

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 19 of 2016

STATE

V

ISIKELI BAINITABUA

Counsel : Mr. T. Tuenuku for the State.
: Accused in person.

Dates of Hearing : 20, 21, 22, 23, 26, 27 August, 2019
Closing Speeches : 30 August, 2019
Date of Summing Up : 30 August, 2019
Date of Judgment : 02 September, 2019

JUDGMENT

(The name of the complainants are suppressed they will be referred to as "AV", "LM" and "RM" respectively.)

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

ISIKELI BAINITABUA, on the 6th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**LM**” by pinching the nipple of the said “**LM**”.

COUNT TWO

Statement of Offence

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

Particulars of Offence

ISIKELI BAINITABUA, on the 20th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by touching the vagina of the said “**AV**”.

COUNT THREE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 20th day of December, 2015 at Lautoka in the Western Division, penetrated the vagina of “**AV**” with his finger.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

ISIKELI BAINITABUA, on the 28th day of December, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AV**” by licking the vagina of the said “**AV**”.

COUNT FIVE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

ISIKELI BAINITABUA, on the 28th day of December, 2015 at Lautoka in the Western Division, penetrated the mouth of “**AV**” with his penis.

COUNT SIX

Statement of Offence

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

Particulars of Offence

ISIKELI BAINITABUA, on the 7th day of January, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted “**RM**” by poking his finger in between the buttocks of the said “**RM**”.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of count one but guilty of counts two to six as charged.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called six witnesses whereas the defence called four witnesses including the accused.
5. The first complainant “AV” who was 9 years of age in 2015 informed the court that she was born on 12th November, 2006 and the accused is her uncle.

6. On 20th December, 2015 the complainant was at the house of the accused after having her shower she was on her way to get her towel from the room when she saw the accused standing at the doorway. The complainant got scared when she saw the accused at this time he came towards her and touched her vagina.
7. The complainant went into the room to wear her clothes after a while the accused called her into the sitting room. In the sitting room the accused showed her some videos in his phone of a man and a woman having sex the accused also told her for them to do what was in the video this made the complainant scared and she refused.
8. The accused's two year old son Rupeni and her grandmother were in the house but her grandmother was sleeping in the room. After the complainant refused, the accused forcefully removed the complainant's pants and panty and then poked his index finger inside her vagina she felt pain, the accused sought forgiveness.
9. The accused then licked and sucked the complainant's vagina for about 5 minutes. After this, the complainant wore her clothes and went to her grandmother and lay beside her. She did not tell her grandmother about what the accused had done to her because her grandmother was sick and sleeping. Since her parents were in Australia, she told her cousin, Litiana about what the accused had done to her. Litiana told the complainant to wait till her parents returned.
10. The complainant also recalled on 28th December, 2015 she was at the house of the accused on this day the accused was at home with his son. When the complainant was sitting on the settee in the sitting room the accused told the complainant to suck and lick his penis, she refused.
11. The accused pushed the complainant's head towards his penis, at this time the accused was not wearing his pants the complainant refused so he again

pushed her head towards his penis. The accused held her jaws and forced open her mouth and then put his penis inside her mouth for about 5 minutes.

12. After this, the accused told the complainant not to tell anyone and he will give her money. The complainant told her cousin Litiana and her elder sister about what the accused had done to her. When the complainant's parents came back from Australia she did not tell anything to her parents but her eldest sister told them.
13. The complainant did not tell her mother, her grandmother or her aunt the wife of the accused that she had watched a bad video in the phone of the accused because the accused had told her not to tell anyone.
14. The complainant stayed at the house of the accused for a week but she did not tell her aunt the wife of the accused about what the accused had done to her.
15. On 29th December the complainant left the house of the accused, at home she did not tell her grandfather about what the accused had done to her, however, she did complain to her cousin Litiana and her sister "LM".
16. The second complainant "LM" who was 15 years of age in 2015 informed the court that on 6th December, 2015 she was at home, in the afternoon the accused with his wife and their baby were returning home to Sakur Place. The accused was carrying baby Rupeni in his arms and the baby was leaning on the chest of the accused.
17. The complainant went near the accused to kiss her cousin Rupeni as she leaned forward to kiss Rupeni she felt the hand of a grown up person touch her breast. When her breast was touched she was scared at this time she took a step back and looked at the accused who was staring at her. The accused did not say anything, she went into her house and told her cousin

Litiana about what had happened. The complainant stated that she felt the hand that touched her breast was not the hand of a child or a baby.

