

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 103 OF 2022

BETWEEN : STATE

AND : APENISA DRUVA

Counsel : Ms A Vavadakua for State
Ms L Ratidara for Accused

Date of Hearing : 20 February 2023

Date of Judgment : 4 April 2023

JUDGMENT

[1] **Charges**

The accused is charged with five counts as follows:

Count One

Rape

On 27 April 2019 at Nukui village, Rewa, the accused penetrated the vagina of VLL, a child under the age of 13 years, with his penis.

Count Two

Rape

On 10 October 2020 at Nukui village, Rewa, the accused penetrated the vagina of VLL, with his penis, without her consent.

Count Three

Rape

On 24 April 2021 at Nukui village, Rewa, the accused penetrated the vagina of VLL, with his penis, without her consent.

Count Four (Representative count)

Sexual Assault

Between 27 April 2019 and 24 April 2021 at Nukui village, Rewa, the accused unlawfully and indecently assaulted VLL by sucking her breast.

Count Five (Representative count)

Rape

Between 27 April 2019 and 24 April 2021 at Nukui village, Rewa, the accused penetrated the vagina of VLL with his tongue without her consent.

[2] **Burden and Standard of Proof**

The burden is on the prosecution to prove each charge beyond reasonable doubt. Unless expressly required by law, the accused does not carry any burden to prove or disprove anything.

[3] **Rape**

Section 207(1) and 2(a) of the Crimes Act defines the offence of rape as follows:

A person rapes another person if —

- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[4] Section 206 of the Crimes Act defines consent as follows:

(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained —

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d)

[5] Section 207 (3) of the Crimes Act states:

For this section, a child under the age of 13 years is incapable of giving consent.

[6] Carnal knowledge means sexual intercourse, that is, penetration of vagina with penis. Slight penetration is sufficient. Ejaculation is not necessary.

[7] **Sexual Assault**

Section 210 (1) (a) and (2) of the Crimes Act defines sexual assault as follows:

(1) An person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(2) The offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in sub-section (1)(a) or (1)(b)(i) if the indecent assault or act of

gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.

- [8] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. Unlawful means without lawful excuse.
- [9] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.
- [10] To prove rape as alleged in count one, the prosecution must prove that on the occasion alleged the accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis, and that at the time, the complainant was under the age of 13 years.
- [11] To prove rape as alleged in counts two and three, the prosecution must prove that on the two occasions alleged the accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis, without her consent.
- [12] To prove sexual assault as alleged in count four, the prosecution must prove that on least one occasion the accused deliberately and without any lawful excuse made contact with any part of the complainant's body and that the act was contrary to the ordinary standards of respectable people.
- [13] To prove digital rape, as alleged in count five, the prosecution must prove that on at least one occasion the accused penetrated the vagina of the complainant with a thing or a part of his body that is not a penis without the complainant's consent.

[14] **Prosecution Case**

The entire prosecution case is based upon the complainant's evidence. She is a child. Her evidence was received using special measures (screen and closed court). The purpose of the special measures was to put the witness at ease and not to prejudice the accused.

[15] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how boys and girls should conduct themselves.

[16] The date of birth of the complainant and her relationship with the accused are not in dispute. She was born on 29 August 2007. He was born on 27 August 2002. Both are cousins and lived in Nukui village, Rewa.

[17] In relating to the first alleged incident, the complainant said that the accused approached her beside the village community hall toilet during the night when she was playing hide and seek with her friends. The accused touched her on the shoulder and when she saw the accused she ran to one Tai Ledua's house. The accused ran after her and got hold of her. She was taken to a washroom area at Tai Ledua's house and made to lie down. She identified the spot when shown the photographs (PE1). He forcefully kissed her lips and then pulled up her t-shirt and sucked her breast. He then pulled down her trousers and licked her vagina before penetrating her vagina with his penis. She resisted by pushing and kicking him but he forcefully pressed down her thighs and penetrated her. When he finished he pulled up his trousers and left. She wore her pants and sulu and went home. She was scared and did not know what to do. She did not complain to anyone at home because her mother had gone to Veisari and her father had gone to drink grog in the village. Only her younger siblings were at home. She herself was in primary school at the time.

