

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 112 of 2017**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**PENI BULAGO**

**Counsel** : Ms. S. Sharma for State  
Mr. F. Vosarogo for Accused

**Hearing on** : 22<sup>nd</sup> - 24<sup>th</sup> January 2018

**Summing up on** : 25<sup>th</sup> January 2018

**Judgment on** : 26<sup>th</sup> January 2018

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

**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 Act 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division unlawfully and indecently assaulted IT (name suppressed) by touching her vagina.

**SECOND COUNT**  
**Representative Count**  
*Statement of Offence*

**SEXUAL ASSAULT:** contrary to section 210(1)(a) of the Crimes Act 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division on an occasion other than the first count unlawfully and indecently assaulted IT (name suppressed) by rubbing a banana on top of her vagina.

**THIRD COUNT**  
**Representative Count**  
*Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

**PENI BULAGO** between the 1<sup>st</sup> day of January 2012 and the 31<sup>st</sup> day of December 2014 at Kalabu, in the Central Division penetrated the vagina of IT (name suppressed), a child under the age of 13 years with a banana.

2. The assessors have returned with the unanimous opinion that the accused is guilty of all counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 25<sup>th</sup> January 2018 and the evidence adduced during the trial.
4. The complainant and two other witnesses were called by the prosecution. The accused chose to remain silent.
5. All the three counts are representative counts where the time of offence is from 01<sup>st</sup> January 2012 to 31<sup>st</sup> December 2014. On the first count it is alleged that the accused sexually assaulted the complainant by touching her vagina. On the second count it is alleged that the accused sexually assaulted the complainant by

rubbing a banana on top of her vagina on an occasion other than the first count. On the third count the accused is charged for rape where it is alleged that he penetrated the complainant's vagina with a banana.

6. In her evidence the complainant initially said that one night when she was sleeping in the bedroom she felt her trousers had gone down and also felt a banana being rubbed. When she woke up, she saw a banana right next to her and the accused standing next to her. Then she said, after she felt her trousers had gone down, the accused was rubbing the banana on her private part and was also touching her body and her private part. Then again she said the accused was also trying to insert the banana into her private part and he inserted it. According to the complainant this happened at night and the accused had done this to her many times. Later on when she was asked why she did not shout, she said the accused put a piece of cloth in her mouth to stop her from shouting and he had always put a piece of cloth in her mouth when he did this to her on other occasions. Therefore, what could be gathered from the evidence led through the complainant was that the alleged acts relevant to all three counts were committed on one occasion and those acts were repeated.
7. Before I assess the complainant's evidence any further, I wish to examine the evidence of the second and the third prosecution witnesses.
8. The second prosecution witness' evidence was that one day during the period between June 2012 and August 2012 during day time, she saw the complainant sitting on the bed inside a bedroom in the accused's house and there was a banana next to her. She went there after she heard the complainant crying. When she asked what happened, the complainant told her "Tutu did it here" pointing to her private part. But the complainant recanted this the next morning when the accused confronted the complainant in front of her and the accused's wife.

9. It is pertinent to note that no evidence was led through the complainant regarding the incident alluded to by the second prosecution witness in her evidence. In fact, no reference was made by the complainant about the second prosecution witness in her evidence in chief. The account given by the complainant was regarding an incident that took place at night and the second prosecution witness' evidence was regarding an incident that may have taken place during day time. The statement "Tutu did it here" which is said to have been made by the complainant to the second prosecution witness is only admissible to establish the fact that such statement was made. All in all, the evidence of the second prosecution witness does not support the case presented through the complainant.
10. The third prosecution witness, the doctor, had medically examined the complainant on 18/03/17 and her opinion was that the healed hymenal laceration she observed is more than two weeks old. Therefore, the evidence of the third prosecution witness only establishes the fact that the complainant's hymen had been penetrated more than two weeks prior to 18/03/17.
11. Coming back to the evidence given by the complainant, it is to be noted that her initial evidence was that she felt her trouser had gone down and a banana being rubbed on her private part while she was sleeping and when she woke up, she saw a banana right next to her and the accused standing next to her. She then changed that version and said when she felt her trouser had gone down, the accused was rubbing the banana on her private part and he was also touching her body and the private part. However, it will be reasonable for the complainant to assume that the accused rubbed the banana on her private part given that she felt her private part being rubbed while she was sleeping and when she woke up she saw a banana right next to her and the accused also standing next to her.
12. Therefore, there is a reasonable explanation for the aforementioned inconsistency. I find the complainant's evidence that the accused rubbed a

banana on her private part and also touched her private part and the body, credible and reliable. The complainant was recalled in terms of the provisions of section 116(1) of the Criminal Procedure Act to clarify what she meant by the term 'private part' and according to her clarification, she was referring to her genitalia.

13. The allegation in the first count is that the accused touched the complainant's vagina and the allegation in the second count is that the accused rubbed a banana on top of the complainant's vagina on an occasion other than the first count. The account given by the complainant was regarding an incident where a banana was used and therefore, that incident should be relevant to the second count and not the first. Though the complainant vaguely said that the accused had touched her private part many times, I find that the evidence led by the prosecution is not sufficient to prove the first count beyond reasonable doubt.
14. However, based on the complainant's evidence that I find credible and reliable I find that the prosecution has proved the elements of the second count beyond reasonable doubt. Rubbing a banana on the complainant's genitalia is an assault which is unlawful, and a right minded person would consider that assault indecent and sexual.
15. The complainant's third version was that the accused also tried to insert the banana into her private part and then he inserted it. This version cannot be reconciled with the first version given by the complainant. Therefore, the evidence the complainant gave on the third count regarding the accused penetrating her vagina with a banana is not credible and reliable. I find that the prosecution has failed to prove the third count beyond reasonable doubt.
16. In the circumstances, I cannot agree with the unanimous opinion of the assessors in relation to counts one and three. I agree with their opinion on count two.

17. I find the accused not guilty of count one and count three and I acquit him accordingly.

18. I find the accused guilty of count two and I convict him accordingly.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Mamlakah Lawyers, Suva.