18. The third complainant "RM" who was 14 years of age in 2016 informed the court that "AV" was his youngest sister and "LM" was his eldest sister. The accused is his uncle on 7th January, 2016 the complainant was at the house of the accused babysitting Rupeni the accused's son. The wife of the accused was doing night shift from 5 pm to 12 midnight at around 9 to 10 pm the complainant got up and went to the washroom. When he returned he went to watch TV the accused was sitting on the settee in the sitting room.
19. After a while, the complainant lay on the mattress face down and fell asleep he woke up after he felt someone was touching his buttocks. When he turned around he saw the accused laughing at him, he did not like what the accused had done to him.
20. The complainant was able to recognize the accused because at that time the light in the sitting room was switched on together with the TV when the accused touched the complainant's buttocks he inserted his fingers inside from on top of the complainant's shorts. Since the complainant was scared he went outside the house and waited for his aunt to come the accused told the complainant not to tell anyone and to keep it a secret. The complainant told his aunt the wife of the accused and his cousin Litiana the next day at his house at Vunato about what the accused had done to him.
21. The fourth prosecution witness was Dr. Teri Konrote. The doctor confirmed that she had examined the first complainant "AV" on 15th January, 2016 at the Lautoka Hospital.
22. The specific medical findings of the doctor were:

- a) The hymen was not visible at the location of 12 o'clock to 9 o'clock;
and
 - b) There was no active bleeding or discharge.
23. The doctor explained that clock positioning was used to describe injuries on the hymen upon examination she was not able to see a quarter of the hymen but the rest of the hymen was intact. According to the doctor the likely cause could have been a result of trauma to the hymen she explained trauma could be in the form of finger penetration, digital self-penetration, horse-riding or anything with sufficient force could cause damage to the hymen and there were other possibilities as well.
24. The fifth prosecution witness was Litiana Tikotani who informed the court that in 2015 the witness was staying at Vunato with her grandparents and her cousins namely "AV" "LM" and "RM" the accused is her uncle.
25. On 6th December, 2015 the complainant "LM" told the witness that in the afternoon as the accused and his son Rupeni were getting ready to go back to their house "LM" had gone to say goodbye and kiss Rupeni when the accused touched "LM's" breast. "LM" immediately after came running inside the house to tell her.
26. The witness told "LM" that they should keep the matter amongst themselves since she was scared of the accused that he would do something to her she suggested that they await the arrival of the complainant's parents. The witness did not tell her grandparents because her grandmother had suffered a stroke and her grandfather could not walk properly.
27. On 24th December, 2015 the witness was at home having dinner when the complainant "AV" came and told the witness that she wanted to say something. The complainant said when she was having her shower at the

accused house the accused was peeping from the door, he then came and touched the complainant's vagina.

28. After this, when the complainant went to lie down on the settee the accused showed the complainant some videos of bad things and said they should do what was shown in the video. When the complainant refused the accused removed the complainant's pants and then he poked her vagina. When the complainant told the accused it was painful, he then used his tongue on her vagina. After doing this the accused told the complainant to suck his penis just like she does with lollipop.
29. The witness and the complainant then hugged each other and both started crying. The witness called "LM" and told her about what "AV" had told her. At this time, the witness told "AV" the accused had also touched "LM's" breast. The witness told both sisters that they should keep it amongst themselves till their parents arrived home.
30. On 8th January, 2016 the witness asked "RM" if the accused also did something to him. "RM" looked shocked the witness then relayed what the accused had done to his two sisters. The complainant "RM" then told her the story of how the accused told him to remove his pants since "RM" was angry he did not continue.
31. Litiana maintained that she did not make up any stories against the accused she told the court what her cousins had told her and she was not lying in court.
32. The final prosecution witness Cpl. 3692 Asenaca Taufu the investigating and the interviewing officer in this case informed the court on 12th January, 2016 she commenced the caution interview of the accused on her personal laptop. The accused had agreed for this mode of interview, after the interview was printed the accused signed followed by the witness and the witnessing officer Cpl. Manoa. The interview was conducted in the English

language the witnessing officer has passed away, before the interview commenced the accused appeared fine, was in good health and had made no complaints. The interview was conducted at the crime office at the Lautoka Police Station.

