

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 241 of 2020

BETWEEN : **THE STATE**

AND : **VARINAVA DELANA**

Counsel : Ms. Semisi, K for the State
: Mr. Buakula, K with Ms. Prakash, S for the Accused

Date of Trial : 1st August 2022
Date of Judgment: 20th September 2022

JUDGMENT

The charges

1. The Accused is charged with 2 counts of sexual assault and 4 counts of rape. Counts 1, 4 and 5 are representative counts. He pleaded not guilty to all 6 counts and the trial was heard over two days.
2. At trial, the Prosecution bears the onus of proving the Accused person's guilt beyond reasonable doubt. The Prosecution does this by making the Court sure of the Accused's guilt. Each element of each of the alleged offences must be proved beyond reasonable doubt.
3. A finding of guilt in one count does not necessarily mean a finding of guilt in the other counts. Each count is decided on the evidence in support of it.

4. The Accused does not have to prove anything. He may remain silent if he wishes to and no adverse finding could be made against him on account of such a choice. The right to remain silent is consistent with the presumption of innocence enshrined in the Constitution.

Elements

5. The representative charge in count 1 is that the Accused had sexually assaulted the Complainant by squeezing her breasts between the 1st day of January 2018 and the 31st day of December 2018. To prove this charge, the Prosecution is required to establish that

- the Accused
- unlawfully and indecently assaulted
- the Complainant
- by squeezing her breasts

6. Count 2 alleges that the Accused had sexually assaulted the Complainant by fondling her breasts and vagina on 2 January 2019. The Prosecution must prove that

- the Accused
- on the 2nd day of January 2019
- unlawfully and indecently assaulted
- the Complainant
- by fondling her breasts and vagina

7. In Counts 3 to 6, the Accused is charged with having carnal knowledge of the Complainant without her consent. The Prosecution must prove the following elements:

- the Accused
- had sexual intercourse with the Complainant
- without her consent

8. A sexual assault is the unwanted physical touching of another person in circumstances that are indecent and offensive to the ordinary standards of propriety.
9. Carnal knowledge means sexual intercourse or penile penetration of the vagina to any extent. Proof that the Accused had ejaculated during sexual intercourse is not necessary.

Agreed facts

10. By an amended set of agreed facts filed 5 August 2022, the following facts are admitted and accepted as proved beyond reasonable doubt:
 - The name of the Complainant and her place of residence. She was born on 5 June 2005.
 - The name of the Accused. He is 53 years old and resides at Block 1, Flat 15, Kia Street, Raiwai.
 - The Complainant and Accused are related. He is her uncle.
 - The Complainant's mother normally left home early in the morning and returned in the afternoon.
 - On 25 July 2020, the Complainant left home and went to one Sitiveni and his cousin. They dropped her off at Tacirua where she went to her uncle's house and met her sister, Ruci. She did not return home.
 - Between the 3rd of January 2019 and 31st December 2019, the Accused penetrated the vagina of the Complainant with his penis. (Counts 3 and 4)
 - Between 1st January 2020 and 24th July 2020 the Accused penetrated the vagina of the Complainant with his penis. (Counts 5 and 6)

The Prosecution case

11. The Complainant was the first witness for the Prosecution. She told the Court both her parents are deceased. She was raised by Alena, the wife of her biological father, from when she was three years old. She regards Alena as her mother. (I refer to Alena both by name and as the Complainant's mother in this Judgment.)

12. After Alena's husband died, she and Alena moved to Nausori. In 2014, she and Alena moved to Raiwai to stay with the Accused who was Alena's partner. She called him, "Ta" meaning, dad.
13. In 2018 while she was in Class 8 at John Wesley Primary, the Accused started touching her body. At first, he touched her in a playful way. She did not like it because he was her father. The first incident happened when she was at home. She was sitting at the table, facing the window. The Accused came from behind her and touched her breast from the back. She did not agree for him to touch her like that and told him not to touch her. At the time, her mother was working and she was at home alone with the Accused. She had wanted to tell her mother but was afraid the Accused would get angry with her. In 2018, this happened more than once.
14. In 2019, she was in Form 3 at John Wesley College. In this year, the Accused tried to have sex with her. She was asked about the 2nd January 2019. She spoke of an incident when she was in the kitchen, cooking. She said the Accused came from behind her and fondled her breasts. She did not like it and she was angry. She told him she would tell her mother and he stopped.
15. After cooking, she sat down in the sitting room, watching TV. The Accused came and touched her private part from on top of her pants. She did not agree for him to do that and she was both scared and angry. She was angry because she felt no father would do something like that. She did not tell her mother about this incident because her mother would get angry with her.
16. She recounted an incident on 3 January 2019. The Accused said for them to have sex. She was scared and did not say anything. The Accused removed her pants. She told him not to remove her pants but he did it anyway. He removed his clothes and came to the bed. He tried to insert his penis into her female private part. It was painful and she told him so. He withdrew but inserted it again. She cried and told him to stop as it was painful. She said he did this to her for about an hour and in that time she was crying and begging him

to stop. Afterwards, she showered. She discovered her vagina was bleeding. She thought she was having her menses.

17. From 4 January 2019 – 31 December 2019, the Accused had sexual intercourse with her on more than one occasion. He would have sexual intercourse with her two to three times in a week. If she refused, he would tell her to not have tea after school and also to not have dinner. She said even if she refused, the Accused would still have sex with her.
18. She recalled an incident when she refused. She was going to have tea when the Accused came and pulled her to the bedroom. He removed her clothes and licked her body, from her neck to her breasts. She was angry and did not want what he was doing. She told him not to insert his penis into her. He told her it would be quick, and inserted his penis into her vagina. She did not agree to him doing this to her.
19. She did not tell her mother about this because she was scared and feared her mother would ask why she did not tell her from the beginning. She also said she was also scared of the Accused who always spoke to her in a harsh way.
20. The following year, from 1st January to 23rd July 2020, the Accused continued to have sexual intercourse with her. On one occasion, the Accused told her for them to have sexual intercourse quickly in the sitting room before her mother returned from work. He removed her clothes, licked her neck and breasts and then inserted his penis into her vagina. She was angry and did not like what he was doing to her. She did not want to talk to him. When he inserted his penis into her vagina, she told him she did not like it and he replied he would not do it again. When she told him to stop, he continued to insert his penis into her vagina until she pushed him away. She did not consent to the Accused doing this to her. She did not report to anyone as sometimes the Accused spoke to her in a harsh way and this scared her.
21. On 24th July 2020 early in the morning, her mother wanted her to leave home together with her but the Accused said it was still early. He said for her to go to school after 7:30am. While she was getting ready to shower, he asked her for them to have sexual intercourse

first before she went to school. He told her to go into the bedroom. He removed her clothes and inserted his penis into her vagina. This did not take long as it was nearly 7:30 and it was time for her to get ready for school. She did not agree to sexual intercourse and told him so. He said for them to have sex in the morning because he would not do it in the afternoon when she returned from school. She did not tell her mother because she was scared.

22. On 25 July 2020, she ran a few errands for her mother when a friend named Sitiveni called her saying he was at the bus stand and for them to meet there. On that day, she went to Tacirua and did not return home. The next day, the Accused and her mother came with a Police Officer to Tacirua and they went to the Police Station. She was scared and reported this matter. It was then that her mother came to know.
23. In cross-examination, the Complainant agreed that she had reported the Accused to the Police when he belted her in 2018. She did not tell the Police then nor did she tell the doctor who medically examined her then that the Accused had touched her breasts. After that incident, her mother had asked her if everything was ok between her and the Accused and she said yes. She was scared to tell her mother because the Accused would get angry with her. She had friends in school but she did not tell anyone about what the Accused did to her. She maintained that the Accused had touched her breasts.
24. She agreed that she passed the Police Station on her way to school and said that she did not make a report there as she was scared that when she returned home, the Accused would be angry with her for reporting.
25. On 25 July 2020, she went to town. She took her mother's bank card and withdrew money from it. She did not return home on this day because she had taken her mother's card and also because of what had been happening to her at home. From Tacirua, they went to the Raiwaqa Police Station because of the bank card issue. She told the Police what had been happening to her because she was afraid to return home.
26. In re-examination, the Complainant said she was afraid to report for fear that the Accused would belt her again and speak harshly to her when she returned home. She did not make

a report to the doctors as they were only observing the parts of her body that the Accused had smacked. She did not tell her mother as the Accused always gave her a bad look not to tell her mother.

27. Dr. Burua medically examined the Complainant on 27 July 2020. The Complainant was generally stable. Her genitalia had profuse whitish discharge at the opening of the vagina and a fresh laceration at the upper end of the labia minora. The hymen not intact. These findings were indicative of positive penetration, most likely by a male erect penis. The fresh laceration would have been within a time frame of less than 6 days. The white discharge depicted fungal infection in the area caused by the introduction of a foreign body upsetting the normal pH balance in the vaginal area. The foreign body in this situation was the penetration of the male penis.
28. The Accused chose not to give evidence and to not call any witnesses in his defence.

Analysis

29. The Accused was well within his rights to choose not to give evidence and be subjected to cross-examination. He does not have to prove anything. It is for the Prosecution to prove his guilt and to do so beyond reasonable doubt.
30. The Prosecution case is dependent on the evidence of the Complainant and examining doctor. If I accept the Complainant's evidence, then the Defendant is guilty of the charges against him. The doctor's evidence proves penetration, but this fact is in any event, proved beyond reasonable doubt in the agreed facts.
31. The identity of the Accused is not in issue. At all material times, he was the partner of the Complainant's mother and the Complainant was living with them.
32. It is an agreed fact and therefore proved beyond reasonable doubt that he had sexual intercourse with the Complainant between 3rd January 2019 and 31st December 2019; and also between 1st January 2020 and 24 July 2020. What remains to be proved for the rape

charges therefore is whether, on the incidents recalled by the Complainant, sexual intercourse had been without her consent.

33. No complaint was made to anyone until the Accused and the Complainant's mother came with the Police on 26 July 2020 to take the Complainant from Tacirua after she left with her mother's ATM card and failed to return. The complaints were made late.
34. The absence of an immediate complaint does not necessarily mean fabrication. Her account is that she did not report to anyone as she was scared of the Accused who spoke harshly to her at times. She said when at home, he would give her a bad look not to say anything to her mother. Her evidence is that when she refused to have sexual intercourse with him after school, he would tell her that she will not have tea and will also not have dinner. The Accused was a person in authority in the home. The Complainant was an orphan brought up by an aunt who was the Accused's partner. I accept as reasonable the Complainant's reasons for not reporting to anyone earlier. A report of a belting is inherently different from reporting a sexual assault.
35. The defence case for the allegations of sexual assault is one of denial. For the rape charges, the defence is that the Complainant had consented to sexual intercourse with the Accused.
36. I consider the allegations dispassionately and without emotion, sympathy or prejudice. On the whole of the evidence, the Complainant struck me as an honest witness. I believe her evidence. She was not able to recollect some of the dates and incidents, but she was able to recall with sufficient clarity some ^{of} them. The inconsistency on where she had been in Count 3, is, in my opinion, peripheral. S
37. She was steadfast under vigorous cross-examination that the Accused had, without her consent, squeezed her breasts sometime in 2018; and fondled her breasts and vagina in 2019. Such acts were without lawful excuse and indecent in that they offend the ordinary standards of modesty. I find the charges in Counts 1 and 2 proved beyond reasonable doubt.

38. On Count 3, I believe the Complainant's evidence that on 3rd January 2019, the Accused had inserted his penis into her vagina without her consent. It was painful and she told him to stop. The Accused did this for about an hour in which time she was crying and begging him to stop. I feel sure that the Accused knew the Complainant did not consent.
39. On Count 4, I believe the Complainant's account that sometime between 4/1/19 and 31/12/19, the Accused had pulled her to the room where he licked her body and inserted his penis into her vagina. At her objection, he told her it would be quick and proceeded to have sexual intercourse with her. I feel sure that the Complainant did not consent to sexual intercourse and that the Accused knew she was not consenting.
40. On Count 5, I accept as true the Complainant's evidence that sometime between 1/1/20 and 23/7/20 in the sitting room, the Accused penetrated her vagina with his penis. She did not consent and told the Accused she did not like what he was doing. I am satisfied beyond reasonable doubt that the sexual intercourse was without the Complainant's consent and that the Accused knew of this fact.
41. On Count 6, I am satisfied beyond reasonable doubt that the Accused had inserted his penis into the Complainant's vagina on the morning of 24/7/20. I believe the Complainant's evidence that she told him no. I feel sure that the sexual intercourse was without her consent and that the Accused knew she was not consenting.
42. For all of the above reasons, I find the Accused guilty of sexual assault in Counts 1 and 2, and of rape in Counts 3 – 6. He is convicted accordingly.




Stainiu F. Bull
Acting Puisne Judge

Solicitors:

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