

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 for the State
Ms. Lavinia David with Mr. Uraia Koroï for the Accused

Hearing : 29 January 2019

Written Reasons : 11 February 2019

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

WRITTEN REASONS

[1] As per the Information filed by the Director of Public Prosecutions (DPP), on 30 October 2015, the Accused 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, considering the intellectual disability of the Accused, this Court should act under the provisions of Section 108 (2) of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”).
- [3] PART X of the Criminal Procedure Act sets out the **PROCEDURE WHERE ACCUSED PERSON HAS A DISABILITY**.
- [4] Section 108 of the Criminal Procedure Act (as amended) is titled “**Procedure when accused does not understand proceedings**”. For ease of reference, the entire Section is re-produced below:

“108. - (1) In the Magistrates Court if the accused, though not insane, cannot be made to understand the proceedings the court shall proceed to hear the evidence, and —

(a) if at the close of the evidence for the prosecution (and if the defence has been called upon, of any evidence for the defence) the court is of opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused; or

(b) if the court is of opinion that the evidence which it has heard would justify a conviction it —

(i) shall order the accused to be detained in accordance with a law relating to mental health; or

(ii) in the absence of any relevant provision of such a law, the court may make any order that the court considers necessary in the circumstances.

(2) In trials before the High Court if the accused, though not insane, cannot be made to understand the proceedings the court shall proceed to hear the evidence, and —

(a) if at the close of the evidence for the prosecution (and if the defence has been called upon, of any evidence for the defence) the court is of opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused; or

(b) if the court is of opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained for such period and upon such conditions as the court thinks fit.

(3) A person ordered to be detained under sections 104 or 105 during the court's pleasure shall be liable to be detained in such place and under such conditions as the court may, from time to time, by order direct, and whilst so detained shall be deemed to be in lawful custody.

(4) The court may, at any time of his or her own motion, or after receiving a report from any person or persons empowered under any applicable law, order that a person detained as provided in this section be discharged or otherwise dealt with —

(a) subject to such conditions as to the person remaining under supervision in any place or by any person; and

(b) such other conditions for ensuring the welfare of the said person and the public —

as the court shall think fit.”

[Emphasis is mine].

[5] To proceed under the provisions of Section 108 (2) of the Criminal Procedure Act, this Court has to satisfy itself firstly that the Accused is not insane or of unsound mind; and secondly that the Accused cannot be made to understand the proceedings of Court.

[6] If the Accused was deemed to be insane or of unsound mind, then the relevant and applicable provision would have been Section 104 of the Criminal Procedure Act. In terms of the said provision Court would have been compelled to adjourn or postpone further proceedings in the case.

[7] During the Inquiry, Court heard the testimony of Dr. Kiran Gaikwad, Acting Medical

Superintendent, St. Giles Hospital. Dr. Gaikwad had completed his MBBS Degree at Pune University, India. He is also the recipient of a Post Graduate Diploma in Mental Health from Fiji National University (FNU) and an International Diploma in Mental Health, Human Rights and Law from ILS, India.

[8] As per the order made by this Court on 19 October 2018, Dr. Gaikwad conducted a psychiatric evaluation on the Accused. Pursuant to the said psychiatric evaluation, the Doctor had tendered a comprehensive Report, dated 8 November 2018. The said Report was marked as X1 during the inquiry.

[9] The Doctor confirmed that the Accused, Paula Seru, had been previously assessed on four different occasions at the St. Giles Hospital and the relevant Psychiatric Reports had also been tendered to this Court. Court is in possession of the said Psychiatric Reports, which are as follows:

- (i) Report dated 12 November 2015, by Dr. Jay Lincoln, Medical Superintendent, St. Giles Hospital.
- (ii) Report dated 17 May 2016, by Dr. Peni Moi Biukoto, Medical Superintendent and Consultant Psychiatrist, St. Giles Hospital.
- (iii) Report dated 12 February 2018, by Dr. Kiran Gaikwad (the Doctor himself).
- (iv) Report dated 15 October 2018, by Dr. Elizabeth Koroivuki, Senior Medical Officer, St. Giles Hospital.

[10] In his latest Report (X1), Dr. Gaikwad has stated as follows: *“It has been noted that while the examining Doctors (above) differed in opinion about fitness to stand trial, all have agreed that the Accused has some degree of intellectual disability and suffers from organic personality disorder, secondary to Epilepsy and has concluded that he was aware of his actions at the time of the alleged crime in their reports.”*

[11] The Doctor testified that for the purpose of his latest examination, the Accused was admitted to the St. Giles Hospital for observation from 24 October 2018 to 2 November 2018.

