

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 445 of 2018

STATE

V

JOSUA DIGITAKI KOTOBALAVU

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Ms. Vuli Savou for the Accused

Dates of Trial : 10-14 February 2020

Summing Up : 17 February 2020

Judgment : 20 February 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "LNK". The name of the complainant's sister is also suppressed. Accordingly, she will be referred to as "LBL".

JUDGMENT

[1] As per the Information, filed in Court by the Director of Public Prosecutions (DPP), the accused Josua Digitaki Kotobalavu is charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, penetrated the vulva of **LNK**, a child under the age of 13 years with his finger.

COUNT 2

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOSUA DIGITAKI KOTOBALAVU, on the 11th of October 2018, at Nasinu, in the Central Division, with intent to insult the modesty of **LNK**, exhibited his penis to **LNK** intending that his penis be seen by **LNK**.

- [2] When his plea was first taken on 27 February 2019, the accused pleaded not guilty to Count 1, but pleaded guilty to Count 2. On the first day of the trial, when his plea was taken formally in the presence of the Assessors, the accused again pleaded not guilty to Count 1, but maintained his plea of guilt for Count 2.
- [3] Court found that the accused pleaded guilty to Count 2 on his own free will and free from any influence. Court was satisfied that the accused fully understood the nature of the charge contained in Count 2 and the consequences of his guilty plea for the said count.
- [4] The Learned State Counsel submitted that she would not be filing Summary of Facts in respect of Count 2, but would be leading evidence of the complainant to establish the facts.
- [5] The ensuing trial in respect of the charge of Rape was held over a period of 5 days. 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 Count 1.

- [6] 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.
- [7] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (b) and (3) of the Crimes Act No 44 of 2009 (Crimes Act).
- [8] The Assessors were directed 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) On the specified date (in this case the 11 October 2018);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Penetrated the vulva of LNK, with his finger; and
 - (v) At the time LNK was a child under 13 years of age.
- [9] The above individual elements were further elaborated upon in my summing up.
- [10] I also directed the Assessors that in the event they find that the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vulva of LNK, with his finger, but from the available evidence they find that the accused unlawfully and indecently assaulted LNK by touching her thighs; as an alternative, they are then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged for that offence in Count 1.
- [11] 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 “*Agreed Facts*” without placing necessary evidence to prove them:
- 1. The accused is Josua Digitaki Kotobalavu, 20 years of Lot 3 Vesivesi Road, Kinoya.
 - 2. The complainant is LNK, 6 years of Tovata Road, Makoi. The complainant was born on the 25th of February 2002. The birth

certificate of the complainant is tendered by consent. **[It must be noted that as per the birth certificate of the complainant her date of birth is recorded as 25 February 2012 and not 2002].**

3. The accused and complainant are first cousins as their mothers are biological sisters.
4. On the 11th of October 2018, at around 11.00 a.m. the complainant was at her grandmother's home at Tovata Road, Makoi.
5. At one point in time on the alleged date, the accused was alone with the complainant.
6. At one point in time on the alleged date, the accused then showed his unclothed penis to her. There was no one else present in the room when the accused did this to the complainant.
7. The complainant then told her relatives and the matter was reported to the police on the 13th October 2018.
8. The complainant was medically examined on the 13th of October 2018 by Dr. Elvira Ongbit.
9. The resume of Dr. Elivira is hereby tendered by consent. The contents of the resume are not disputed. **[However, the prosecution did not call Dr. Elvira Ongbit to give evidence in this case as she was said to be overseas. In her place the prosecution called Dr. Nikotimo Bakani].**

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

[13] The prosecution, in support of their case, called the complainant (LNK), her sister, LBL, and Medical Officer, Dr. Nikotimo Bakani. The prosecution also tendered the following documents as a prosecution exhibits:

Prosecution Exhibit **PE1**- Birth Certificate of the complainant.

Prosecution Exhibit **PE2**- Medical Examination Report of the complainant.

Prosecution Exhibit **PE3**- The diagram drawn by Dr. Nikotimo Bakani.

[14] The defence relied on the evidence of the accused himself.

