

IN THE HIGH COURT OF FIJI AT LABASA

CASE NO: HAC. 52 of 2019

[CRIMINAL JURISDICTION]

STATE

V

ALIFERETI LAGOLEVU

Counsel : Mr. I. Rakaria for the State
Ms. R. Raj with Ms. K. Boseiwaqa for the Accused

Hearing on : 21 - 23 September 2020

Summing up on : 23 September 2020

Judgment on : 24 September 2020

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KV". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT

Statement of Offence

Rape: contrary to Section 207(1) and (2) (b) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 11th of August 2018 to the 26th

of August 2018 at Navunievu, Bua in the Northern Division penetrated the vagina of **KV**, with his finger, without her consent.

SECOND COUNT

Statement of Offence

Sexual Assault: contrary to Section 210 (1) (a) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 01st of January, 2018 to the 31st day of December 2018 at Navunievu, Bua in the Northern Division, unlawfully and indecently assaulted **KV** by grabbing both her breasts.

THIRD COUNT

Statement of Offence

Indecently Insulting or Annoying Any Person: contrary to Section 213 (1) (b) of the Crimes Act, 2009.

Particulars of Offence

ALIFERETI LAGOLEVU, between the 01st of January, 2016 to the 31st day of December 2016 at Navunievu, Bua in the Northern Division, intruded upon the privacy of **KV** by doing an act likely to offend her modesty.

2. At the close of the prosecution case, upon inquiry, the prosecutor agreed that the third count is not made out. That is, the prosecutor conceded that there was no evidence on the element in relation to 'intruded upon the privacy'. Therefore, in terms of section 231(1) of the Criminal Procedure Act 2009, a finding of not guilty was recorded on the third count and the case proceeded only in respect of counts one and two.
3. The assessors have returned with the unanimous opinion that the accused is not guilty of the first count but guilty of the second count.
4. I direct myself in accordance with the summing up delivered to the assessors on 23/09/20 and the evidence adduced during the trial.
5. The prosecutrix ("PW1") was the sole witness for the prosecution. The accused gave evidence in his defence.

6. Given all the evidence adduced in this case including the evidence of the accused, the demeanour of PW1 when she gave her evidence, and the demeanour of the accused I find that the account given by PW1 regarding her encounters with the accused in relation to the two charges is credible and reliable.
7. According to the evidence, PW1 did not make a complaint against the accused until her sister who is said to have witnessed the incident relevant to the second count, informed her mother. The reason PW1 gave for not making a complaint was that the accused loved her and she thought about the accused. She did not want the accused to get in trouble. She also said in her evidence that when the matter was brought before the village headman where she was told to report the matter to the police, she initially declined and she also said that she had forgiven the accused. This evidence clearly demonstrated PW1's affectionate disposition towards the accused.
8. Moreover, though PW1 said in relation to the first count that the accused penetrated her vagina with his fingers, in relation to the second count she said that the accused put his hand inside her skirt but only touched her vagina. She was specific that the accused touched 'outside'. If she had an ulterior motive to put the accused in trouble, she had the opportunity to say that the accused penetrated her vagina in relation to the said incident relevant to the second count as well.
9. Considering these circumstances, I am unable to agree with the decision of the assessors to believe PW1 in relation to the second count and not believe her in relation to the first.
10. Nevertheless, I have noted a possible reason for the assessors not to believe PW1 on the first count.

11. According to the evidence-in-chief of PW1, the sequence of events that is relevant to the first count are as follows;
 - a) PW1 floats on the water facing upwards;
 - b) The accused jumps into the water;
 - c) The accused pulls PW1 towards his (private part) groin area from her legs in a manner that her legs are parted;
 - d) The accused holds one leg of PW1 with one hand and puts his other hand through her clothes from her waist area and penetrates her vagina; and
 - e) PW1 kicks the accused.

12. Then, during cross-examination, PW1 said that she was submerged in water when the accused pulled her. Though this would be a natural occurrence, that is, it would be natural for a person who was floating on the water facing upwards to submerge when suddenly pulled by someone from the legs, the defence counsel was able to highlight this as a significant inconsistency in PW1's evidence as PW1 in her examination in chief did not come out with the fact that she submerged as noted above.

13. Thereafter, the defence counsel quite forcefully argued during her closing address that since the above events are said to have taken place quickly one after the other and where PW1 would have been struggling due to the fact that she was submerged in water and was kicking, it is not possible for the accused to insert his hand from her waist through her clothes and then penetrate her vagina. She argued that PW1's version was not probable.

14. I would dismiss this contention of the defence counsel primarily for three reasons.

15. First, as it is explained above, I find PW1 to be a credible and a reliable witness and especially, given her affection demonstrated towards the accused it cannot be expected from her to lie in order to put the accused in trouble.
16. Secondly, I find it improbable for PW1 to be able to fabricate a story of such nature. It would not be possible for her to come up with that version of events with such details unless she had to experience same. On the same note, if she were to fabricate a story she would have come up with a simpler one.
17. Thirdly, PW1's version is in fact not improbable. Both PW1 and the accused were 2 years younger when this alleged incident had taken place. The accused agreed that PW1 was slim at that time. She was 14 years old. PW1 clearly said that the accused pulled her towards his private part in a manner her legs were parted. She said that the water was up to her breast level and that means the accused would have been able to stand steadily. She said that the accused held onto one of her legs from one hand and then pressed the other hand on her waist area and then slid or inserted it through the cloths she was wearing before he penetrated her vagina using the fingers.
18. As the accused is said to have pulled PW1 towards his groin area, it could be reasonably inferred that the complainant's groin area with her legs parted should have reached very close to the accused's body. Then, since the accused is said to have held one leg of PW1 from one hand, it is evident that he would have held that leg from the thigh, closer to PW1's groin area. Given the grip on that leg, even if the 14-year-old PW1 may have been struggling to surface at the time, it would not be impossible for the accused to slide his hand from PW1's waist, through her underwear and then penetrate the vagina with his fingers. However, according to PW1 (cross-examination) the accused had already inserted his hand when she struggled. Thus, PW1's version in relation to the first count is not improbable.

19. Furthermore, I have also found the account given by the accused to be unreliable. If the accused held onto PW1's feet who was at that time floating in an attempt to brace himself as he said in his evidence, it would not have assisted the accused to balance himself at all. Such maneuver would also have caused PW1 to submerge in water for the same reasons highlighted by the defence counsel during her cross-examination. Nonetheless, the accused's version is silent on this. Moreover, according to the accused's version, PW1 who insisted him to get into the water does not communicate with him at all while he was in the river which is unusual.
20. All in all, having assessed all the evidence including the evidence of the accused, accused's demeanour and deportment when he gave evidence and his answers to certain questions, I do not have an iota of doubt on the veracity of the evidence given by PW1, including her evidence on the incident relevant to the first count. Had the prosecutor properly guided PW1 to recall and relate her story step by step with more detail during the evidence-in-chief, there would not have been an opportunity for the defence counsel to raise the argument alluded to above.
21. In view of the evidence in relation to the first count, I am satisfied beyond reasonable doubt that the accused penetrated PW1's vagina with his fingers without her consent knowing that she did not consent. In relation to the second count, I am satisfied beyond reasonable doubt that the accused assaulted PW1 by grabbing her breasts and the said assault was indecent and also sexual in nature.
22. In the circumstances, I agree with the unanimous opinion of the assessors in relation to the second count; but I am unable to agree with their opinion in relation to the first count.
23. I find the accused guilty of both first and the second counts as charged.

24. The accused is hereby convicted of count one and count two accordingly; and he is acquitted in relation to the third count.
25. I consider it appropriate to make one final general observation. It is often noted in rape cases as in this case that the prosecutors' main focus is simply to get the relevant complainant to say that there was penetration. Given this inclination, vital details in relation to the surrounding circumstances of the offending are simply ignored when leading the evidence. Such details which are overlooked, in some cases may be relevant in discerning the accused's state of mind and in some cases may be relevant as aggravating circumstances when it comes to sentencing. More importantly, in some cases the defence counsel succeed in highlighting these information that are overlooked as inconsistencies (omissions). For the same reason stated above, most prosecutors also fail to realise the damage done in this manner to the prosecution case during cross-examination of the relevant witnesses and thereby fail to at least make an attempt to clarify such inconsistencies during re-examination. This is an issue the prosecutors need to address, in the interests of justice.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused**