

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 41 of 2015

STATE

V

PETERO MASALA

Counsel : Ms. S. Kiran for the State.
: Ms. K. Vulimainadave [LAC] for the Accused.

Date of Hearing : 11 October, 2018
Closing Speeches : 15 October, 2018
Date of Summing Up : 16 October, 2018
Date of Judgment : 17 October, 2018

JUDGMENT

*(The name of the complainant is suppressed she will be referred to as ("**EB**").*

1. The Director of Public Prosecutions charged the accused by filing the following information:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western Division, unlawfully and indecently touched the vagina of “**EB**” with his finger, without the said “**EB’s**” consent.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 16th day of May, 2012 and 19th day of August, 2012 at Yalalevu, Ba in the Western Division, had carnal knowledge (penile sex) of “**EB**” without the said “**EB’s**” consent.

COUNT THREE

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PETERO MASALA aka **PETE MASALA** sometimes between the 29th day of July, 2013 and 3rd day of August, 2013 at Raiwai, Suva in the Central Division, unlawfully and indecently touched the breasts, neck, and private parts of “**EB**” on top of her clothes, without the said “**EB’s**” consent.

2. In respect of counts one and two the assessors had returned with a unanimous opinion that the accused was guilty of sexual assault (count one) but not guilty of rape (count two).

3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up, re-direction and the evidence adduced at trial.
4. The prosecution called three (3) witnesses and the accused exercised his right to remain silent and did not call any witness.
5. In respect of the third count the accused on 28 August, 2015 in the presence of his counsel had pleaded guilty. On 13 November, 2015 the accused in the presence of his counsel admitted the summary of facts read out in court.
6. The summary of facts admitted by the accused is as follows:

“The victim is “EB”, aged 15 years then, Student, of FSC Quarters, Ba (“the victim”). The accused is Petero Masala aka Pete Masala, aged 41 years then, Cleaner (“the accused”). The accused is the victim’s uncle in law i.e the accused’s wife and the victim’s mother are sisters.

Sometime between 29/7/13 and 3/8/13, the victim went to Suva for Table Tennis training. She was told by her mother to stay at one Aunt Maxine’s house as it was closer to Garden City where the training was hosted. The accused also resided there at that time as it was close to the University of the South Pacific where he worked at that time. The victim slept in the sitting room while staying at Aunt Maxine’s house in Suva. One night, between 29/7/13 and 3/8/13 when she was sleeping, she felt light being shown on her face. She opened her eyes and saw the accused shining a torch at her face and at the same time touching the victim’s neck, breasts and private part on top of her clothes. The victim was scared and did not know what to do so she turned around. The accused touched her for about an hour. The victim had not consented to the touching.

The victim left for Ba the next day. The incident affected the victim psychologically and she did not do well at school. She later confided her relatives and the matter was reported to the police. Copy of the victim’s police statement is annexed.

The accused was taken into custody and caution interviewed. At Q52 he admitted to fondling her breast but denied shining torch light on the victim’s face in Suva. Copy of the caution interview is annexed.

The accused was charged with 1 count of "Indecent assault" contrary to section 212 (1) of the Crimes Decree 2009."

7. Upon considering the summary of facts read out by the State Counsel which was admitted by the accused and upon reading the caution interview of the accused dated 12 April, 2014 this court is satisfied that the accused has entered an unequivocal plea of guilty on his own freewill. This court is also satisfied that the accused has fully understood the nature of the charges and the consequences of pleading guilty. The summary of facts admitted by the accused satisfies all the elements of the offence of indecent assault.
8. In respect of counts one and two the evidence adduced in court are as follows:
9. The complainant "EB" in 2012 was a Form 3 student. On one of the days during the second term of school she was at the house of her uncle the accused, her aunty had gone to work. The complainant did not go to school because she was having stomach ache. During breakfast the complainant was alone with the accused, he offered to massage the complainant's stomach. The complainant and the accused after breakfast went into the sitting room. At this time the complainant's cousin had gone somewhere, the complainant was alone with the accused.
10. The complainant was wearing a shorts and a top in the sitting room the accused started to massage the stomach of the complainant. The accused continued massaging the complainant upwards after that he started to massage the complainant's vagina and was "playing around" by touching it. The accused then removed the complainant's shorts and underwear. At this time the complainant started to cry, she went blank, her hands were sweating, she was scared, felt helpless and she did not know what to do.
11. The accused then came on top of her and penetrated her vagina twice with his penis. While the accused was doing this, the complainant felt weak.

When the accused penetrated her for the second time the complainant pushed the accused away. The complainant said that it was painful, her legs were shaking and she felt weak, emotionally she felt she was broken. The complainant did not give her consent to the accused to touch her vagina or penetrate her vagina with his penis.

12. After this, the complainant ran to the house of her good friend and school mate Faustina Kavoa who lived across the road. The complainant used to go to the house of her friend to study or to do school projects.
13. When the complainant went to Faustina's house her friend was not at home, Faustina's uncle was sleeping in the house. The complainant went into Faustina's bedroom, used the bathroom then locked herself in the bedroom and waited for Faustina.
14. When Faustina came home after school, the complainant told Faustina that she had a stomach ache and so she wanted to go home. After two days the complainant went to Faustina's house to study for her mid-term exam.
15. It was here the complainant told Faustina why she had wanted to go home the other day. Further the complainant told Faustina she did not want to go to the house of her uncle and that she hated her uncle for what he had done to her.
16. The complainant also told Faustina the reason why she did not tell her on the day of the incident because she was shocked and scared. The complainant did not tell Faustina anything in school after the incident because she was not talking much in school.
17. The complainant could not think properly and didn't know who to talk to. Faustina wanted to tell her mother but the complainant stopped her since she felt nobody would believe her and that she was scared.

18. The incident happened when the complainant was in Form 3 but the matter was reported to police after 2 years when she was in Form 5. The reason for the delay was that the complainant couldn't continue to live with it any longer, it was too much for her. She used to see the accused at family gatherings and he was also one of the Eucharistic Ministers in the church. On one occasion the accused was at the altar preaching, at this time the complainant broke down in church. The complainant told her aunty Soko Thaggard of severe headache.
19. At the hospital the complainant was given medicine and sent home. At home the complainant felt shortness of breath and fainted so she was again taken to the hospital. The medicine was not working, so the doctor told the complainant's aunt to ask the complainant what was wrong with her. The complainant then told her aunty what the accused had done to her.
20. The second prosecution witness was Faustina Kavoa the best friend of the complainant who informed the court in 2012 during the second term of school the complainant had told the witness that her uncle Petero Masala had offered to massage her stomach. When massaging he went onto the complainant sexually forcing himself on her by penetrating her vagina. The complainant told this to the witness two days after the incident.
21. When the complainant was telling the witness what had happened to her she was scared and couldn't talk properly. The witness wanted to tell her mum, but the complainant told her not to tell her mum or anyone else. The witness could not remember meeting the complainant after returning home from school on the day of the alleged incident.
22. Laisiana Tukana knew the complainant since they went to the same church and were also distant relatives.
23. This witness recalled in February, 2014 during a Sunday mass at 7.00am she noticed the complainant was crying with her head bowed. After the

church service the witness went to the complainant to find out what was the matter.

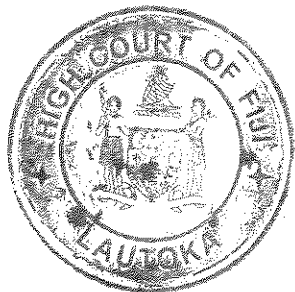
24. Upon questioning the complainant there was no response, the witness noticed the complainant was in some kind of pain. The complainant's cousin took the complainant to his home. After lunch that day the witness received a call that the complainant wanted to see the witness. The complainant's cousin came in his car with the complainant and all went to the hospital.
25. At the hospital the complainant was in pain, she saw the complainant had one hand on her head and the other hand on her chest since the complainant was not saying anything, the witness told the complainant she will ask questions and all the complainant had to do was to shake her head for a "no" and give a nod for a "yes".
26. As the questioning progressed the complainant finally spoke and told the witness that she had been sexually hurt, when asked who did that, the complainant shook her head.
27. When questioned whether it was just fondling, the complainant replied "yes" the next question was whether he had touched her womanhood, the complainant replied "yes". The complainant was reluctant to tell the name of the person who had done this to her. After the complainant calmed down she told the witness the name of the accused.
28. The defence on the other hand took up the position that the accused did not sexually assault or have sexual intercourse with the complainant that is penetrate the vagina of the complainant with his penis without her consent. The complainant and her family had an animosity against the accused since he married the complainant's aunty after her husband had passed on. In view of this, the complainant concocted these false allegations against him since they did not want the accused as part of the family.