[18] In relating to the second alleged incident, the complainant said that during the night she was at her home with her siblings when one of her friends called out to her

saying that the accused was waiting for her at the seawall. She accompanied her friend to the seawall and when they arrived at the seawall no one was there. As they were walking back to her home she realized her friend had suddenly disappeared. Her friend was walking behind her. When she looked back she saw the accused. He convinced her to accompany him to his home to get some drinks for her dad. When she refused, he pulled her by hands and took her to his home. He took her to a room in his house which was used for a kitchen. He told her to wait on the bed while he will get the drinks for her to take home to her dad. He kept her engaged with a conversation but when she realised he was not giving her the drinks, she stood up to leave. He then forcefully pushed her down on the bed.

[19] She described the events that followed:

He then forcefully kissed my mouth and then pulled up my t-shirt. And he sucked my breast. And then he pulled down his trousers and then I told him to stop and then he told me that this will be fast. Then I told him no and then he forcefully pulled my pants and penetrate his penis to my vagina. And I asked him where is the drinks and he said that he will bring it later at my place. And then I told him you just lied to me and you just want that to do to me. You just wanted to do the things that you had just done to me. And then I pushed him away and then I opened the door and I ran to my home.

[20] She did not report the incident to anyone because she did not trust anyone and that she was concerned that people in her village will gossip about her if they will come to know.

[21] In relating to the third alleged incident, the complainant said that she was at her home sleeping during the night when the accused entered her bedroom and woke her by shaking her arm. When she woke up she asked him where he came from and he told her that he climbed from the window. She said that only her younger

siblings were home. Her mother was at Veisari and her father was somewhere else in the village drinking grog. She told him to go back to his home but he refused. He held her arm and kissed her. She told him not to but he pulled her arm more strongly. He then pulled her blanket and pulled up her t-shirt and sucked her nipple. He then removed his clothes and also pulled down her pants while she tried to push him away. He penetrated her vagina with his penis. She told him not to do it because it was painful. After sex he returned to his home. She did not report the incident to anyone because she was scared and worried about people gossiping about her.

[22] Her evidence is that she did not give consent to any of the sexual acts with the accused. The matter came to light when she reported to her mother that she was pregnant.

[23] That is a summary of the prosecution case.

[24] **Defence case**

The accused chose to give evidence. When he was asked about the first incident that allegedly took place on 27 April 2019, the accused said that he was not at his village but was at Makoi helping his brother to shift homes. He came to Makoi on 26 April 2019 and returned to his village on 29 April 2019.

[25] The accused's brother gave evidence that from 26 to 29 April 2019 the accused was with him in Makoi to help him to move homes and that the accused did not go to his village during this period.

[26] In cross-examination the accused accepted that in his caution interview he told the police that on 27 April 2019 he was working for a company in Laucala Beach, Suva.

[27] When asked about the incident that allegedly took place in October 2020 the accused said 'I already asked her and she gave consent'. But when pressed that

the incident took place at his home he denied luring the complainant to the seawall or meeting her at any time.

[28] When asked about the incident that allegedly took place on 24 April 2021, the accused said that he had consensual sexual intercourse with the complainant. He said that when he went to her house, she opened the door and let him inside. She took him to her bedroom, voluntarily removed her clothes and had consensual sexual intercourse. He said that he did not suck her nipples or licked her vagina at any time.

[29] That is a summary of the defence case.

[30] **Analysis**

On count one, the only issue is whether the accused penetrated the complainant's vagina with his penis. Lack of consent is not an issue because it is not disputed that the complainant was 12 years old on 27 April 2019. The accused himself was a juvenile (17 years old) at the time.

[31] The accused and his brother gave evidence that at the time of the alleged incident the accused was in Makoi and not at Nukui village where the alleged incident took place. The notice of alibi was filed late after the statutory period for notice had expired. In cross-examination, the accused admitted he gave a different alibi to the police when he was interviewed under caution. I do not accept the alibi to be true.

[32] However, a false alibi does not mean that the accused is guilty of the charge. The prosecution carries the burden to prove guilt of the accused beyond a reasonable doubt. The accused does not carry any burden to prove his alibi is true.

[33] The complainant gave a detailed account of the incident that allegedly occurred on 27 April 2019. She struck me as an honest and reliable witness. Although the alleged incident occurred at nighttime, the complainant had ample opportunity to

recognize the accused. They knew each other. They are cousins. They lived in the same village. She recognized him because he made bodily contact with her. Nothing obstructed her view. Her recognizance of the accused is reliable. Her account of the event is reliable and honest. Her explanation for not complaining to anyone is reasonable. She was a 12 year old female child and her mother was living somewhere else at the time. The accused was an older male cousin living in the same village as her. She was confused and embarrassed to tell anyone. I believe her account that on 27 April 2019 the accused forcefully took her to Tai Ledua's house and penetrated her vagina with his penis.

- [34] On count one, I am satisfied of the accused's guilt beyond a reasonable doubt.
- [35] On count two, all the elements of rape are in dispute. The defence case is of a complete denial.
- [36] I believe the complainant's account of the incident that took place on 10 October 2020 at the accused residence. Her recognizance of the accused is correct. I accept her account that the accused lured her inside his house on the pretext of giving her drinks for her to take it to her father. I believe her account that the accused forcefully had sexual intercourse with her inside his house and that she did not consent. He knew she did not consent. She was coherent and logical with her account. Her explanation for not reporting is reasonable.
- [37] On count two, I am satisfied of the accused's guilt beyond a reasonable doubt.
- [38] On count three, the accused does not dispute that on 24 April 2021 he had sexual intercourse with the complainant. His defence is that she consented.
- [39] The accused's account that the complainant out of the blue invited him to her house and had consensual sexual intercourse with him is not logical or believable.

- [40] I believe the complainant's account of the incident that took place on 24 April 2021 at her residence. I believe her account that he entered her bedroom as an intruder and then had sexual intercourse despite her resistance and lack of consent. He knew she did not consent. She was impregnated by him and when her pregnancy surfaced the accused was caught. The complainant's account is logical and credible.
- [41] On count three, I am satisfied of the accused's guilt beyond a reasonable doubt.
- [42] Count four is a representative count of sexual assault. I have to be satisfied beyond a reasonable doubt that at least one incident of sexual assault took place during the period alleged – 27/04/19-24/04/21.
- [43] The conduct alleged is that the accused sucked the complainant's breasts. The complainant gave evidence of three accounts when the accused sucked her breast before having sexual intercourse. The accused denies the first account because he was somewhere else and not at the place of the offence. The accused completely denies that the second account took place. On the third account the accused admits sexual intercourse but not sucking the complainant's breasts. I believe the third account of the complainant that the accused sucked her nipples before sexual intercourse. The act was unlawful, deliberate and contrary to the ordinary standards of respectable people in this community.
- [44] On count four, I am satisfied of the accused's guilt beyond a reasonable doubt.
- [45] Count five is a representative count of digital rape over a period of two years from 27 April 2019 to 24 April 2021. But the complainant did not come to proof to support a representative charge. She gave a scanty account of digital penetration of her vagina by the accused using his tongue on 27 April 2019 when she was 12 years old. She did not reveal any other incidents of digital penetration of her vagina by

the accused using his tongue. I do not feel sure whether any act of digital penetration of the complainant's vagina occurred in fact or not.

[46] On count five, I am not satisfied of the accused's guilt beyond a reasonable doubt.

[47] **Result – Verdict**

The verdict of the Court is:

Count one – Guilty – Convicted.

Count two – Guilty – Convicted.

Count three – Guilty – Convicted.

Count four – Guilty – Convicted.

Count five – Not Guilty – Acquitted.




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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused