

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 095 of 2022

STATE

vs.

RAFAELE RAKAI

Counsel: Ms. J. Fatiaki with Ms. P. Ram for the State
Ms. M. Singh with Mr. J. Buakula for Accused

Date of Hearing: 16th to 17th August 2022

Date of Closing Submission: 17th August 2022

Date of Judgment: 23rd August 2022

JUDGMENT

1. The name of the Complainant is suppressed and referred to as “**AB**”.
2. The Accused is charged with four counts of Rape, contrary to Section 207 (1), (2) (a) and (3) of the Crimes Act, one count of Rape, contrary to Section 207 (1),(2) (c) and (3) of the Crimes Act, three counts of Rape, contrary to Section 207 (1), (2) (b) and (3) of the Crimes Act and two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are:

Count 1

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI between the 1st day of January 2019 and the 31st of December 2019, at Chadwick Road, in Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

Count 2

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, between the 1st day of January 2019 and the 31st day of December 2019, on the same occasion as in **COUNT 1**, at Chadwick Road, in Nakasi, in the Eastern Division, penetrated the mouth of “**AB**”, a child below the age of 13 years, with his penis

Count 3

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI between the 1st day of January 2019 and the 31st of December 2019, at Chadwick Road, on an occasion other than **COUNTS 1 & 2** in Nakasi, in the Eastern Division, penetrated the vulva of “**AB**”, a child below the age of 13 years, with his tongue.

Count 4

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, between the 1st day of January 2019 and the 31st day of December 2019, at Chadwick Road, on an occasion other than in **COUNTS 1, 2 and 3**, in Nakasi, in the Eastern Division, unlawfully and indecently assaulted “**AB**”, by making her touch his penis.

Count 5

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, between the 1st day of January 2020 and the 31st day of December 2020, at Chadwick Road, in Nakasi, in the Eastern Division, unlawfully and indecently assaulted “**AB**”, by touching her buttocks.

Count 6

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI between the 1st day of January 2020 and the 31st of December 2020, on an occasion other than **COUNT 5**, at Chadwick Road,

in Nakasi, in the Eastern Division, penetrated the vulva of “AB”, a child below the age of 13 years, with his fingers.

Count 7

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, *between the 1st day of January 2020 and the 31st day of December 2020, on an occasion other than in COUNTS 5 & 6 at Chadwick Road, in Nakasi, in the Eastern Division, had carnal knowledge of “AB”, a child below the age of 13 years.*

Count 8

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI *between the 1st day of January 2021 and the 31st of December 2021, at Chadwick Road, in Nakasi, in the Eastern Division, penetrated the vulva of “AB”, a child below the age of 13 years, with his tongue.*

Count 9

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, between the 1st day of January 2021 and the 31st day of December 2021, at Chadwick Road, on the same occasion as **COUNT 8**, in Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

Count 10

Statement of Offence

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

Particulars of Offence

RAFAELE RAKAI, between the 1st day of March 2022 and the 14th day of March, 2022, at Chadwick Road, in Nakasi, in the Eastern Division, had carnal knowledge of “**AB**”, a child below the age of 13 years.

3. The Accused pleaded guilty to two offences of Rape as charged under counts three and six of the Information and two counts of Sexual Assault and pleaded not guilty to the other counts on the 3rd of May 2022. The hearing commenced on the 16th of August 2022 and concluded on the 17th of August 2022. The Prosecution called only one witness that was the Complainant. After the Prosecution’s evidence, the learned Counsel for the Prosecution conceded that the Complainant provided no evidence for counts seven, eight, nine and ten of the Information and invited the Court to act under Section 231 (1) of the Criminal Procedure Act. The Court, accordingly, found the Accused not guilty of counts seven, eight, nine and ten of the Information and acquitted him of the same, thus leaving only the first and second counts of Rape remain in the hearing. Subsequently, the learned Counsel for the Defence informed the Court that the Accused opted to exercise his right to remain silent, hence, offering no evidence for the Defence.

4. Having carefully considered the evidence of the Complainant and the oral submissions made by the Counsel of the Prosecution and the Defence, I now proceed to pronounce the Judgment as follows.

Burden and Standard of Proof

5. I first draw my attention to the burden and standard of proof. The Accused person is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused persons is on the Prosecution. It is because the Accused person is presumed innocent until he is proven guilty.
6. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offences without any reasonable doubt.

Elements of the Offences

7. The main elements of the first count of Rape are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant was a child under the age of 13 years.
8. The main elements of the second count of Rape are that:
 - i) The Accused,
 - ii) Penetrated the mouth of the Complainant with his penis,
 - iii) The Complainant was a child under the age of 13 years.

Admitted Facts

9. The Prosecution and the Defence tendered the following Admitted Facts under Section 135 of the Criminal Procedure Act.
 - a. ***THAT*** the Accused, **RAFAELE RAKAI**, 45 years old was a Security Officer before this alleged offending.
 - b. ***THAT*** the Complainant in this case, **"AB"**, [hereinafter referred to as "the complainant"], is related to the Accused.
 - c. ***THAT*** the complainant's father is the biological brother of the Accused person's wife and thus the Accused is related to complainant as her Uncle.
 - d. ***THAT*** the complainant and her father lived with the Accused and his wife, together in the same house at Chadwick Road, Nakasi, with the complainant's father's brother Eroni and his family from 2019 to a few weeks in March of 2022.
 - e. ***THAT*** the complainant was a primary school student during the period mentioned in para. 4 above.

The Prosecution's Case

10. The Court heard the evidence of the Complainant, where she explained that the Accused came down from the bathroom and laid beside her when she was sleeping in the living room with her cousins on one of the nights in 2019. She recognized him with the light from the bathroom when he descended the stairs. The Accused then removed her pants and put his "polo" into her female private parts. The Complainant said that she couldn't move when he did that. The Accused then put his "polo" into her mouth. Having done that, the Accused went out to sleep where his wife was sleeping. According to the Complainant, the Accused

used to sleep in the living room with them. The Accused threatened the Complainant the following morning, saying if she told anyone about the incident, he would kill her inside the house. The Complainant was scared of the Accused and did not tell anyone of this incident.

11. In 2020, The Complainant heard from her cousin Monika that the Accused had been touching Monika's private parts. Two cousins then decided to inform one of their elder cousins, Grace. However, their aunty, the wife of the Accused, did not believe them when Grace related her the allegation. Once again, in April 2021, the Complainant had informed Sereana when MSP officers came to the school to conduct a survey. Yet, nothing had eventuated effectively regarding this allegation until March 2022.

Right to Remain Silent

12. The Accused exercised his right to remain silent, hence, offering no evidence. The Accused is not obliged to present evidence, and his decision to exercise his right to remain silent must not be construed to his disadvantage. It proves nothing; still, the onus is on the Prosecution to prove the allegation against the Accused beyond a reasonable doubt.

Evaluation of Evidence

13. The Complainant was ten years old in 2019. She is now thirteen years old. The evidence of the child witness must be evaluated by referencing factors appropriate to her strengths and weaknesses related to her age, mental development, understanding and ability to communicate. (*vide; Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021)*).
14. In evaluating the evidence, the Court must first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is

relevant. (vide *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022)).

Evidence of Recognition

15. According to the Admitted Fact filed under Section 135 of the Criminal Procedure Act, the Accused admitted that he is known to the Complainant as he is closely related to her. Moreover, the Defence admitted that the Accused lived in the same house with the Complainant during the period between 2019 to March 2022. Accordingly, the Defence has not disputed the Complainant's ability to recognize the Accused if she had seen him.
16. The Complainant stated in her evidence that she saw the Accused descending the stairs from the bathroom and coming to her from the light that was on in the bathroom. This evidence was not challenged or suggested otherwise by the Defence. The Complainant and the Accused had been living in the same house, and he, sometimes, used to sleep with them in the living room. Therefore, I do not find that the Complainant had mistakenly recognized the Accused as the perpetrator.

Probability

17. I now proceed to determine whether it is probable for the Accused to approach the Complainant while she was sleeping with her cousins on the mattress in the living room and penetrate her vagina and then her mouth with his penis without causing alarm to her cousins. The Court heard no evidence explaining how many cousins were sleeping with her or how far they were sleeping from her.
18. The Accused also used to sleep with the Complainant and her cousins in the living room. Hence, if anyone noticed the Accused lying beside them, that would not cause any unfamiliarity as it was a routine of the Accused to sleep with them in the living room. Importantly, it was stated by the Complainant that she couldn't move when the Accused removed her clothes and committed this crime, which the Defence did not challenge or

suggest otherwise. Considering the young age of the Complainant, the nature of the relationship between the Complainant and the Accused and the gravity of the alleged act, I find it was probable for the Accused to commit this crime as explained by the Complainant.

Penetration

19. I shall now draw my attention to the issue of penetration. Prematilaka JA in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15 meticulously defined the meaning of vaginal area and how to approach the evidence of a child in respect of the issue of penetration. Premathilaka JA held that:

“Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the

count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

20. The Complainant expressly stated that the Accused put his "polo", a slang word commonly used in i-taukei language, to identify a male penis inside her female private part. According to her, it was painful, and pain came from her female private part. She later identified her female private part as "mimi". The Accused then put his "polo" into her mouth.
21. The Complainant is a thirteen-year-old minor. It is unreasonable to expect a thirteen-year-old child to explain sexual conduct using all these technical and scientific terms. There is no

doubt that she was referring to the vaginal area of her body and the penis of the accused when she explained that he put his "polo" in her female private part. Accordingly, I am satisfied that the Complainant had explained in her evidence that the Accused had penetrated her vagina, if not vulva, with his penis.

Delay

22. The learned Counsel for the Defence contended that the delay in reporting the matter might affect the credibility of the evidence given by the Complainant. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018) has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
23. The Complainant had not promptly informed anyone of this incident because she was scared that the Accused would kill her in the house if she did so. Eventually, she found the courage to inform her cousin Grace when she found out another cousin, Monika, was also going through the same ordeal as she did. According to the rules of hearsay evidence, the conversation between Monika and the Complainant is admissible to the extent that Monika made that statement, and it led the Complainant to share her experience with Monika and eventually informed Grace about this crime.
24. Regrettably, no action was taken in 2020 in respect of this crime. Once again, there was no prompt response from the law enforcement authorities when she reported this crime to Sareana in School when MSP officials came to the School.
25. Accordingly, the Complainant explained the reason for not promptly reporting this matter to anyone. Hence, a lack of promptness and spontaneity has not affected the credibility of the evidence given by the Complainant.

26. The Court observed the Complainant answered affirmatively when it was suggested to her by the learned Counsel for the Defence that the Accused had not put his "polo" into her female private part. The Court further observed that she denied the proposition made by the learned Counsel for the Defence immediately after the above question, suggesting that the Accused had never put his "polo" into her mouth. The Complainant then reaffirmed her claim stating that the Accused put his "polo" into her female private part during the re-examination. Considering her age and how she gave her answers, I do not find that the above affirmative answer of the Complainant had affected her credibility.
27. Considering the reasons discussed above, I am satisfied that the Prosecution has successfully proven beyond a reasonable doubt that the Accused had committed these two offences of Rape as charged under counts one and two of the Information.

Conclusion

28. In conclusion, I find the Accused guilty of the said one count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (c) and (3) of the Crime Act and convict to the same accordingly.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe", written over a horizontal dotted line.

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

23rd August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.