29. I accept the evidence of all the prosecution witnesses as truthful and reliable. The complainant was able to recall what the accused had done to her and was able to describe the acts of the accused clearly. The incident took place some six years ago yet the complainant was able to explain what she had gone through.
30. The matter was reported to the police two years after the alleged incident, however, it was due to the fact that from 2012 to 2014 the complainant had kept the incident to herself after telling her friend Faustina, but could not continue to live with it any longer. It was too much for her particularly when she used to see the accused at family gatherings and he was one of the Eucharistic Ministers in the church. The complainant broke down in church which led to her telling the third prosecution witness Laisiana at the hospital what the accused had done to her. Considering the circumstance of the complainant the late reporting to police does not affect her credibility she was scared, confused and did not know what to do. I accept that the complainant tried to keep the incident to herself and not let anyone know but she could not.
31. Laisiana also noticed the condition of the complainant in the hospital and when the complainant calmed down she was able to speak about what the accused had done to her two years ago.
32. The complainant had told her friend Faustina two days after the incident about what the accused had done to her. I also accept the reason why the complainant had told Faustina not to tell her mother. Although Faustina did not say anything about sexual assault by the accused this does not affect the credibility of the complainant's evidence.
33. The complainant did disclose material and relevant information about the unlawful sexual conduct by the accused in respect of the offence of rape. There is no requirement of law that a complainant has to tell all the details

of the unlawful sexual conduct on the part of the accused. The fact that the complainant had told her friend about being raped by the accused was sufficient in the circumstances of the case (*see Anand Abhay Raj vs. State, CAV 0003 of 2014 (20 August, 2014)*).


34. Even though the third prosecution witness Laisiana Tukana in cross examination had informed the court that the complainant had told her the accused had asked the complainant to massage him also does not create any doubt on the evidence of the complainant.
35. The defence has been of denial and the position taken by the accused was that he had only massaged the complainant but did not do anything as alleged. This court rejects the defence denial and suggestion that as a result of an animosity between the complainant, her family and the accused, the complainant had made a false allegation against him. The undisputed evidence before the court was that the complainant was at the house of the accused on the day of the alleged incident and they had breakfast together. The complainant in her evidence also stated that on the day before the alleged incident she had stayed at the house of the accused. This suggests that the relationship between the complainant and the accused was good.
36. The defence has not been able to create any reasonable doubt in the prosecution case.
37. The demeanour of all the prosecution witnesses were consistent with their honesty they were able to withstand cross examination and I have no doubts in my mind that they told the truth in court.
38. I am satisfied beyond reasonable doubt that sometimes between the 16th day of May, 2012 and 19th day of August 2012 the accused unlawfully and indecently touched the vagina of “EB” with his finger, without the said “EB’s” consent.

39. I am also satisfied beyond reasonable doubt that sometimes between the 16th May, 2012 and 19th August, 2012 the accused had carnal knowledge of “EB” without “EB’s” consent.
40. I also accept that the accused knew or believed that the complainant was not consenting or didn’t care if she was not consenting at the time.
41. I agree with the unanimous opinion of the assessors that the accused is guilty of sexual assault and I overturn the unanimous opinion of the assessors that the accused is not guilty of rape as charged.
42. On the guilty plea of the accused I find the accused guilty of indecent assault as charged.
43. In view of the above, I find the accused guilty as charged and I convict him of all three counts.
44. This is the judgment of the court.



At Lautoka

17 October, 2018



Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.