33. The witness had given the accused his rights at Q.9 and also the allegation and the cautionary words at Q.6 of the caution interview. The interview was conducted for two days, the interview for day one was suspended at Q.51 for the accused to rest. The interview recommenced the next day on 13th January, 2016 which concluded at 11:15 hours.
34. The witness stated the accused was not threatened, forced or intimidated to sign the caution interview. Furthermore, the witness and the witnessing officer did not forge the signature of the accused according to the witness the accused did not complain about any ill treatment by the police officers at the conclusion of the caution interview the accused appeared remorseful for what he had done.
35. The witness maintained the witnessing officer Cpl. Manoa was present throughout the interview and had signed the caution interview in her presence.
36. At the conclusion of the interview it was printed the accused read the contents before signing whatever the accused had told her was recorded in the caution interview.
37. As part of the defence case the accused informed the court in 2015 he was residing at Jinnu Road, Waiyavi, Lautoka he is a Carpenter and he was working at Momi Bay. He left for work early in the morning every day at about 4.30am to 5.30am and he worked 7 days a week.
38. On 20th December, 2015 the accused left his home for work at 4.30am leaving at home the complainants grandmother, his son Rupeni and the

first complainant "AV". When he boarded the bus, he realized he had forgotten his phone at home. Since it was Sunday he knocked off from work at 1pm he then went to Farmers Club at Nadi Town to drink beer with some of his friends including Peni Nakarawa and Joape Ralulu it was very late at night that he arrived home that day.

39. The next morning on the 21st the accused left for work, Peni Nakarawa also boarded the same bus from Kashmir. The accused also stated from 23rd December, 2015 till 4th January, 2016 he was on Christmas leave. On 24th December the first complainant "AV" and her grandmother returned to their home at Vunato.
40. On 7th January, 2016 the accused was at work he finished work at 4pm, however, he received a call before reaching Nadi Town to do overtime. The accused returned to the worksite in the company vehicle to do overtime. After doing overtime he knocked off at 8pm arriving home at around 11pm.
41. When he reached home, he saw the complainant's grandmother, Rupeni and the complainant "RM". His wife returned from work at around 12 midnight there was no complaint from anyone that night or the next morning. The complainant "RM" had come to babysit his son Rupeni and then returned to Vunato that same night. The accused gave the complainant his fare to go back to Vunato. The complainant never complained of anything that had happened to him or the way he was treated.
42. According to the accused just before Christmas he had gone to attend a wedding at Vunato. It was Sunday the accused with his family was about to leave for his home when the complainants grandfather came to say goodbye to his son Rupeni who was in his arms the accused was carrying a bag and holding the pram with his other hand. As the accused was going towards the car the complainant "LM" called out saying "*wait, I also want to kiss him*" "LM" came running pulled Rupeni, kissed him and went back. The complainant's grandfather was looking at them.

43. The complainant did not complain to his wife Seleima or her grandparents. On 12th January, 2016 the accused was arrested by the police at Namaka. He was assaulted by police officers at the Namaka roundabout and also at the police station. He did not make any statement when questioned by the police officers. The police officers did not allow him to see his family members or his wife.
44. In his caution interview the accused answered questions about meals and where he was on the 20th and 21st December, 2015 he had told the police he was working.
45. According to the accused he was not given his rights in the police station. The accused had asked for one of his relatives to be present and also for Legal Aid to be present which was not allowed. He was taken to the summer house beside the crime office here the police officers continued with their questions he was slapped and punched on the back of his head.
46. The accused denied committing the offences as alleged he said he did not do anything to the children who were under the care of his wife. The answers in the caution interview were fabricated by the interviewing officer.
47. The accused did not tell the Magistrate that he was assaulted by the police officers when he appeared in the Magistrate's Court on 14th January, 2016, however, he had told this to his counsel. When the accused was referred to the court record that the matter was stood down at his request to 2pm, and he had the opportunity to tell the Magistrate about the assault the accused stated that he was not in his right state of mind. He agreed that he did not tell the Magistrate about the assault or any injuries suffered.
48. The accused further stated that the complainant "AV" had made a false allegation against him with the help of her parents and that she had only watched the video on his phone and nothing happened.

