, it is difficult to accept that there was any physical resistance by the complainant for the accused to insert his penis inside her vagina. Therefore, I am inclined to form the view that the complainant did not come out with what exactly happened between her and the accused on the night in question.
25. In the circumstances, I find the accused not guilty of the 5<sup>th</sup> count and of the 6<sup>th</sup> count.
26. In the light of the above, I agree with the unanimous opinion of the assessors on the second, fourth, fifth and sixth counts. I am unable to agree with the unanimous opinion of the assessors on the first count and the third count.

27. Accordingly;

- a) I acquit the accused on the second, fourth, fifth and sixth counts;
- b) I convict the accused of the alternative offence of indecent assault under section 212(1) of the Crimes Act on the first count; and
- c) I convict the accused as charged on the third count.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : Toganivalu & Valenitabua, Barristers & Solicitors, Suva.