

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 78 of 2021

STATE

vs.

MITIELI ROKOLACADAMU

Counsel: Ms. S. Bibi & Ms. P. Kumar for the State
Trial in Absentia [Unrepresented]

Date of Hearing: 20th & 22nd March 2023

Date of Closing Submission: 24th March 2023

Date of Judgment: 29th March 2023

JUDGMENT

(The name of the victim is suppressed she will be referred to as "MN")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 28th October 2021.

COUNT ONE

Statement of Offence

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

Particulars of Offence

MITIELI TOKOLACADAMU on the 2nd day of March 2021 at Gau, in the

Eastern Division, penetrated the anus of MN with his penis without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

MITIELI TOKOLACADAMU on the 2nd day of March 2021 at Gau, in the Eastern Division, penetrated the vagina of **MN** with his penis without her consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MITIELI TOKOLACADAMU on the 2nd day of March 2021 at Gau, in the Eastern Division, penetrated the vagina of **MN** with his tongue without her consent.

2. As the trial was proceeded in absentia and the Prosecution led in evidence the victim PW1 MN, PW2 her school teacher Mr. Nadan Sami, PW3 the Head Teacher Aisake Lutunauga, PW4 Assistant Head teacher and the Child Protection Officer Ms. Losena Volainisiga, PW5 her mother Akosita Seini and closed its case. At the close of the prosecution case as there was prima facie evidence upon hearing the submissions of the prosecutor this was set for judgement. Having carefully considered the evidence presented during the hearing and the submission of the state, I will now proceed to pronounce the judgment.

Trial in Absentia

3. At the outset when the information was filed the Accused was present and upon reading the charges he had pleaded not guilty to all three counts of Rape. Then he was

enlarged on bail on 29th July 2021. When this was mentioned on 28th April 2022 the trial dates were set for 20-24 March 2023 in the presence of the Accused. Thereafter this was mentioned on several dates. However when this matter was mentioned on 14.03.2021 the Accused failed to come to court and was absent, thus a bench Warrant was issued. When mentioned on 17th March 2023 it was submitted by the State Counsel that the police were unable to locate the Accused as he was not found in the given address and he was reported to have gone to the West.

4. The accused was represented by counsel but since the said counsel was not available since January 2023, the Accused was granted several mention dates to retain and obtain the services of another counsel or the Legal Aid which he failed to do and then absconded. No doubt the Accused has a right of representation but the said right to representation is not an absolute and the circumstances and the manner in which the accused through his or her own choice or conduct, came to be unrepresented may be relevant to the assessment of fairness of so proceeding in the absence and without representation. (Condon v R, [2006] NZSC 62, [2007] 1 NZLR).
5. When mentioned on 20th March 2023 it was submitted by the State Counsel that several attempts made to locate and execute the warrant were not successful and the state filed an affidavit for trial in absentia. This was a 2021 matter and as this Court was satisfied that the Accused with sufficient notice and being well aware of the trial dates was absconding, the prosecution was permitted to proceed in his absence by virtue of Section 14 (2) (h) (i) of the Constitution. This matter was taken up for trial from the 20th to the 22nd of March as scheduled. However, to ensure a fair trial the court did put certain questions to the Complainant to clarify certain matters that appeared to this court be relevant to the defense of the Accused.

Elements of the charges

6. For the Accused to be found guilty of the three counts of Rape in the present case based on sub sections 1 and 2(b) of Section 207 of the Crimes Act, in addition to the date stated in the respective counts the prosecution must prove beyond reasonable doubt, the following elements, that;
 - i) The Accused,

- ii) Penetrated the vagina and the anus of the Complainant with his penis and the vagina with his tongue,
- iii) The Complainant did not consent to the Accused to the said penetrations,
- iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis and the tongue in that manner.

The slightest penetration of the complainant's vagina and anus by the Accused's penis and tongue are sufficient to satisfy penetration.

7. If I may elaborate counts No.1 and 2 that of rape are based on sub sections 2(a) of Section 207 of the Crimes Act and count No.3 that is based on sub sections 2(b) of Section 207 of the Crimes Act. Under these sections, the offence of Rape is constituted when a person penetrates the vagina/anus without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

Presumption of innocence

8. No adverse inference may be drawn from the absence of the accused and it will be considered as being akin to the exercise of the right to silence by the Accused. The accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence led by of the prosecution the Accused must be found not guilty of the charges and accordingly acquitted.

Summary of evidence.

9. The Prosecution led in evidence the victim PW1 MN, PW2 her school teacher Mr. Nadan Sami, PW3 the Head Teacher Aisake Lutunauga, PW4 Assistant Head teacher

and the Child Protection Officer Ms. Losena Volainisiga, PW5 her mother Akosita Seini and closed its case.

10. According to the victim **MN**, her date of birth is 28th February, 2006 and the birth certificate was produced as exhibit PE1. She is now 17 years and she lives at Nadi with her mother. In March 2021 she was living at Sawaieke Village in Gau Island. On the 1st March, 2021 she had returned home from school and was about to wash her uniform in the kitchen sink. Her mother and siblings were not at home and she alone had been there. Then she had seen the Accused walking to their house with a music box and has wanted to charge it. It was in the afternoon and the Accused who was known to her as Mitcheli had been a known person a distant relation or a cousin of the father from the same village. She had seen him come to her house when the father is around and she herself had visited his house with her friends to meet Mitcheli's sister.
11. After coming in Accused had walked up to the kitchen sink, kissed her and asked her to do bad things meaning to have sexual intercourse with him. She had been afraid and was unable to tell anything to him. Then he held her by the hand and taken her into the bathroom. Then he had removed her pant and panty and licked her vagina. Then he had kissed her and inserted his private part which is explained to be his penis from her rear into her vagina. She had felt his penis going into her vagina and also pain. She had tried to push him but was not successful. She had then managed to push him away but once again he had inserted his penis from front into her vagina. She also said that he did insert his penis into her anus. She did say that the Accused penetrated her vagina and anus and also licked her vagina but she did not like it or consent. The Accused was engaging in these acts for around 2 hours.
12. Then both of them had come out she had worn her clothes and gone to the kitchen to wash her uniform. Accused had been lying on the settee in the sitting area. She had due to fear gone to the rear of the house and been there. Then her mother had walked in and seen the Accused in the sitting area. Her mother had called but she had been reluctant to come in and her mother had looked disturbed and was staring at Mitcheli. The Accused had then left the house.

13. She had not told her mother and remained silent. When asked for the reason she said that she was scared of her mum as she thought she would punch and also she was afraid of the Accused. However, the following morning soon after she went to school and the names were called out by the teacher she had informed her class teacher Mr. Sami that something bad had happened to her. He had brought it to the notice of the head teacher and the child protection officer Ms. Losena. They have made enquiries and reported this to the police.

Other Evidence

14. PW2 Mr. Sami confirms that the victim approached him that morning and in i-Taukei uttered “*Sir, e dua naka ca cakava vei au*”. Mr. Sami though not an i-Taukei understood the i-Taukei dialogue to some extent. She was telling him that something bad had happened. She had appeared to be frightened and disturbed. He said that she is usually quite friendly and make friends easily though she was an average student. He had referred her to the head teacher.
15. The Head Teacher Mr. Aisake said that on the 2nd of March victim MN was brought to his office by Mr. Sami. Mr. Aisake had inquired and MN had told that Miti did something bad to her. As Miti was also a previous student was known him and his full name he said is Mitieli Rokolacadamu. The witness then identified the photograph exhibit PE2 as being the photograph of the said person. Mitieli had been in year 6 when this witness came in 2014. He said that the said boy was about 4 to 5 years senior to MN. The victim had then told him that Miti touched her breast, private body and pulled her to the washroom.
16. MN’s mother too was a teacher in the same school but Ms. Akosita has not informed her immediately as the girl appeared to be afraid. As he was a male teacher and due to the policy of the school, he had got down Losena the Child Protection Officer.
17. Losena had met MN and was informed of the incident by the head teacher and has wanted her to have a session with MN. She had inquired and MN had told her that Miti came to her house to charge the music box then kissed her and dragged her into the bathroom and forcibly took her clothes and his pants too. Then he had pushed his balls ti her buttocks. She had understood this to mean putting the penis into her buttocks. She

was also told by MN that he put his balls at the back and in the front. PW1 had looked scared. Then she had made arrangements to inform the police.

18. Finally, MN's mother Akosita Seini said that she herself was a teacher in the school however MN had spent much of her life with her grandmother. She did not have a good or close rapport with her daughter. On the 1st of March she was required to attend to something at school and was late to come home. Around 6pm when she came, she was shocked to see Mitieli in the house lying down in the sitting area. When she inquired, he had told that was there to charge his music box. She had then called out MN who was rather reluctant to come from the rear of the house. The Accused had then left and Akosita had had called the other children and she too gone to make some home visits.
19. It is on the next day that she was informed by the Child Protection Officer of this incident. She said that Mitieli Rokolacadamu is related to MN's father and lived in the village. She had found out from the Child Protection Officer that something had happened to her daughter on the 1st of March.

Evaluation

20. As the Accused was absent and unrepresented there was no cross-examination. However, I will consider the evidence of the witnesses separately and collectively and consider with special care and attention, to identify possible inconsistencies or improbabilities or any other matter that may be in favour of the Accused.

Identity

21. The Accused was not present at the trial. He is a known person and happens to be a cousin of the father of MN. She herself have seen him coming to their house and she has visited his house on one occasion or two. Her mother PW5 Akosita clearly described the details of the Accused. She said his name is Mitieli Rokolacadamu. Then PW3 the head teacher Mr. Aisake also had known Mitieli as a student of the school. All three of them identified a photograph which was in the copy record of the Magistrate's Court. Therefore, the identity of the Accused was clearly established by the Prosecution.

The Acts of Penetration

22. The proof of these charges are solely dependent on the testimony of the victim MN. According to the victim she narrated a series of acts which the Accused committed on her. Upon being taken into the bathroom she said that he penetrated her vagina as well as her buttocks which she referred to as her *butt*. She further explained that the Accused did penetrate her vagina from her front with his penis. Then he also penetrated her butt from the *back* (rear). To prove the offence of rape penetration of some degree is necessary. As to penile-vaginal penetration she is very specific and clear that the penis did enter her vagina. As to the act of penetration from her behind (*back*) what she says is that he put it into her butt. In the common usage the butt clearly is a reference to the buttocks and she explained that she was facing her back to the Accused when he so penetrated his penis to her butt. She does not use the word anus. However, when one says that the butt was penetrated the only meaning and the necessary inference is that her anus was penetrated with the penis. There is no other probable inference or meaning that can emanate from the said evidence in these circumstances. Therefore, the prosecution has proved the act of penile-vaginal penetration as well as penile-anal penetration.
23. She also did testify that the Accused licked her vagina. She in her evidence described this act as licking her *ovaries*. She said this in the iTaukei dialect and it was translated so. What she in fact to said was that the Accused's tongue reached her inner vagina. This incident had taken place when no one else was at home and according to the victim the duration was 2 hours. When she says two hours it was clear that she did not mean precisely two hours on the clock. She merely said that it was a long drawn out series of acts. The Accused was several years her senior and also a relative known to the victim. In these circumstances the victim who was just 13 years surrendering and succumbing to the aggressive advances of the Accused is extremely probable and possible. The Accused would also certainly be able to and did have the opportunity to insert his tongue into her vagina and do as he pleased.

Consent

24. The victim clearly says that she did not agree or consent to the acts of penetration by the Accused. That is her direct evidence in court. But she admits that she did not manifest this at the time of the incident. Thus, if she did not consent why did not, she say so to the Accused? She was alone at home and the Accused related and known to

her had without any warning walked into the house. He had verbally suggested to her that they should engage in sexual intercourse. He had very bluntly made his intentions known and even kissed her and then held her hand and taken her into the toilet. This girl I observe even at 17 years looks extremely innocent, naïve and is of an extremely submissive nature. Her teacher, the head teacher as well as the Child Protection officer described her as an average student and that she was visibly afraid and disturbed when she divulged the incident to them. A girl of this nature when faced with such a situation in the said circumstances will no doubt fall into great embarrassment, fear and helplessness. This will be further compounded when the perpetrator happens to be a known male adult with a familial tie and she being alone in the house. That is exactly what she meant when she said she was afraid and that she did not tell anything when he asked if he could do it. The evidence reveals so and she naturally would have got into a state of shock, disbelief and dismay.

25. Is it probable that she would allow the Accused to remove her panty without fighting or resisting if she was not consenting? As described above the Accused has seized the opportunity when the victim was vulnerable and alone. If this was committed by a total stranger she may have cried out, resisted or attempted to run away. But when it is a known relative of this nature the suddenness, familiarity and disbelief appears to have put the girl into state of fear and helplessness where the Accused was able to do as he pleased.
26. If such a horrible thing happen to her without her consent then why did not she tell her mother who arrived around 6pm? The Accused was still in the house and she was in the rear of the house. Her mother seeing the Accused in the house had been staring in surprise and has called MN. This would be the most opportune moment for her to have told her mother. She did not do so. She explained that she was afraid that her mother may punch her. It is in evidence that MN grew up with her grandmother and was living with her. It was just a short time before this incident that her mother has come to live with the victim. Her mother Akosita in evidence explained that her rapport with MN was just beginning to pick up when this incident happened. In these circumstances MN being reluctant to tell her mother at that moment is highly possible and probable.

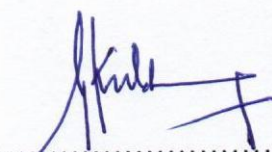
27. Though, she did not disclose immediately to the mother, she did on the following morning tell this to her teacher Mr. Sami. She had uttered that something bad was done to her by Miti. Mr. Sami said that the girl was in distress and appeared to be afraid when she told him in the i-Taukei dialogue that something bad happened to her. Thereafter, she discloses this to the head teacher and then in detail to the female child welfare officer Ms. Losana. Her demeanour and the manner of disclosing is consistent only with the subsequent conduct of a victim who had been sexually assaulted without her consent.
28. The complainant, a 13-year-old girl, and the Accused was a known relative who was senior in age. Accused had suddenly come into the house and gazed at her and asked if he could ‘*do it*’ meaning to have sexual intercourse. The complainant said that she was afraid at this point. She is alone in the house. Then the Accused kisses her and holds her hand and takes her into the bath room. Then removes her panty and licks her pubic area. The accused in rapid succession embarks upon a series of acts involving touching and licking of a sexual nature, each progressively more intimate and aggressive than the previous. When he approaches to penetrate her vagina, she then pushes him in an attempt to resist but to no avail. He does not stop his pursuit of penetrating both the vagina and the anus kissing and licking her vagina too. With her pushing, it appears that the sexual advances of the Accused have become even more aggressive and intent. This had put the victim into a state of fear and helplessness that enabled the Accused to freely pursue his sexual escapade for almost 2 hours. The Complainant appears to have succumbed and Acquiesced. No doubt the surrender and compliance by the complainant was due to fear and helplessness when she was sexually overpowered by a known relation who was relatively senior in age. If a total stranger has done so she may have reacted differently.
29. On this evidence the physical *element* of these three charges being; (a) the acts of sexual intercourse (anal-penile, vaginal-penile and vaginal-tongue) with the victim; (b) without consent, are proved beyond reasonable doubt. The affirmative finding or proof as to each of these elements by itself will not suffice, but the requirement of *the fault element* must also be satisfied to successfully prove the offence of rape. The prosecution must establish beyond reasonable doubt that the accused either was aware that the victim was not consenting (knew), or else realized the victim might not be

consenting, and was determined to have intercourse with her whether the victim was consenting or not (reckless). Her initial silence in conjunction with the attempt to push at the point of first vaginal penetration was a clear manifestation that she was not consenting and the accused knew and he certainly ought to have realized that the complainant was afraid and is not a willing participant. The Accused's conduct of just embarking upon and perusing with his sexual escapade in rapid succession completely overpowering and with scant disregard to her resistance clearly proves that the accused realizing that she might not be willing and not consenting was determined to have intercourse with her whether she was consenting or not. This proves the fault element.

Conclusion

30. In the above circumstances, I hold that the prosecution has proved beyond reasonable doubt that the penis and the tongue were inserted in to the vagina and also the penis was inserted in to the anus of the victim MN as narrated by her. This was done without her consent; and it was the Accused, and the Accused himself and no other who had done so. In the circumstances, of this case I hold that the Accused knew that MN was not consenting to the Accused so penetrating her vagina and anus. These acts have been committed by the Accused on the 1st March 2021 at Suva in the Central Division. I hold that all these ingredients have been proved beyond reasonable doubt by the prosecution.
31. Accordingly, I hold that prosecution has proved counts No. 1, 2 and 3 of rape as charged beyond reasonable doubt and I find the Accused Mitieli Rokolacadamu guilty of the said counts of Rape, as charged, and convict him separately for the same.




.....
Gihan Kulatunga
Judge

At Suva

29th March 2023

Solicitors

Office of the Director of Public Prosecutions for the State.
Accused Absent and Unrepresented