

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 316 of 2015

STATE

V

PAULA SERU

Counsel : Ms. Lavenia Bogitini with Ms. Shirley Tivao for the State
Ms. Lavinia David with Mr. Uraia Koroï for the Accused

Dates of Trial : 29-31 January 2019

Summing Up : 1 February 2019

Judgment : 4 February 2019

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

JUDGMENT

[1] According to the Information filed by the Director of Public Prosecutions (DPP), the accused Paula Seru is charged with the following offence:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

PAULA SERU, on the 22nd day of June 2015, at Mualevu Village, Vanuabalavu, in the Central Division, penetrated the vagina of **LL**, a 3 year old girl, with his finger.

- [2] Prior to the trial proper commencing in this case, an Inquiry was held to ascertain whether this Court should act under the provisions of Section 108 (2) of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), considering the intellectual disability of the accused. At the end of the said Inquiry, Court was satisfied that due to his intellectual disability, the accused, though not insane, is not in a position to duly understand the proceedings of this Court. Accordingly, Court made a ruling that it is appropriate to proceed to hear the evidence in this case in terms of the provisions of Section 108 (2) of the Criminal Procedure Act.
- [3] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days.
- [4] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the charge of Rape.
- [5] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [6] During my summing up I explained to the Assessors the salient provisions of Section 207 (1), (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [7] Accordingly, I directed the Assessors that in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 22 June 2015);
 - (iii) At Mualevu Village, Vanuabalavu, in the Central Division;
 - (iv) Penetrated the vagina of LL with his finger; and
 - (v) At the time LL was a child under 13 years of age.

[8] The above individual elements were further elaborated upon in my summing.

[9] The prosecution, in support of their case, called the complainant, LL, her mother, Rigieta Saulekaleka, and the Medical Officer, Dr. Ilikini Naitini.

The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit **PE1**- The Medical Examination Report of the complainant.

[10] The accused opted to remain silent.

[11] In terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence have consented to treat the following facts as "*Amended Agreed Facts*" without placing necessary evidence to prove them:

1. The complainant is LL, 3 year old girl of Boitaci Village in Vanuabalavu [as at 22nd June 2015].
2. Paula Seru of Mualevu Village is charged with Rape contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act.
3. The complainant was medically examined by Dr. Ilikini Naitini on the 22nd July 2015.
4. The complainant's mother is one Rigieta Saulekaleka, 20 years old of Boitaci Village, Vanuabalavu [as at 22nd June 2015].
5. The complainant and her mother were at Mualevu Village on the 22nd June 2015.
6. Paula Seru was at Mualevu Village on the 22nd June 2015.

[12] Since the prosecution and the defence have consented to treat the above facts as "*Amended Agreed Facts*", without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.

[13] It is already agreed between the parties that, as at 22 June 2015, the complainant was 3 years old.

- [14] When asked as to what happened to her in Lau, the complainant testified that “Seru told me that he was going to buy me chewing gum and then he touched my vagina”. The witness used the term “mimi” to refer to her vagina. She explained that the accused used his finger to touch her mimi and showed her right index finger to depict this. When asked if the finger went inside the mimi or outside the mimi, the witness clearly said “inside the mimi”. She also testified that she was standing at the time and that the accused was lying down. The complainant also said that Seru had put his finger into her mimi for a short time and that it was painful.
- [15] The complainant said that when Seru did this to her she was at Mualevu Village and it was day time. When asked as to exactly where Seru did this to her, the witness said “I was standing near at home”. When asked to explain near whose home the witness said “Near Selai’s home”. However, the prosecution has failed to clarify who Selai is or where Selai’s house is located.
- [16] The defence counsel submitted that since the instructions received from the accused were not coherent and rational instructions, and since the complainant’s evidence has been consistent throughout her evidence in chief, counsel is not in a position to put forth any cross examination to the witness.
- [17] The complainant’s mother, Rigieta Saulekaleka, testified that the complainant is her daughter and her date of birth is 26 July 2012. As at 22 June 2015, she was living at Boitaci Village. On that particular day she recalls being at Mualevu Village, with the complainant. They had gone to attend the church service and had slept overnight at Mualevu. She and the complainant had been staying at her aunt, Maraia’s house in Mualevu. She explained that her aunt has two houses. They were staying in one house and the accused was staying in the other house. The two houses were about 5-6 meters apart.
- [18] The witness testified that in the morning of 22 June 2015, whilst at Mualevu, she was at home. The complainant was outside but near to the house. After a while, the complainant came back running inside to tell her what Seru had done to her.
- [19] The complainant had come and told her “mum Seru wants to touch my mimi and then he will give me chewing gum”. When asked the exact words the complainant had used, the

witness repeated what she said before “mum Seru wants to touch my mimi and then he will give me chewing gum”. When the witness was asked as to what the complainant meant when she referred to the term “mimi”, the witness said, it meant her vagina.

