

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 121 of 2017

STATE

V

EPARAMA TEKEI

Counsel : Ms. Lavenia Bogitini for the State
Mr. Aseri Vakaloloma for the Accused

Dates of Hearing : 17 November 2017

Date of Ruling : 21 November 2017

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "APLT also known as PV" or simply as "PV"

RULING

NO CASE TO ANSWER

1. The Accused in this case is charged with the following Information:

COUNT ONE

Statement of Offence

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

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the vagina of **APLT also known as PV**, a child under the age of 13 years, with his finger.

COUNT TWO

Statement of Offence

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

Particulars of Offence

EPARAMA TEKEI, on the 16th of March 2017, at Navua, in the Central Division, penetrated the anus of **APLT also known as PV**, a child under the age of 13 years, with his finger.

2. During the trial of this case, the prosecution led the evidence of the complainant, **APLT also known as PV**, **Alisi Marama**, **Francis Tuivunilagi**, and **Trevina Marama Tuivunilagi**.
3. The Prosecution also tendered in evidence the birth certificate of the complainant, **APLT also known as PV**, as Prosecution Exhibit **P1**.
4. At the close of the Prosecution case, the Counsel for the Accused made an application in terms of Section 231 (1) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), that there is no evidence that the Accused committed the offences charged and as such the Court should record a verdict of not guilty against him.
5. This preliminary matter was taken up for hearing before me on 17 November 2017. Both Counsel for the Accused and Counsel for the State were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

6. Section 231 (1) of the Criminal Procedure Act provides as follows:

When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.

7. In the case of **State v. Waisale Tuivuya** [2003] FJHC 186; HAC 15X of 2002S (4 November 2003); it was held:

“The test to be applied under Section 293 of the Criminal Procedure Code is whether there is evidence in respect of each ingredient of the offence. If there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence, then there is a prima facie case (*Sisa Kalisoqa –v- State* Criminal Appeal No. 52 of 1984, *State –v- Mosese Tuisawau* Criminal Appeal No. 14 of 1990).

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Accordingly, the question to be addressed at this stage of the proceedings is whether there is some relevant and admissible evidence in respect of each element that must be proved before the Accused could be convicted of the offences alleged against him in the information.”

8. In the case of **State v Ratu Inoke Takiveikata** [2011] FJHC 129; HAC 5 of 2004 (28 February 2011); it was stated that:

“The phrase ‘no evidence’ has been interpreted to mean that there is no evidence on an essential element of the charged offence (Sisa Kalisoqa v State, Criminal Appeal No. 52 of 1984). If there is some evidence on the

essential elements of the charged offence, the application for a no case to answer cannot succeed. The credibility, reliability and weight are matters for the assessors and not for the trial judge to consider at a no case to answer stage."

9. It is clear that since Section 231(1) of the Criminal Procedure Act has retained the provisions similar to that of Section 293(1) of the now repealed Criminal Procedure Code (Chapter 21) in respect of no case to answer, the test remains the same. If there exists some relevant and admissible evidence, direct or circumstantial, touching on all the ingredients of the offences charged, then there is a prima facie case.
10. As indicated earlier the Accused in this case has been charged with two counts of Rape.
11. The two counts of Rape are contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
12. The provisions of Section 207 (1) and (2) (b) and (3) of the Crimes Act is reproduced below:

"207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a)

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c)

(3) for this section, a child under the age of 13 years is incapable of giving consent."

13. Therefore, in order to prove the ingredients of Count One, the Prosecution has to establish that:

- (i) the accused;
- (ii) on the specified day (in this case the 16 March 2017);
- (iii) at Navua, in the Central Division;
- (iv) penetrated the vagina of APLT also known as PV with his finger; and
- (v) at the time APLT also known as PV was a child under 13 years of age.

14. In order to prove the ingredients of Count Two, the Prosecution has to establish that:

- (i) the accused;
- (ii) on the specified day (in this case the 16 March 2017);
- (iii) at Navua, in the Central Division;
- (iv) penetrated the anus of APLT also known as PV with his finger; and
- (v) at the time APLT also known as PV was a child under 13 years of age.

15. The complainant, APLT also known as PV testified as follows:

- (i) *She said that she is 4 years old and staying in Pacific Harbour. She is attending school.*
- (ii) *When asked who she lives with, she said mummy and Epa. She continued that mummy is sitting down outside.*
- (iii) *She testified that "Epa poked my mimi and bumbum" and she pointed the middle finger of her right hand. She said she was lying down (at the time), and Epa was standing up.*
- (iv) *She stated that when he poked her mimi it was sore. Later she also stated that when Epa poked her bumbum it was sore.*
- (v) *When told to explain what she meant by the word "poke" she demonstrated by poking on clay.*
- (vi) *The witness also explained, what she meant by the term "sore". The witness put a pencil on her hand and demonstrated what she meant by sore.*

- (vii) When asked to show the mimi and the bumbum, the witness demonstrated by showing it on the doll that was with her.*
- (viii) Later, the witness lifted the dress she was wearing and showed where her mimi and bumbum were.*

16. Alisi Marama, testified that:

- (i) She was working as the nanny of the complainant. She had been working in that capacity for 2 years and 3 months.*
- (ii) She testified to the events that transpired on 16 March 2017.*
- (iii) She has left Villa 373, Daniva Place, Pacific Harbour, at 5.00 in the evening. The complainant was sleeping at the time. The accused and Christopher Donlon were at home when she left.*
- (iv) At around 7.30 pm, she had received a phone call from Francis Verma. Francis Verma asked her as to where she was when this thing happened. She had asked what happened. Francis Verma said, "did you know that Eparama molested PV?"*
- (v) The next morning she had gone to the Villa around 8.00 am. Francis Verma and PV were having breakfast. As she entered the house, PV had greeted her by saying "Hi Nau." PV had then said "Epa poked my mimi and my bumbum." And told her to call the Police. PV had also being showing her middle finger.*
- (vi) When questioned as to what PV's behaviour was like at the time, the witness testified that she was naughty. PV had stood up on the counter, and pulled down her pants/shorts she had been wearing at the time. She had been wearing a diaper inside. She had pulled the diaper on one side and with her middle finger she had showed what happened. Later the witness said that PV was using her middle finger and pointing towards her private parts or her mimi.*

(vii) Francis Verma had said "well the child has talked-we can't do anything."

17. Francis Tuivunilagi, is the younger sister of Trevina Marama Tuivunilagi, who is the biological mother of the complainant. She testified as follows:

(i) Around 6.00-6.30 in the evening of 16 March 2017, her aunt Francis had brought PV to their house.

(ii) About 20 or 30 minutes later, PV had pooped and her mother had called her to change PV.

(iii) She had then taken PV to the changing room and was changing her. She had given her a shower, and started drying up with the towel. When she was towelling her female parts, PV had got a shock and closed her legs. She had then told that her mimi was sore.

(iv) When asked as to why her mimi was sore PV had said "Epa poked my mimi."

(v) The witness said she had been shocked and upset on hearing this. So she had called her younger sister, Martina. PV had repeated the same thing to her younger sister as well. PV kept repeating herself and started crying. Thereafter, the witness, had called her mother and informed her about what PV had said.

18. Trevina Marama Tuivunilagi, the biological mother of PV, testified that on the 24 March 2017, she had received a phone call from Francis Verma, informing her of the alleged incident. She had told the witness that PV had said that Epa had poked her mimi and her bumbum and she also said that we needed to report the matter for the wellbeing of PV. Trevina had reported the matter to the police in the first week of April 2017.

19. Considering the totality of the evidence led by the prosecution, a summary of which I have referred to above, I am satisfied that there exists some relevant and admissible evidence, touching on all the ingredients of the two offences of Rape. Thus a prima facie case has been made out by the Prosecution in respect of both count one and count

two.

20. In the circumstances, I hold that there is a case to answer by the Accused in respect of both count one and two.

21. FINAL ORDERS:

1. The application made by the defence for a no case to answer is dismissed.
2. I hold that there is a case to answer by the accused in respect of both count one and two and accordingly, I call for his defence in respect of both counts.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



Dated this 21st Day of November 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Vakaloloma & Associates, Suva.