[12] In his Report, Dr. Gaikwad has made the following observations regarding the Accused:

“The Accused was observed to be in a stable mental state with no obvious psychotic or manic symptoms. He spoke relevantly and expressed himself in a normal thought process. He was respectful, maintained good rapport and answered all questions mostly in a coherent and relevant manner.

The Accused was able to carry on a normal conversation and answer questions appropriately. The Accused demonstrated during today’s examination that his motivation is self-serving.”

[13] As to his thoughts regarding this case, the Doctor has said in his report that the Accused was born prematurely, at 8 months gestation, at Lomaloma Hospital. He had delayed developmental milestones such as talking and walking. At age 5, he started to have seizures. From records, he was not on any epileptic treatment until 2011, when he was first assessed at St. Giles Hospital.

[14] As per his opinion, the Accused is diagnosed with Organic Personality Disorder due to secondary Epilepsy. He also has a Mental Retardation, specifically Intellectual Disability. He is receiving medications for Epilepsy and Hypertension.

[15] Dr. Gaikwad testified that intellectual disability is synonymous with mental retardation. It is a condition where a person’s cognitive functioning and learning ability is impaired. There can be different degrees of intellectual disability – borderline, mild, moderate, or severe – based on a person’s behaviour. The Doctor was of the opinion that the degree of intellectual disability of the Accused, Paula Seru, is somewhere between borderline and mild.

[16] The Doctor explained that to assess the Accused’s fitness to plead guilty, the Doctor has

used the *Presser* criteria, and to assess the Accused's ability and competence to stand trial, he has used the *McGarry* criteria.

[17] Dr. Gaikwad's conclusions, which are based on the history, information available, current observations made during the Accused's stay in hospital, current examination and interviews by team of Doctors and assessment of the Accused's mental state, are as follows:

"(1) That he was aware of his actions at the time of the alleged criminal offence.

(2) That he is fit to plead.

(3) That the Accused suffers from mental illness as he has intellectual disability/mental retardation and Epilepsy and lack of proper education which makes it bit demanding for the Accused to understand the Court proceedings.

(4) That the Accused is fit to stand trial. Although his ability to exercise the right of challenge and to understand the substantial effect of the evidence that may be given is uncertain, he has fair knowledge of right and wrong in terms of sexual offences and is able to understand consequences of taking plea.

It is observed that during subsequent interviews his statements about the sequence of events varied. This maybe the factor which has strongly influenced the reports made in the past and has caused difference of opinion in different reports. We cannot be certain whether this is due to his seeming intellectual disability. Exact level of intellectual disability can only be measured using psychometric tests administered by qualified psychologists. However, we do not have one in the Ministry of Health.

(5) *Therefore, assessment by psychologists and his opinion to assess his level of intellectual disability and competence is recommended”.*

[18] Based on the above recommendations, this Court directed that the Accused be examined by a psychologist. Accordingly, Ms. Elenani Vuru, Senior Psychologist, Fiji Corrections Service, conducted a psychological assessment on the Accused and has submitted to Court her Psychological Assessment Report, dated 14 January 2019.

[19] As per the Report, Ms. Vuru’s conclusions are reproduced below:

CONCLUSIONS

A full psychological assessment to an accused who has been diagnosed with Organic Personality Disorder Secondary to Epilepsy is very challenging and faced with limitations. However, understanding the person in trial is crucial in order to assist the court in providing the best services to all those involved and under its care. The psychological evaluation was conducted to the accused with the use of few tools, namely the clinical interview, mental health assessment and selective psychometric. The following have been concluded with the opinion that:

1. *The accused, Paula Seru’s cognitive functioning still has the capacity to reasonably understand and participate in court or with any legal proceedings.*
2. *The accused who has a mental impairment with poor education does not prevent him from being socially productive.*
3. *The accused was aware of his actions towards the alleged crime and court proceedings is not new to him since he was convicted once with a similar offence as earlier highlighted in the report.*
4. *In conclusion the accused, Paula Seru is fit to stand trial.*

[20] Having heard the testimony of Dr. Gaikwad and carefully examining all the Medical Reports received in this case, Court is satisfied that the Accused is not insane or of unsound mind.

However, though not insane, Court is of the opinion that the Accused cannot be made to duly understand the proceedings of Court.

[21] Based on all the above material, both State Counsel and Defence Counsel also agree that due to his intellectual disability, the Accused is not in a position to duly understand the proceedings of Court.

[22] Accordingly, on 29 January 2019, I made order that Court should proceed to hear the evidence in this case in terms of the provisions of Section 108 (2) of the Criminal Procedure Act. The hearing in the case proceeded on the above premise.

[23] I informed parties that my Written Reasons for the above order would be provided by me on a later date.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 11th 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.**