49. In respect of the allegation of the 28th the accused also said nothing happened. According to the accused, the complainant made up a false allegation against him because of the family dispute since the toilet system at the complainant's house was damaged other than this they had consumed grog in the house of the complainants which was contrary to their religious belief the parents of the complainants did not like it so they all got together to make a false allegation against him.
50. The accused stated that he was working on all the days of the allegations and he denied committing the offences as alleged.
51. The second defence witness Peni Nakarawa informed the court that he was working as a Grounds man for Fletcher Construction at Momi. He knew the accused and both used to board the same bus to work in the morning.
52. On 20th December, 2015 the witness had travelled together with the accused to Momi. At the work site the witness and the accused sometimes had their meal together the accused also used to sell food parcels and cigarette rolls which the witness sometimes used to buy from the accused.
53. On 28th December, 2015 the witness was working at Momi but the accused was not at work on this day. On 7th January, 2016 which was a Thursday the witness was working he started work at 7am and knocked off at 8pm. When he boarded the bus in the morning he saw the accused in the bus so he went and sat beside the accused.
54. The third defence witness Joape Ralulu informed the court that he knows the accused since 2015 and they had been working together at the Fletcher Construction the accused used to sell food parcels and also sometimes during the weekend the witness used to drink with the accused.

55. On 20th December, 2015 which was a Sunday the witness was at work at around 1pm he finished work with the accused, on this day the company had organized a thanksgiving party which both had attended.
56. On 21st December, 2015 the witness was at work he started work at 7am and knocked off at 4pm and he saw the accused at work. On 7th January, 2016 the witness was at work he started work at 7am and knocked off at 8pm he saw the accused working on the day.
57. On 23rd December, 2015 the witness finished work and resumed on the 4th January, 2016 during Christmas leave some workers continued working such as some of the Grounds men, Tile Layers and some of the Carpenters.
58. On 28th December, 2015 the witness went to work at Momi, the accused was also at work on this day.
59. The final defence witness Apakuki Sowane informed the court that he knows the accused since they were raised together. The witness stated he started work for Fletcher Construction from July, 2015 as a Tile Layer. The accused was also working for Fletcher Construction and it was through the accused that he was able to get employment with Fletcher Construction.
60. On 20th December, 2015 the witness was at work they finished work at 1pm after which there was a party organized by the company for all the workers. The accused was at work as well.
61. On 21st December, 2015 the witness was at work laying tiles near the accused's job site he went to buy cigarette from the accused that day. There was no work from 23rd to the 27th December, but the witness resumed work on the 28th. On the 28th the witness saw the accused working with the other workers.

62. On 7th January, 2016 the witness was at work with the accused during the whole week he used to have lunch with the accused and every time he wanted to have a cigarette he would always go and buy a roll from the accused.
63. Upon carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of all the prosecution witnesses as truthful and reliable.
64. All the complainants gave a detailed account of what the accused had done to them some three to four years ago their demeanour in court was consistent with their honesty.
65. All the complainants were able to withstand lengthy cross examination and were not discredited they were also forthright and not evasive in their answers.
66. I accept the complainants were living with their grandparents who were sickly hence, the complainants did not make any complaints to them about what the accused had done, however, the complainants promptly informed their cousin sister Litiana who suggested they await the arrival of their parents from Australia.
67. I also accept that Litiana was afraid of the accused and therefore she did not wish to confront the accused with what the complainants had told her. Litiana was also a reliable and truthful witness and this court can rely on her evidence.
68. Considering the age of the complainants at the time they had told Litiana relevant and important information in respect of the unlawful sexual conduct by the accused which was enough to alert her of what the accused had done. There is no requirement of the law that a complainant has to tell

all the details of the unlawful sexual conduct to the person complained (see *Anand Abhay Raj vs. State, CAV 003 of 2014 (20 August, 2014)*). Although the first and third complainants “VK” and “RM” did not fully tell Litiana about what the accused had done to them that is complainant “VK” did not tell Litiana that the accused had inserted his penis into her mouth and the complainant “RM” did not tell Litiana the accused had poked his finger in between his buttocks does not in my judgment affect the credibility and the reliability of their evidence.

69. There was also some confusion over the dates and the incidents but the omissions were not significant to affect the credibility of the complainants since passage of time does affect ones memory.
70. At the time of the alleged incidents the complainant “VK” was 9 years of age and the complainant “RM” was 14 years of age but they had relayed to Litiana important information about what the accused had done to them. Victims of sexual abuse react differently when asked to explain the unexpected sexual ordeal to someone.
71. Furthermore, I accept the admissions contained in the caution interview of the accused was obtained by the police officers in just circumstances and that the accused had voluntarily given his answers to the questions asked which was the truth. The answers in the caution interview do not give any iota of indication that the answers were fabricated by the interviewing police officer.
72. The answers mentioned in the caution interview could only be known to the accused and nobody else. Moreover, the accused in his evidence raised issues of assault during his arrest and at the Lautoka Police Station, and breach of his Constitutional Rights, however, this was not put to the interviewing officer in cross examination.


73. Furthermore, the accused did not raise any issues of assault when he was produced in the Magistrate's Court the day after the caution interview was completed that is on 14th January, 2016. I reject the issue of involuntariness and the forgery of the accused signature in the caution interview as an afterthought which is unbelievable. I also reject the defence assertion that the complainants had colluded with their parents to make a false complaint against the accused because he had damaged their toilet system and had consumed grog in their house which was against their religious belief as implausible on the totality of the evidence.
74. The accused and his witnesses did not tell the truth in court. It was observed that the accused was not forthright in his evidence or in cross examination. He was cautious in answering questions he took his time to answer questions which allowed him the opportunity to choose his words properly so as not to put himself in a difficult situation. The accused demeanour was not consistent with his honesty.
75. The alibi witnesses called by the accused were his friends and drinking partners who were close to each other. It appeared to me that the witnesses were rehearsing whatever they had discussed their evidence was similar and was narrated without any second thought. The only truth by Peni Nakarawa was when he said on the 28th December, 2015 the accused was not at work.
76. The accused stated on 20th December, 2016 he went to work it was a Sunday he knocked off from work at 1.00 pm. From work he went to Farmers Club, Nadi to drink with Peni Nakarawa and Joape Ralulu and it was very late in the evening he reached his home.
77. Peni Nakarawa did not mention anything about finishing work at 1.00pm and going to drink at the Farmers Club with the accused. Joape Ralulu and Apakuki Sowane told the court that on 20th December the work had finished

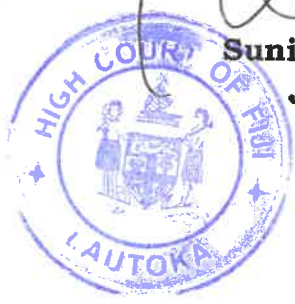
at 1.00pm and after that he and the accused joined the party organized by the company.

78. Furthermore, the accused did not say anything about selling food parcels and cigarette rolls at the work site yet the alibi witnesses said otherwise. Another interesting aspect of the defence evidence was that the accused told the court that he was on Christmas leave from 23rd December, 2015 to 4th January, 2016 and he did not say anything about going to work during this period yet the alibi witnesses saw the accused at work during this period is unbelievable. The alibi witnesses were unreliable and untruthful and no weight can be given to their evidence in respect of the above.
79. The demeanour of the accused and all the alibi witnesses led me to the inescapable conclusion that the defence of alibi was a planned afterthought. The evidence of the accused is inconsistent with his alibi witnesses. It was obvious that these alibi witnesses came to court to help the accused. The alibi witnesses and the accused persons are known to each other and all had concocted a story to tell the court.
80. The accused and the alibi witnesses were also discredited in cross examination. The prosecution has rebutted the defence of alibi beyond reasonable doubt.
81. The defence has not been able to create a reasonable doubt in the prosecution case.
82. This court is satisfied beyond reasonable doubt that on 6th day of December 2015 the accused had unlawfully and indecently assaulted "LM" by pinching her nipple.
83. This court is satisfied beyond reasonable doubt that the accused on 20th December, 2015 had unlawfully and indecently assaulted the complainant

“AV” by touching her vagina and had also penetrated the vagina of the complainant “VK” with his finger a child under 13 years of age.

84. This Court is also satisfied beyond reasonable doubt that the accused on 28th December, 2015 unlawfully and indecently assaulted the complainant “AV” by licking her vagina and had also penetrated the mouth of the complainant “AV” with his penis a child under 13 years of age.
85. This court is also satisfied beyond reasonable doubt that on 7th January, 2016 the accused unlawfully and indecently assaulted the complainant “RM” by poking his finger in between his buttocks.
86. For the above reasons, I overturn the unanimous opinion of the assessors that the accused is not guilty of count one indecent assault. I agree with the unanimous opinion of the assessors that the accused is guilty of counts two to count six.
87. In view of the above, I find the accused guilty of two counts of indecent assault, two counts of sexual assault and two counts of rape as charged and I convict him accordingly.
88. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

02 September, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Accused in person.