

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]
CRIMINAL CASE NO. HAC 110 OF 2017

BETWEEN : **STATE**

AND : **MESULAME LESAVUA**

Counsel : **Ms. P. Lata for the State**
Ms. L. Volau for the Accused

Hearing on : **20th - 22nd of July 2020**

Summing up on : **29th of July 2020**

Judgment on : **07th of August 2020**

JUDGMENT

(The name of the alleged victim is suppressed and will be referred to as VV)

1. The accused, Mesulame Lesavua is charged with 2 counts of Indecent Assault, 2 counts of Rape, one count of sexual assault and one count of Attempted Rape, alleged as detailed below to have committed on VV who is related to him as a nephew.
2. The details of the offences that he was charged by the Director of Public Prosecutions are as follows;

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, on the 25th of December 2016 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 2

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, between the 01st of January 2017 and 31st of January 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 3

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, between the 01st of April 2017 and 30th of April 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.

COUNT 4

Statement of Offence

RAPE: Contrary to section 207(1) and (2) (c) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, penetrated the mouth of VV with his penis, without his consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, unlawfully and indecently assaulted VV.

COUNT 6

Statement of Offence

ATTEMPTED RAPE: Contrary to section 44 and 207(1) and (2) (a) of the Crimes Act of 2009.

Particulars of Offence

Mesulame Lesavua, on the 13th of May 2017 at Nadi, in the Western Division, attempted to penetrate the anus of VV with his penis, without his consent.

3. The accused pleaded not guilty to the charges and the ensuing trial lasted for 3 days. At the trial the complainant VV, Mr. Vilisimani Rakikau and Ms. Rajieli Naiveno gave evidence for the prosecution while the accused gave evidence, in defense.
4. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused not guilty to the alleged first two counts of Indecent Assault, but found him guilty for two lesser alternative counts of 'Indecently Insulting or Annoying any Person' set out in section 213 of the Crimes Act, 2 counts of Rape, the count of Sexual Assault and the count of Attempted Rape.
5. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
6. The sole witness to substantiate on the alleged incidents is the PW1, VV. I am mindful that the law requires no corroboration. Therefore it can be acted on the evidence of a sole witness. However, if we are to rely on a sole witnesses' evidence we must be extremely cautious of the credibility and the dependability of such evidence.

Analysis

7. VV and the accused are close relations. The accused is his mothers' biological sister's husband, or an uncle of his. VV's evidence is clear. On first two alleged incidents, he did not go to the accused though called. It should be noted that the prosecution was wrong in bringing charges under section 212 as there was no physical contact between them at all on both those occasions. Therefore the appropriate counts would be under section 213 of the Crimes Act. The assessors were correct in finding the accused not guilty of the first two counts as the prosecution could not adduce any evidence of an assault.
8. It is to be noted that those acquittals were based on the absence of any evidence of an assault and not due to any lack of credibility or the acceptability of the evidence of the PW1, VV. This position is substantiated by, assessors finding the accused guilty of the two lesser counts under section 213 of the Crimes Act.

9. The 6th count alleged in the information is of attempted rape. In the statement of offence, it reads the alleged offence as contrary to section 44 and 207 (1) and (2) (a) of the Crimes Act. It seems that the learned Director of Public Prosecution has overlooked the section 208 of the Crimes Act, which creates the offence of attempted rape. Since the circumstances, ingredients and liability is the same and no prejudice is caused to the accused, I consider the 6th count to be under section 208 of the Crimes Act.
10. When considered the elements of the alleged offences, the identity of the accused was never challenged. The other elements were clearly established by the prosecution through the evidence. As far as the evidence of the VV is concerned, there were no material inconsistencies *per se* or *inter se*. The evidence of the PW2 and PW3 substantiates the VV's evidence on some of the material points. In addition to recording, I have observed the witnesses and their demeanor when giving evidence. I am satisfied that the prosecution has established the alleged offences subject to what I have referred above, beyond a reasonable doubt.
11. I am well aware that the accused need not prove anything and his innocence is presumed. When the prosecution establishes a case beyond reasonable doubt it is my duty to consider the evidence and the case of the accused and consider whether it creates a doubt in the prosecution case. The accused's evidence is inconsistent on many material points. It seems that some of his evidence is contradictory to his own instructions to his counsel. Having considered the evidence in total, I am convinced that the defense fails to create a reasonable doubt in the prosecution case.
12. Therefore I agree with the unanimous opinion of the assessors subject to the aforesaid.
13. In the result, I find the accused not guilty of first two counts of Indecent Assault contrary to section 212 (1) of the Crimes Act and Acquit the Accused of the same.
14. I convict the accused of;
 - Two counts of 'Indecently Insulting or Annoying any Person' contrary to section 213 of the crimes Act,
 - Two counts of Rape contrary to section 207 (1) and 2 (c) of the Crimes Act,

A count of Sexual Assault contrary to section 210 (1) (a) of the Crimes Act;
and,
A count of Attempted Rape contrary to section 208 of the Crimes Act.

15. This is the Judgment of the Court.



Chamath S. Morais
JUDGE

Solicitor for the Prosecution :
Solicitor for the Accused :

Office of the Director of Public Prosecution, Lautoka
Office of the Legal Aid Commission, Lautoka