- [15] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are proved beyond reasonable doubt. Based on the said agreed facts the date of incident (11 October 2018) and the place of incident (Tovata Road, Makoi, which is in Nasinu, in the Central Division) has been agreed upon. It has also been agreed that the complainant was 6 years old at the time of the incident, and therefore, that she is a child under the age of 13 years is also proved beyond reasonable doubt. However, the prosecution has to prove beyond reasonable doubt that the accused penetrated the vulva of LNK, with his finger.
- [16] The complainant has testified that the incident took place in her cousin's room, at her house. As to the exact time of the incident, the complainant testified that the incident took place after she came from school that day. When asked what time she came home after school that day, the complainant answered: "Day time, a bit after lunch." The accused testified that the incident took place at his grandmother's house, and around 10.00 in the morning.
- [17] In the agreed facts it has been agreed by the parties that: "On the 11th of October 2018, at around 11.00 a.m. the complainant was at her grandmother's home at Tovata Road, Makoi." It has also been agreed that: "At one point in time on the alleged date, the accused was alone with the complainant."
- [18] Therefore, there is no dispute that the incident took place on 11 October 2018, at Tovata Road, Makoi, in Nasinu.
- [19] The main issue for determination is as to whether the accused penetrated the vulva of LNK, with his finger. The prosecution should prove this beyond reasonable doubt.
- [20] The complainant clearly testified as to how the accused took off her skirt and penetrated her vulva with his finger. The complainant used the term 'pia' to refer to this part. The complainant testified in Court as follows:

Q. *Did your cousin Josua do anything to you?*

A. *Yes.*

Q. *What did Josua do to you?*

A. *I was sleeping. He took off my skirt. He held his right hand and he do something to me (kitaka vei au).*

Q. *What did he do?*

A. *He did my pia.*

Q. *What do you mean by pia?*

A. *The front of us.*

Q. *What do you use the pia for?*

A. *For urine.*

Q. *Can you point where your pia is?*

A. *The Witness showed/demonstrated by pointing to her genital area.*

Q. *You said you were sleeping and he took off your skirt?*

A. *Yes.*

Q. *How did you know he took off your skirt if you were sleeping?*

A. *I could feel it.*

Q. *And you also told us that he held his right hand?*

A. *Yes.*

Q. *What did he do with his right hand?*

A. *He poked here (witness pointed towards her genital area).*

Q. *Where was he poking?*

A. *The witness stood up and pointed towards her genital area.*

Q. *How do you know he poked you there?*

A. *I was sleeping and I can remember (and I was thinking).*

Q. *And when he poked what did you feel?*

A. *His hand.*

Q. *Apart from his hand what did you see, did you see his hand?*

A. *Yes.*

Q. *What did you see?*

A. *Only his hand.*

Q. *Can you show us what you saw from his hand?*

A. *The witness showed her index finger and middle finger.*

Q. *When did you see his hand like that?*

A. *When he put it outside.*

[21] I accept the complainant's evidence to be truthful, credible and reliable. I also accept that the complainant informed her 12 year old sister, LBL, about the incident as soon as her sister came home from school that day. Accordingly, I am satisfied that the complainant made a prompt and a proper complaint about the incident to her sister, and thereby that her credibility is strengthened in view of that recent complaint.

[22] The accused testified and totally denies that he poked or penetrated the vulva of the complainant. However, he admits that he asked the complainant to remove her pants. When she did so, he says that he had touched her thighs. I do not accept this position taken up by the accused to be true.

[23] The Assessors have found the evidence of the Prosecution to be truthful and reliable as they have by their unanimous decision found the accused guilty of the charge of Rape. Therefore, it is clear that they rejected the position taken up by the accused that he only touched the complainant's thighs.

[24] In the circumstances, I agree with the unanimous opinion of the Assessors in finding the accused guilty of Count 1. In my view, the Assessor's unanimous opinion was justified. It was open for the Assessors to find the accused guilty on the available evidence in respect of the said count. I concur with the unanimous opinion of the Assessors in respect of the charge of Rape.

[25] 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 charge of Rape.

[26] In the circumstances, I find the accused Josua Digitaki Kotobalavu guilty of Count 1 as charged, and convict him of the said charge.

[27] As for Count 2, the accused has already pleaded guilty to the charge of Indecently Annoying Any Person, contrary to Section 213 (1) (a) of the Crimes Act.

Section 213 of the Crimes Act reads as follows:

(1) A person commits a summary offence if he or she, intending to insult the modesty of any person —

(a) utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by the other person; or

(b) intrudes upon the privacy of another person by doing an act of a nature likely to offend his or her modesty.

[28] Evidence has been led by the prosecution to establish that the accused exhibited his penis to the complainant, intending that his penis be seen by the complainant, and with the intention of insulting her modesty.

[29] During his testimony in Court the accused admitted to showing his penis to the complainant. Furthermore, in the agreed facts it has been agreed by the parties that “At one point in time on the alleged date, the accused then showed his unclothed penis to her. There was no one else present in the room when the accused did this to the complainant.”

[30] Therefore, Court finds the accused’s guilty plea to be unequivocal. Accordingly, I find the accused guilty on his own plea and I convict him in respect of Count 2 as charged.



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

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 20th Day of February 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Volavola Lawyers, Nasinu.**