

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 34 of 2019

BETWEEN : STATE

AND : SUTUWETI TUISAVURA

Counsel : Ms U. Tamanikaiyaroi for the State  
Ms M. Singh and Ms S. Hazelman for the Accused

Date of Hearing : 14,15 & 16 October 2020

Closing Speeches : 16 October 2020

Date of Summing up: 19 October 2020

Date of Judgment : 21 October 2020

(The name of the complainant is suppressed and will be referred to as "TS")

JUDGMENT

1. The Accused is indicted for two counts of rape and one count of sexual assault as follows;

Count one

*Statement of Offence*

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

*Particulars of Offence*

Sutuweti Tuisavura on the 17<sup>th</sup> day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his finger without her consent.

**Count two**

*Statement of Offence*

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

*Particulars of Offence*

Sutuweti Tuisavura on the 17<sup>th</sup> day of June 2016, at Moala in the Central Division, penetrated the vagina of TS, with his penis without her consent.

**Count three**

*Statement of Offence*

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

*Particulars of Offence*

Sutuweti Tuisavura on the 17<sup>th</sup> day of June 2016, at Moala in the Central Division, unlawfully and indecently assaulted TS, by touching her breast.

2. The State called three witness for the prosecution. After the closure of the prosecution case the Accused gave evidence and no other witnesses were called for the defence.
3. At the summing up I gave directions to the assessors on the degree of proof, elements of the offences, evaluating evidence and delay in complaining the incident, among other things.
4. After a short deliberation the assessors returned with a unanimous opinion finding the Accused guilty of all three counts.

5. Having directed myself in accordance with the summing up I will now review the evidence adduced in this case to pronounce my judgement.
6. The complainant gave evidence that on 17 June 2016 the Accused took her to a vacant house and started touching her breasts. She further gave evidence that the Accused inserted his pointing finger into her vagina and later he inserted his penis into her vagina. She clearly stated in her evidence that she did not agree to any of the acts committed by the Accused.
7. It must be noted that Section 129 of the Criminal Procedure Act provides that no corroboration is needed for sexual offences.
8. The complainant had been 15 years of age at the time pertaining to the offences. As per the evidence the Accused is related to the complainant and he was referred to as Momo or uncle by the complainant.
9. On the day of the incident the Accused had taken the complainant to a vacant house under the pretext of taking her to her grandparents. The complainant said that the Accused held her by her wrist and on their way to the village he took her to a vacant house. She admitted that she did not cry for help. However, she said that she was frightened, and the vacant house was far from the village. She further gave evidence that the Accused told her to be quiet and he did not let her run away.
10. The main issue that surfaced in this case was the delay in reporting the incident. As it was quite rightly raised by the defence the complainant had informed about the incidents of sexual abuse to her aunt after about one year and ten months. In **State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018)** the Court of Appeal discussed the issue of delay in making a complaint. The Court of Appeal noted that the test to be applied on the issue of delay in making a complaint is described as “the totality of circumstances test”. Accordingly, the court must examine whether the complaint was made at the first suitable



opportunity within a reasonable time or whether there was an explanation for the delay.

11. Further the Court of appeal discussed the same issue in **Prasad v State [2020] FJCA 101; AAU125.2016 (10 July 2020)** where the delay in that case was two years.
12. It would be pertinent to quote the following paragraph of **State V Serelevu** (supra) which sheds more light on this issue;

“26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

13. In view of the above discussed authorities I will now consider whether the delay in the present case affects the veracity of the complainant's evidence. The complainant gave evidence that she did not tell anyone about the incidents as the Accused told her that he would do something that she has never seen if she tells anyone about it. She repeatedly stated that she was scared that he will do something again.
14. Under cross examination the complainant admitted that she used to visit the house of the Accused. She admitted that she used to hang out with the daughter of the Accused. But she confirmed that she did not visit his house during the years 2016, 2017 and 2018. Therefore, it appears that complainant had tried to avoid the Accused after the incident. She also stated that she was frightened when she saw the Accused going pass her house at times.
15. She finally unfolded the story to her aunt on 24 August 2018. According to the evidence she decided to do so as the Accused started coming to her place when her uncle's house was being constructed. The complainant gave evidence that she was scared and finally decided to tell her aunt about the incident.
16. I have considered the explanation given by the complainant. Given the young age of the complainant, relationship with the Accused and her personal circumstances including the fact that she was staying with her grandparents and aunt and not with her mother, I am convinced that the explanation for delay is valid and justifiable. Thus, I have no reason to disbelieve the satisfactory explanation given by the complainant and therefore I am of the view that the delay does not affect veracity of her evidence.
17. The evidence of the complainant about her explanation for delay could not be challenged by the defence. Although it was suggested that she made a false allegation after two years, no evidence suggests that the complainant had a reason to make a false allegation.



18. Further I have observed the demeanour of the complainant. She gave evidence in a convincing manner. She was not evasive, and she gave forthright answers. Her evidence was consistent and the defence could not discredit her evidence. I consider the complainant as a credible and reliable witness. Although the Accused denied all the allegations, I am of the opinion that the defence could not create any doubt in the prosecution case.

19. Thus, I accept the evidence given by the complainant as truthful. I am satisfied that the evidence given by the complainant proves all the elements in the first, second and third counts beyond reasonable doubt.

20. I have no reason to disagree with the unanimous opinion of the assessors as it appears that they have believed the complainant and have rejected the evidence given by the Accused.

21. In the circumstances I find the Accused guilty to the first, second and third counts.

22. Accordingly, the Accused is convicted for all three counts as charged.



**Rangajeeva Wimalasena**  
**Acting Judge**

At Suva

21 October 2020

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission