

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 168 of 2021

STATE

vs.

MELI DAUMEKE TOUTOU

Counsel: Ms. W. Elo for the State
Ms. P. Mataika for the Accused

Date of Hearing: 17th to 18th January 2023

Date of Closing Submission: 19th & 23rd January 2023

Date of Judgment: 25th January 2023

JUDGMENT

Introduction

1. The information dated 6th October 2021 contained three counts. The 1st and 2nd counts were counts of digital rape and of sexual assault of EV. Count No. 3 also a count of sexual assault of which the victim was JB. However, as the prosecution was not able to secure the attendance of JB the information was amended just prior to the commencement of the trial. The information so amended consisted only counts No. 1 and 2 of digital rape and of sexual assault of EV and *Nolle Prosequi* was entered in respect of Count No. 3. At the trial EV was the only witness called by the prosecution and prior to the conclusion of her evidence as it transpired that the alleged act of rape was committed after her 13th birthday in April 2021 the information was amended for the third time by amending and substituting a count of rape under section 207 (1) and

(2) (b) of the Crimes Act.

2. Director of Public Prosecutions has now charged the accused for the following offences as per the Amended Information dated 18th January 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

MELI DAUMEKE TOUTOU between the 1st day of March 2021 and the 22nd day of May, 2021 at Nabua, in the Central Division, penetrated the vulva of EVAMC with his finger, without her consent

COUNT TWO

Statement of Offence

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

Particulars of Offence

MELI DAUMEKE TOUTOU between the 1st day of March 2021 and the 30th day of April, 2021 at Nabua, in the Central Division, unlawfully and indecently assaulted EVAMC by licking and sucking her breasts.

3. For the Accused to be found guilty of the count No. 1 that 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 and place stated therein, the prosecution must prove beyond reasonable doubt that;
- i) the Accused is *Meli Daumeke Toutou* and he himself did;
 - ii) penetrate the vulva of the Complainant with his finger;
 - iii) it was so penetrated without the consent of the complainant; and
 - iv) the Accused knew or believed or reckless that the Complainant was not Consenting for him to insert his finger in that manner.

The slightest penetration of the complainant's vulva by the Accused's finger is sufficient to satisfy penetration.

4. If I may elaborate count No.1 of rape is based on sub sections 2(b) of Section 207 of the Crimes Act. Under which section, the offence of Rape is constituted when a person penetrates the finger in to the vulva 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.
5. For the accused to be found guilty of count No. 2 that of "sexual assault" under section 210 (1) (a) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the accused Meli Daumeke Toutou himself did on the date and place specified in the charge, unlawfully and indecently assault EV by licking and sucking her breasts as described in the charge.
6. Sexual assault is an aggravated form of indecent assault. The prosecution must prove the above elements against the accused beyond reasonable doubt. "Assault" is to apply unlawful force to the person of another without his or her consent. The "assault" must be considered "indecent" by right thinking members of society. The test is basically objective.
7. The ingredients of Sexual assault under the 1st limb of section 210 and indecent assault as defined under section 212 of the crimes Act are the same except for the distinction in the titles of the respective sections. It appears that sexual assault is an aggravated form of indecent assault as it carries a higher sentence. Thus, considering the use of the word '*sexual*' in the title of section 210, I am of the view that, sexual assault should necessarily be involuntary contact of a 'sexual' nature that occurs through the Accused's use of force, coercion or the victim's incapacitation.

Burden of Proof

8. The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests 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 was not sure of the Accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

Admitted Facts

9. The following facts are admitted by the parties;

1. *The first child complainant is one EV, student of Nabuni Settlement in Cunningham Road in Suva in the Central Division.*
2. *She has five siblings, of which she is the second youngest.*
3. *She currently attends Nasinu Gospel Primary School and she is in class 8.*
4. *Esther's mother, Bulou Vutailei Cokanasiga engages in domestic duties whilst her step-father, Josevata Lomaiviti works as a Boat Captain.*
5. *The second child complainant is one Jayce Baka, 10 year old student of Mead Road in Nabua in Suva in the Central Division.*
6. *She attends the Hilton Special School in Suva.*
7. *Meli Daumeke Toutou ("Meli") is a 54 year old security officer who resides at 289 Mead Road, Nabua, Suva in the Central Division.*
8. *Esther and Jayce are related to Meli, Meli is Esther's step-uncle and Jayce's step-father.*
9. *During the month of February 2021, Esther was taken by her mother to Mead Road to live with her Aunt Ma and family.*
10. *She lived with her Aunty Ma, and her aunt's children, namely, Jayce, Buna, Eroni, her aunt's husband, namely, Meli Daumeke Toutou and her elder sister, namely, Bulou Emele.*
11. *Her Aunt Ma is the first child complainant's mother's younger sister.*
12. *The first child complainant, Esther lived with her Aunt Ma and her family between February and April 2021 at Nabua in the Central Division.*
13. *One week before the Covid 19 second wave in 2021, Esther moved back to her parents at Nabuni Cunningham.*
14. *The first child complainant, EVAMC was medically examined on the 23rd June 2021 by Dr. Mereseini Bavadra at the CWMH.*
15. *The second complainant JBC was medically examined on the 23rd June 2021 by Dr. Mereseini Bavadra at the CWMH.*
16. *Meli Daumeke Toutou was arrested, caution interviewed and charged with two counts of Rape, contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009 and two counts of Sexual Assault, contrary to section 210 (1) (a) of the Crimes act 2009.*

Summary of Evidence

Evidence of EV

10. According to the evidence of **EV** her date of birth is 29th April, 2008. During February, March and April of 2021, she was living with her aunt Ma at Mead Road. Aunt Ma is her mother's sister and is married to the Accused. EV and her sister Bulou also have been so living with them due to the convenience of travel to their school. The Ma had three children and one was a daughter who was younger to EV. EV, her sister Bulou the three children the Accused and his wife Ma were all living in this house. Both the Accused and his wife Ma have been employed at a security organization and they have been working on a shift basis. The Accused usually goes for the 3-11 pm while Ma used to go during day-time 7am-3pm shift.
11. Soon after EV had gone to live in this house certain acts of sexual nature have been committed by the Accused. According to EV she and the Accused's daughter used to bath together and they come to the only room in this house to get dressed up. Both of them come to the room with a towel wrapped around each of them and then change into their clothes in this room. The Accused is alleged to have lowered the towel and touched and licked her breast in that room. She says this has happen on a number of occasions and the Accused did the same thing to his own daughter.
12. EV had not told this to anybody. These incidents and acts are usually committed when Ma and sister Bulou are not around. On one occasion the Accused had touched her "pipi" or "mimi" which she described as the female organ and the Accused is alleged to have touched and poked her "pipi" or "mimi" with his finger. This too had happened in the same room and she says that she felt pain when he so poked his finger into her "mimi".
13. In view of the Covid pandemic in April she had moved back to her parent's house at Cunningham and as her grandmother also had passed away. When she so returned home she had told her sister about what had happened and her sister had told that she will tell their mother.
14. In cross-examination she admitted that it is in her statement that, *her sister came into the room when the Accused was poking his finger into her "mimi"*. However, in

evidence she denies anyone actually coming into the room at that time and admits that it in her statement and says that it is incorrect. She had gone to the police with her mother and made the complaint. Then she also admitted that the incident of poking the finger was committed after her birthday on the 29th April, 2021, and that in 2021 her birthday was celebrated at the Accused's house.

15. The defence suggested that as her mother did not like and disapproved Ma getting married to the Accused. As her mother disliked the Accused it was suggested that she got EV to make this false and fabricated complaint. The victim denied these suggestions and said that she did not know of such a dislike.

Evidence of the Accused

16. The Accused was called to give evidence on his behalf. He admitted that EV is his niece. He had not had a good relationship with EV's mother as she did not approve and like his marriage to Ma as he was previously married. He admits that EV lived with them during the first part of 2021 until the Covid pandemic. He denies licking or sucking her breast or poking the finger. He admits that there was some rumors and there was *bad blood* between EV's mother and himself. However, he admits that they reconciled and that he and his wife went gone to EV's mother apologised and sought forgiveness. He denies that the apology was because he committed the acts but it was due to the bad relationship. He also says that EV's mother too apologised because she made a complaint.

Evaluation of the Accused's evidence and the defence

17. The Accused in his evidence took up a total denial, no contradictions or omissions were raised during cross examination. His position is that this is a fabricated and false allegation instigated by the victim's mother. The reason for the false allegation is that victim's mother being elder sister of the Accused wife had not liked him getting married to her sister. Let me consider the probability of EV and her sister was sent to the Accused house and they lived there for almost three months from February to May. There was no allegation or complaint during that time. It is upon the victim going back to her home this complaint has been made. In the first instance if EV's mother had any issue or dislike it is unusual of her to send her children to live at the Accused house in

any event if she planned and wanted to make a false complaint she would not keep her children for three months and one good expect her to complaint much earlier, this clearly shows that sending the children to his house had not been with any ulterior motive. In the normal cause of event when a girl child is subject to sexual abuse the parents try to separation conceal to avoid embarrassment that may be caused to the victim. Therefore her mother making use of their daughter in this manner to make a false complaint is a rare occurrence.

18. In view of the above analysis the Defence evidence and the defence taken up are improbable in the circumstances of this case, it appears to be a desperate attend by the Accused to put forward some defence. Therefore I find that the Accused's evidence improbable and it is so improbable it is false. In this circumstances the Defence position of false fabrication appears to be highly improbable. Accordingly I find that defence evidence is false and hereby reject the defence.
19. The fact that the defence is disbelieved or the defence evidence being rejected will in no way prove the charges. The burden of proof is with the prosecution to prove all ingredients of the charges beyond reasonable doubt. This burden does not shift to the defence in any way. Now I will proceed to consider the evidence of the prosecution to ascertain and decide if the prosecution evidence is reliable and trustworthy.

Evaluation of the prosecution evidence

20. The complainant as being a girl of around 13 years when the alleged incident had taken place. Initially the Accused has alleged to have licked and sucked her breasts including that of his daughter's when they came after a bath. They have not complained to anybody. It appears that the Accused was an uncle quite senior in age and the victim was living with him and under his control. The Accused is alleged to have threatened to smack her if she told anybody. Therefore, due to fear she says she did not tell anyone.
21. There is certainly a delay in reporting this matter by the victim. Delay by itself will not render her evidence inadmissible provided there be an acceptable explanation for the delay. She was living in Accused's house and claims to have been frightened. A small girl living under the command and control of her own aunt's husband is sexually abused by the very person in whose protection and care she is left, will certainly and

naturally make her helpless. She in her evidence did say that when he was licking her breast she remained motionless and stunned. This is clear evidence of the helpless state to which the victim has fallen into. Not only herself but the Accused has done the same thing in her presence to his daughter. This will certainly make things far worse. It is an accepted fact that when young children of this nature are victims by their own protectors and elders, such victims blame themselves for their predicament. Then they turn to suffer in silent due to the sense of shame and guilt. The Accused clearly had taken advantage of this situation.

22. In a similar context in **Rajinder Raju v. State of H. P.** Criminal Appeal No. 670 of 2003 decided on 07.07.2009, R.M. Lodha, J. speaking on behalf of the Supreme Court of India said;

‘a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman....; she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her.’

23. In the normal course of events sexual abuse will cause to the victim a feeling of embarrassment, fear and humiliation. A victim of sexual abuse may even be afraid that she would not be believed by her family members if the abuser happens to be either a family member or a close relative especially if such person is an adult guardian. This fear will keep the victim silent and prevent disclosing the abuse to another. This will enable her to be exploited repeatedly. These are some of the many reasons why victims of sexual abuse remain silent. Therefore, I am of the view that though there was delay on the part of EV in disclosing of the sexual abuse to her sister and thus keeping silent for a few weeks, would certainly not render her evidence unreliable on that score alone.
24. There is a contradiction that was raised in cross-examination. She had told the police that her sister walked into the room when the finger was poked in but in evidence she says that nothing like that happened but she admits that being in her police statement. Now I will consider if this is a mere contradiction has arisen due to the lapse of memory or due to utterance of a falsehood.

25. According to the victim during this period of almost 3 to 4 months she has been subjected several of acts of sexual nature (sucking her breasts). All these have happened in the room. She was just 13 years at that time and almost two years after that she had given evidence. In this back drop of prolong sexual abuse and lapse of time one cannot expect her to remember all minor details which will include someone coming into the room on such an occasion.
26. She had admitted that it was told to the police, which answer was given after she was shown the statement and reading it. In the context what she in fact said was, not that she remember telling that to the police but she merely admitted that it is so recorded in the statement shown to her. Further, the contradictory portion does not state that her sister saw the poking of the finger in, but she is alleged to have told that her sister came in. If the sister had seen the poking then it may be significant and important. In these circumstances, her sister merely walking in when one such act of abuse was taking place may possibly be forgotten due to the lapse of time and memory of a girl of this age. Thus this is not a significant contradiction and is thus disregarded.
27. I observed her demeanor, she was little over 14 years or around 15 years when she gave evidence. She was more of a timid nature and disposition who did not exhibit any degree of maturity. She was extremely soft spoken, childish and naive. In responding to questions she was prompt and precise. The manner of responding was consistent with that of a person recalling and narrating which she had actually experienced. In these circumstances, I am satisfied that this contradiction has arisen due to a lapse of memory and not due to the utterance of falsehood and that EV is a credible and a reliable witness and her evidence is truthful.
28. The victim says that the act of sexual assault, sucking of her breast was taking place for some times and had happened on several occasions. It is towards the end of her state that the early inserting the finger in her private part. If someone wanted to fabricate a story and get a small girl to repeat it one will not expect the fabrication of a complicated series of events as in this case. The victim also states that the Accused had sexually assaulted his own daughter together with the victim. This to my mind, is extremely improbable to be a false fabrication.

Proof of the charges

29. Now, I will consider if the Prosecution had proved the ingredients of the charges. Count number one as amended is an allegation of digital rape of a girl of thirteen years therefore, the issue of consent is relevant. The prosecution should prove the lack of consent. According to EV the Accused whilst in bed is alleged to have inserted his finger into her vulva. She uses the word “pipi” or “mimi” to describe the female genitalia but she very clearly said that the Accused poked his finger into her pipi and in court raised her hand and showed the index finger and explained. She had felt pain in her vulva. The description of the act considered in conjunction with the sensation of pain in her female organ leads to the necessary inference that the Accused had in fact inserted his finger into her vulva. This proves the physical elements of this offence however this should have been committed without the consent of the victim and that the Accused knew or believed or reckless that the Complainant was not consenting.

30. The Complainant clearly and unambiguously explains that the Accused did insert his index finger into her vulva. However when questioned as regards the poking of the finger, she does not directly and clearly say that it was without her consent. After clarification by Court the Prosecutor further questioned. However the lack of consent was led and elicited by asking leading a question. The said leading question also was asked joining both the acts namely that of rape and sexual abuse together. As far as licking and sucking of her breast is concerned she had been clear that she did not like it and did not consent. That she had answered directly but in respect of inserting the finger her position as to consent is not clear and it is uncertain. In that backdrop the evidence does not with sufficient clarity and prove that lack of consent to the act of digital penetration or that it was so done without her consent.

31. If I may dwell further and consider this issue; EV was at the Accused’s house from February onwards. After the lapse of a short time the sexual abuse of sucking and licking her breast commences. The victim clearly said that she did not like it and she did not consent and also when he did so suck her breast at the outset she was frozen and stunned. Thus as regards the sucking of her breasts committed at the commencement of the abuse, it is clear that she did not consent. However, according to her evidence the act of digital penetration had taken place after her thirteenth birthday which then was after the 29th of April, 2021. By this time the acts of sucking, licking and touching her

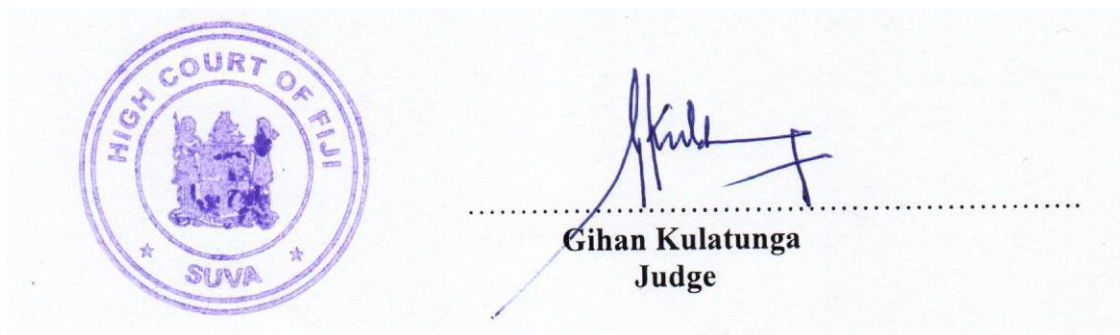
breasts have been continuing for sometimes. EV being a very young pubescent girl has been thus introduced to experiencing sexual pleasure by the Accused. It is quiet natural and possible, even though she did not consent and was reluctant at the outset she probably have begun to enjoy her new found sexual experience and pleasure as time passed by.

32. That being so the Accused too appears to have cunningly and tactfully, groomed the girl to progressively advancing sexual activity and by the end of April he has begun to insert his finger into her vulva. In the aforesaid scenario it is possible and probable that EV was a willing victim by that time. The insertion of the finger has taken place after that 29th of April. In these circumstances the evidence certainly proves beyond reasonable doubt that the accused did in fact insert his finger to her vulva but, as to the issue of consent there is uncertainty. As such there is a reasonable doubt on this necessary ingredient and vital issue of lack of consent.
33. The doubt so arises in respect of consent not because EV's evidence is disbelieved but because she did not directly say so. However this does create a doubt as to consent in respect to count No.1. In a criminal case of this nature the benefit of such doubt should accrue to the Accused. Accordingly, I find that the Prosecution has failed to prove count No.1 the allegation of rape beyond reasonable doubt.
34. As for the second count of sexual assault as already discussed and evaluated above EV's evidence proves beyond reasonable doubt that the Accused did between March and April 2021 did lick and suck her breasts when she came into the room after her bath. She had not liked it and not consented to such acts, certainly at commencement. The Accused was the uncle of the victim who was 54 years of age. Considering his seniority in age and the young age of the girl in conjunction with their relationship of uncle and niece this act is certainly improper and indecent in the eyes of the right thinking persons of this society. I am satisfied that the evidence clearly proves all the ingredients of count No.2.
35. I have considered the evidence in its totality the suggestion made and the evidence of the Accused. As the suggestion and positions taken up by the Accused are so improbable I find that the Defence has not been able to create any doubt on Prosecution case or evidence as far as count No.2 is concerned.

36. Further the Accused without doubt, knew that she was not consenting and at least he was reckless in this regard. The fact that she was stunned and frozen proves that the Accused knew and was aware that she was not consenting to the touching, sucking and licking of her breasts. Accordingly, I am satisfied that the prosecution has proved that the Accused himself sucked and licked her breasts of EV and she did not consent which the Accused certainly knew. Accordingly I hold that the prosecution has proved beyond reasonable doubt all ingredients of the allegation of sexual assault as charged in count No. 2. Accordingly I find the Accused guilty in respect of the said offence of sexual assault.

Conclusion

37. In the above circumstances, I hold that the prosecution has failed to prove count No. 1 and accordingly the Accused is acquitted of count No. 1. As the prosecution has proved count No. 2 beyond reasonable doubt the Accused is hereby convicted of count No. 2 for committing sexual assault as charged.



At Suva

25th January 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused.