

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 259 of 2018

STATE

V

RATU SELA DRADRA MATIA

Counsel : Ms. Kimberly Semisi for the State
Ms. Litiana Ratidara with Ms. Ruci Nabainivalu for the Accused

Dates of Trial : 8-12 July 2019

Summing Up : 15 July 2019

Judgment : 17 July 2019

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

JUDGMENT

[1] According to the Amended Information filed by the Director of Public Prosecutions (DPP), the accused Ratu Sela Dradra Matia is charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

RATU SELA DRADRA MATIA, between the 1st day of January 2017 and the 31st day of December 2017, at Kadavu, in the Southern Division, had carnal knowledge of BVS, a child under the age of 13 years.

COUNT 2

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of Crimes Act 2009.

Particulars of Offence

RATU SELA DRADRA MATIA, between the 1st day of January 2017 and the 31st day of December 2017, at Kadavu, in the Southern Division, unlawfully and indecently assaulted BVS, a child under the age of 13 years, by kissing her mouth, touching her breasts and biting her breasts.

COUNT 3

Representative Count

Statement of Offence

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

Particulars of Offence

RATU SELA DRADRA MATIA, between the 1st day of January 2017 and the 31st day of December 2017, at Kadavu, in the Southern Division penetrated the vagina of BVS, a child under the age of 13 years, with his tongue.

COUNT 4

Statement of Offence

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

Particulars of Offence

RATU SELA DRADRA MATIA, on the 9th day of June 2018, at Kadavu, in the Southern Division, penetrated the vagina of BVS, a child under the age of 13 years, with his fingers.

- [2] The accused pleaded not guilty to the four charges and the ensuing trial was held over 5 days.
- [3] 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 all four counts.
- [4] 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.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1), (2) (a) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act). I also explained to the Assessors the salient provisions of Section 210 (1) of the Crimes Act, which deals with the offence of Sexual Assault.
- [6] Accordingly, I directed the Assessors that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified time period (in this case between 1 January 2017 and 31 December 2017);
 - (iii) At Kadavu, in the Southern Division;
 - (iv) Penetrated the vagina of BVS with his penis; and
 - (v) At the time BVS was a child under 13 years of age.
- [7] I directed the Assessors that in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case between 1 January 2017 and 31 December 2017);
 - (iii) At Kadavu, in the Southern Division;
 - (iv) Penetrated the vagina of BVS, with his tongue; and
 - (v) At the time BVS was a child under 13 years of age.

[8] Similarly, the Assessors were informed that in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this case the 9 June 2018);
- (iii) At Kadavu, in the Southern Division;
- (iv) Penetrated the vagina of BVS, with his fingers; and
- (v) At the time BVS was a child under 13 years of age.

[9] And finally the Assessors were directed that in order for the prosecution to prove the second count of Sexual Assault, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between 1 January 2017 and 31 December 2017);
- (iii) At Kadavu, in the Southern Division;
- (iv) Unlawfully and indecently assaulted BVS, by kissing her mouth, touching her breasts and biting her breasts.

[10] All the above individual elements were further elaborated upon in my summing up.

[11] The prosecution, in support of their case, called the complainant (BVS), the Head Teacher of her school, Iosefo Vuloalua Nabi, a Medical Officer, Dr. Marshanell Veronica Leong and one police witness, WPC 4632 Miliana.

The prosecution also tendered the following documents as prosecution exhibits:

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

Prosecution Exhibit **PE2**- Birth Certificate of the complainant.

[12] The accused gave evidence in support of his case.

[13] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Admitted Facts*” without placing necessary evidence to prove them:

1. The complainant is one BVS, 9 years old student of Kabariki Village, Nabukelevu, Kadavu and the accused is one Ratu Sela Dradra Matia, 45 year old farmer of Kabariki Village, Nabukelevu, Kadavu.

2. The complainant and the accused are related. The complainant is the accused's niece. The complainant and the accused are also staying in the same village.

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

[15] Based on the said agreed facts the identity of the accused is proved as it has been agreed that 'The accused is Ratu Sela Dradra Matia'. All the other elements of the four offences must be proved by the prosecution beyond reasonable doubt.

[16] The complainant testified that she is now 10 years of age. Her date of birth is 27 January 2009. Therefore, during the period 1 January 2017 and 31 December 2017, she would have been 8 years of age and, as at 9 June 2018, she would have been 9 years old.

[17] The complainant clearly testified to all the acts that the accused had perpetrated on her. I have summarized the complainant's evidence at length in my summing up.

[18] In respect of Count 2, although the charge refers to the accused touching of the complainant's breasts and biting of the breasts, in addition to kissing of her mouth, the complainant in her evidence did not make reference to the accused touching her breasts. She only referred to the accused kissing her mouth and biting her breasts. This omission does not make the charge defective. It is sufficient for the prosecution to establish beyond reasonable that the accused did either of the two acts-touching her breasts or biting the breasts of the complainant, in addition to kissing her mouth.

[19] Further, in Count 4, the date of offence has been specified as 9 June 2018. During her testimony the complainant did not make reference to a specific date of offence. She said the incident in Count 4 happened in the month of June 2018. Iosefo Vuloalua, the Head Teacher, said in evidence that the complainant informed him of the alleged incidents on 12 June 2018. Thereafter, he made his report to the police on 14 June 2018. The statement of the complainant was also recorded on 14 June 2018 and on the same day she was examined by Dr. Marshanell Veronica Leong.

[20] From the above, it is clear that the incident referred to in Count 4 should have taken place on a day prior to the 12 June 2018 (the day on which the matter was reported to Iosefo Vuloalua). 9 June 2018, is merely three days prior to that.

[21] It must be noted that in terms of the provision of Section 182 (3) of the Criminal Procedure Act, it is stated that a variance between the charge and the evidence produced in support of it with respect to the date or time at which the alleged offence was committed is not material.

- [22] I am aware that this is a provision of law that is directly applicable to proceedings in the Magistrate's Courts. However, in the absence of any similar provisions for proceedings in the High Court, this provision maybe adopted for proceedings before the High Court as well.
- [23] The complainant had not told anyone about the incidents, until she informed her School Teacher, Ms. Liku (Ms. Akesa Ratadina Liku), on 12 June 2018. Ms. Liku had taken her on the same day to the Head Teacher, Mr. Iosefo Vuloalua. The complainant then relayed the incident to the Head Teacher. The complainant testified that she did not inform her mother about the incidents since she was scared.
- [24] In her evidence, the complainant agreed that she had told Ms. Liku, only about the incident which happened in the toilet of the accused's house, where the accused had laid her down and used his two fingers to poke her mimi. She had not told Ms. Liku about the incident when she went to get the broom (from the accused's house), or about the incident which happened when she went to collect small crabs. The incident which happened in the toilet was the latest incident, which took place in June 2018.
- [25] The Head Teacher of the Levuka Primary School in Kadavu, Iosefo Vuloalua, testified on behalf of the prosecution. He said on 12 June 2018, Ms. Akesa Ratadina Liku brought the complainant over to him. This was around 8.10 in the morning. The complainant had then informed the Head Teacher of what the accused had done to her.
- [26] In the statement given by Iosefo Vuloalua to the Police, he has failed to mention several important details of the incident. He explained that the reason for this was that, this was the first time as Head Teacher that he had to experience an incident or a complaint of this nature. Thus, he agreed that he had failed to state all the details as narrated by the complainant to him, when writing his Police Statement. He had recorded his own statement.
- [27] Although, this lapse on the part of the Head Teacher was quite unsatisfactory, I do accept the explanation offered by him. I also believe the portion of his evidence where he said that the complainant had informed him of all three incidents which happened-inside the toilet of the accused's house; inside of the accused's house, when the complainant went to burrow the broom; and in the mangrove swamps.
- [28] For all the aforesaid reasons, I accept the evidence of the complainant as truthful and credible.
- [29] The accused testified in Court and totally denies all the allegations against him.
- [30] The Assessors have found the evidence of the prosecution as truthful and reliable as they have by a unanimous decision found the accused guilty of all four charges. Therefore, it is clear that they have rejected the total denial made by the accused.

- [31]** 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 all counts.
- [32]** In coming to this finding I have not given any weight to the medical evidence of Dr. Marshanell Veronica Leong. At D10 of the Medical Examination Report of the complainant (Prosecution Exhibit PE2), which is the part dealing with the history as related by the person to be examined, it is stated thus:
- “The patient was assaulted on 5 occasions. She says that last year her uncle penetrated her vagina with his fingers and penis. She experienced vaginal bleeding thereafter. He also bit her left breast. Two other youths also inserted their fingers into her vagina on a different occasions. On June 9th, her uncle also inserted his fingers into her vagina.”
- [33]** In the Medical Report, the Doctor has reported that the complainant’s hymen was not intact, or that her hymen had been perforated.
- [34]** Since reference has been made in the Medical Report to two other youths also inserting their fingers into the complainant’s vagina, the perforation of her hymen could have taken place due to those incidents. There is more than a reasonable doubt that is created as to whether it was the accused’s acts that led to her hymen being perforated.
- [35]** At the time the Medical Report was tendered to Court, the portion of the history (D10) had been blotted out in the copies of the report that was handed over to the Assessors. Thus, the Assessors were totally unaware as to the reference made by the Doctor to the two youths also inserting their fingers into the complainant’s vagina on a different occasion.
- [36]** The only reference to any other person, other than the accused, sexually abusing the complainant came by way of the evidence of WPC 4632 Miliana. She testified that the Police had apprehended another suspect, interviewed and formerly charged him in a separate case. However, she said that the complainant in both cases is BVS, the complainant in this case.
- [37]** In my view, the Prosecution should have been cautious in tendering this Medical Report in evidence. In any event, in the instant case, the Defence should have also objected to the Report being tendered to the Assessors with the portion of the history being blotted out.
- [38]** In any event, no corroboration is needed to prove an allegation of a sexual offence. Thus, I give no weight to the medical evidence of Dr. Marshanell Veronica Leong.
- [39]** 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 offences of Rape and Sexual Assault with which the accused is charged in respect of counts 1, 2, 3 and 4.

[40] In the circumstances, I find the accused guilty of Rape and Sexual Assault as charged, in respect of counts 1, 2, 3 and 4.

[41] Accordingly, I convict the accused for the offences of Rape and Sexual Assault as charged, in respect of counts 1, 2, 3 and 4.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 17th Day of July 2019

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