[20] The witness was asked the following questions in examination in chief to which she replied as follows:

- Q. *From your knowledge what did Seru do to your daughter?*
- A. *To my knowledge, Seru had touched my daughter, as no one else was near that house. It was only Seru and my daughter.*
- Q. *How do you know that Seru had touched your daughter?*
- A. *I believed in what my daughter said. When I came out to confront Seru, he turned away from me and started walking away. I have an aunt, she was a school teacher (her aunt Maraia). I had relayed the incident to my aunt, who is a school teacher. My aunt came out of the house, and started calling Seru’s name, but he got into a carrier to go back to his place.*
- Q. *Can you explain, when you said Seru had touched your daughter, what do you mean by this?*
- A. *To my understanding, Seru tried to touch my daughter’s vagina.*
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- Q. *Can you clarify to us, how do you know that she (complainant) ran into the house after he told her what he wanted to do?*
- A. *I saw her running towards me. By looking at her face, I felt something was wrong. When she reached me, she told what had happened.*
- Q. *How do you know that she ran immediately after Seru told her this?*
- A. *I know my Lord. I saw him walk past the house to go to the house he was staying. My daughter was outside. It was not even 5 minutes when I saw him walk past that house again and my daughter ran towards me.*
- Q. *You said that it was not even 5 minutes when you saw Seru walk past the house again and your daughter ran towards you. Within that 5 minutes did you see either Seru or LL?*
- A. *I was in the house. Through the window I could see my daughter and Seru. I could see Seru standing at the door but not clearly. My daughter was outside.*

Q. Was LL anywhere close by to Seru?

A. Yes. End of the witness box would be the door. Seru was inside and my daughter outside. At one point I could not see her whole body, I could only see half of her standing outside.

[21] Rigieta said that the matter was reported to the Police about 2 to 3 weeks after 22 June 2015. When asked why she did not report the matter immediately to the Police, the witness replied that she did not go to the Police immediately after the incident, because to her knowledge, if she reports against the accused, the Police will not take any action against him. She had finally reported the matter so that the accused does not to do this again.

[22] I find from the disclosures provided to Court that the complaint to the Police had been made on 22 July 2015, exactly one month after the incident.

[23] The same day, the complainant had been medically examined by Dr. Ilikini Naitini, at the Lomaloma Hospital in Vanuabalavu.

[24] The doctor testified as to the specific medical findings found in column D12 of the Medical Examination Report. He has noted that there was “redness around the vagina. No abrasion or laceration noted. Can’t appreciate the hymen.” The redness was on the labia minora, which is the inner wall of the vagina. There were no abrasion or laceration on the vagina or labia majora or labia minora.

[25] The Doctor explained as to what he meant by the term “can’t appreciate the hymen”. In this case, he did not see the hymen instantly. However, he said that could be due to two reasons:

1. The patient was very uncomfortable and kept on moving which made the examination not so easy.
2. He was only in his 2nd year of practice and the patient was a very young kid.

[26] The Doctor testified that the hymen is a fibrous membrane that covers the external opening of the vagina. “Normally the hymen is more obvious. In this examination, it could be there, probably right inside and I must have missed it or it might have not been there.”

- [27] In the Doctor's opinion, if a fully grown adult male's finger is inserted into a child's vagina, it will perforate the hymen and it could cause abrasions or bruising, if applied with force. Usually for children the healing process is fast. For a healthy child, it would take 10-14 days for a wound/injury (abrasions or bruising) to heal. However, if it is a deep wound it will take longer to heal.
- [28] The Doctor concluded that the inability to appreciate the hymen does not entirely rule out the possibility of penetration. Similarly, the absence of any visible injuries in the vagina, and the absence of any foul smelling discharge at the time of examination, also does not rule out the possibility of penetration.
- [29] Therefore, the doctor's findings are not conclusive. It is to be noted that the doctor had carried out this examination one month after the alleged incident. In any event, no corroboration is required to prove an allegation of Rape.
- [30] Based on the evidence led in Court and also based on the amended agreed facts filed in this case, the fact that the complainant and her mother were at Mualevu Village, on the 22 June 2015, and also the fact that Paula Seru was at Mualevu Village, on the 22 June 2015 is proved. It is also proved that the complainant was 3 years old at the time of the alleged incident, and as such was a child under 13 years of age.
- [31] Both the complainant and her mother clearly identified the accused, Paula Seru, as the person who committed the alleged offence. Therefore, the identity of the accused has been established by the prosecution.
- [32] The final element left for the prosecution to prove was whether the accused penetrated the complainant's vagina, with his finger. I am satisfied that the prosecution has proved this element too beyond reasonable doubt.
- [33] The complainant clearly testified that the accused had told her that he was going to buy her chewing gum and inserted his index finger into her vagina. She had immediately informed her mother about the incident. However, in reporting the matter to her mother she had said "mum Seru wants to touch my mimi and then he will give me chewing gum". This is the testimony of the complainant's mother, who is the recent complaint witness. I do not see this as contradiction. It must be borne in mind that the complainant

was only 3 years old at the time of this incident, and this is the manner in which she reported the incident to her mother.

[34] The law relating to recent complaint evidence is that complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Court is satisfied that in the instant case the complaint to the mother contained sufficient information with regard to the conduct of the accused. Therefore, I am satisfied that the complainant made a prompt and a proper complaint to her mother, and by virtue of that prompt complaint her credibility is strengthened.

[35] The Assessors have found the evidence of prosecution as truthful and reliable as they have by a unanimous decision found the accused guilty of the charge.

[36] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of the charge.

[37] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Rape with which the accused is charged.

[38] In the circumstances, I find the accused guilty of the charge of Rape.

[39] Accordingly, I convict the accused of Rape as charged.



A handwritten signature in black ink, appearing to read "Riyaz Hamza", is written over a horizontal line.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 4th Day of February 2019

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Office of the Legal Aid Commission, Suva.**