

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 135 of 2017

STATE

v.

TEVITA NAODELE TOUTOU

Counsel: Mr. M. Vosawale with Ms. S. Tivao for State
Ms. V. Filipe for Accused

Hearing: 24th to 26th October 2017

Summing Up: 30th October 2017

Judgment: 31st October 2017

JUDGMENT

1. The name of the complainant is suppressed.
2. The accused has been charged with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act, and two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

[Representative Count]

Statement of Offence

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

Particulars of Offence

TEVITA NAODELE TOUTOU between the 1st day of February 2010 to the 31st day of December 2010 at Suva, in the Central Division, unlawfully and indecently assaulted **AB** by fondling her breast and touching her vagina.

COUNT TWO

[Representative Count]

Statement of Offence

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

Particulars of Offence

TEVITA NAODELE TOUTOU between the 1st day of January 2012 and the 31st day of December 2012 at Suva, in the Central Division, penetrated the vagina of **AB** with his penis, without her consent.

COUNT THREE

[Representative Count]

Statement of Offence

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

Particulars of Offence

TEVITA NAODELE TOUTOU between the 1st day of January 2013 and the 12th of March 2017 at Suva, in the Central Division, penetrated the vagina of **AB** with his penis, without her consent.

3. Consequent upon the plea of not guilty entered by the accused, the matter proceeded to the hearing. The hearing commenced on 24th of October 2017 and concluded on the 26th of October 2017. The prosecution presented the evidence of three witnesses, including the complainant. The accused opted not to give evidence. Subsequently, the

learned counsel for the prosecution and the defence made their respective closing addresses. I then delivered the summing up.

4. The three assessors in their unanimous opinion found the accused guilty for the count of Sexual Assault and two counts of Rape as charged in the information.
5. Having carefully considered the evidence adduced during the course of the hearing, the respective closing addresses of the counsel, the summing up and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
6. The prosecution alleges that the accused had fondled the breast and touched the vagina of the complainant when she was sleeping on the floor of the living room during the period between 1st of February 2010 and 31st of December 2010. The complainant was twelve years old in 2010. During the period between 1st of January 2012 and 31st of December 2012, the accused had penetrated the vagina of the complainant with his penis without her consent. The prosecution further alleges that the accused had penetrated the vagina of the complainant with his penis without her consent during the period between 1st of January 2013 and 12th of March 2017.
7. According to the evidence given by the complainant, the accused had sexually assaulted and penetrated her vagina with his penis repeatedly during the period that has been specified in the information.
8. The defence extensively cross examined the complainant, emphasizing the inconsistent nature of her evidence given in court with the statement she made to the police. The complainant in her evidence admitted that the following facts, that she stated in her evidence, have not been recorded in the statement she made to the police, they are:
 - i) The accused used to look at her when she came back from the bathroom in 2010,
 - ii) The accused came home after drinking grog,
 - iii) When she tried to call her mother, the accused had slapped her mouth,

- iv) In 2012, the accused came home after drinking grog and undressed her. He then put his penis into her vagina. When she tried to turn over he had punched on her thighs.
9. Emphasizing the inconsistent nature of the evidence given by the complainant in the court and the statement she made to the police, the learned counsel for the defence urged in her closing address that the evidence given by the complainant lack the credibility, hence, could not be considered as truthful and reliable evidence.
10. I do not find the above inconsistencies are fundamentally rooted to the main dispute of this matter. Hence, I do not find such inconsistencies have adversely affected the credibility and reliability of the evidence given by the complainant.
11. It has been submitted by the leaned counsel for the defence that the fact the complainant did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made was true.
12. The complainant in her evidence said that when she tried to shout or scream, the accused had punched on her mouth. He had also threatened her that he will kill her if she tells to someone else about this incident. She had tried to call her mother but the accused had punched her. When her mother got up and asked what happened, the accused had punched her as well. He had threatened the complainant not to tell the mother, if she does, he will kill both of them. The accused had further said that he will not afraid to go to prison. Moreover, the complainant said that the last time the accused penetrated her vagina with his penis was in March 2017, that was few weeks before she related this matter to her aunty.
13. The complainant in her evidence explained the reason for not reporting this incident as soon as it took place. I accept the explanation given by the complainant. Hence, I do not find such delay in reporting the matter has affected the credibility and reliability of the evidence given by the complainant.

14. In view of the reasons discussed above, I am satisfied that the evidence given by the complainant is credible and reliable. I accordingly accept the evidence given by the complainant as the truth. The evidence given by the aunty of the complainant, to whom the complainant had related this incident in April 2017, has further strengthened the credibility and reliability of the evidence given by the complainant.
15. Accordingly, I am satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault and Rape as charged under first, second and third counts respectively. Hence, I do not find any cogent reasons to disregard the unanimous opinion of guilt given by the three assessors.
16. In conclusion, I hold the accused guilty for one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and convict for the same accordingly.




R.D.R.T. Rajasinghe
Judge

At Suva
31st October 2017

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.