

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 166 OF 2021

BETWEEN : STATE

AND : TOMASI QILIA

**Counsel : Ms U Tamanikaiyaroi for the State
Mr W Navuni with Ms A Sharma for the Accused**

Date of Hearing : 24 – 25 April 2023

Date of Judgment : 26 April 2023

JUDGMENT

[1] The accused is charged with a representative count of rape. The charge alleges that the accused between 1 February 2021 and 30 September 2021 penetrated the vulva of the complainant, a child under the age of 13 years, with his finger.

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

The burden is on the prosecution to prove the charge beyond reasonable doubt. Each element of the offence must be proved beyond reasonable doubt but not every fact of the story.

[3] In this case, the accused chose to give evidence. But he does not carry any burden to prove or disprove anything.

[4] **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.

[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] **Admitted Facts**

The following facts are agreed between the prosecution and the defence under the provisions of section 135 of the Criminal Procedure Act:

- a. The name of the person charged is Tomasi Qilia.
- b. Tomasi was born on 25 May 1963 and was 59 years old by May 2021.
- c. Sometime between 01 January 2021 and 30 September 2021, Tomasi resided at Wairua Settlement, Tamavua -i- wai, Suva. Tomasi has resided at Tamavua-i -wai for approximately 30 years.
- d. Tomasi is also known by Elizabeth by the name of 'Ta Qilia'.
- e. Elizabeth's mother's name is Semaema Vulasigavaki ['Semaema'] and Elizabeth's father's name is Penaia Pio Nawaqabuli ['Penaia']
- f. Sometime between 01 January 2021 and 30 September 2021, Elizabeth resided in Wairua Settlement, Tamavua-i-wai, Suva.
- g. Tomasi and Elizabeth live in separate houses in Wairua settlement, Tamavua-i-wai, Suva however their homes are in close proximity to one another.
- h. The existence of the Elizabeth's medical report is not disputed however the contents of the same are disputed.

- i. It is agreed that the admissibility of the following documents are not in dispute and the same is tendered by consent and annexed as follows:-
1. Photographic booklet dated 08/09/21;
 2. Rough sketch Map dated 09/11/21.

[7] **Evidence led by the Prosecution**

The prosecution led evidence from the complainant and her mother.

[8] The complainant is a child. She is six years old. She gave unsworn evidence. Her evidence was received using special measures in closed court using a screen and with a support person sitting next to her. The purpose of the special measures was to put the witness at ease and not to prejudice the accused.

[9] Due to her tender age the complainant had some difficulty in effectively communicating and expressing herself during her evidence. In her evidence she referred to the accused as Ta Qilia, which is also an admitted fact. When shown the photographic booklet she correctly identified her house and Ta Qilia's house. She said that Ta Qilia showed her 'Laloca' and then gave her a lollipop. She said that Laloca is bad. When asked what kind of man Ta Qilia is, she responded bad. She said that Ta Qilia did something bad. When asked what did Ta Qilia did to her, she responded, can't say. But she drew a picture to communicate what Ta Qilia did to her. In her drawing (PE1) she depicted that Ta Qilia had touched her genitalia area with his hand. She referred to her genitalia as 'Voli'. When shown the body map of a female child (PE2) she pointed to the genitalia area where Ta Qilia had touched with his hand four times. She said that after doing that Ta Qilia gave her lollipop and would tell her to go home.

[10] The complainant's mother gave evidence of the complainant's date of birth. The complainant was born on 15 November 2016. The mother confirmed that the complainant referred to her private parts as 'Voli' since she started talking. She said that she lived in the same settlement as the accused with her spouse and children and that the accused was like a grandfather to her.

[11] **Evidence led by Defence**

That is a summary of evidence led by the prosecution.

[12] The accused denies the allegation of rape. He accepts that the complainant is like his grandchild and she would normally visit his home and he would give her candies. He said that he was not in good terms with the complainant's mother because of a land dispute. He said that the complainant referred to him as a bad person because of the arguments he had with the complainant's mother whenever the complainant would come to his home, but he did not touch the complainant's private parts at any time.

[13] That is a summary of the defence evidence.

[14] **Analysis**

The identity of the accused is not an issue. The accused and the complainant are relatives. They lived next to each other in the same settlement. The complainant addressed the accused as Ta Qilia. The accused accepts that the complainant had been to his home on a number of occasions.

[15] The age of the complainant is not in dispute. She was four years old at the time of the allegation between January 2021 and September 2021. I do not expect a 4 year old child to remember dates of the events. The charge is a representative count. I have to be satisfied as to feel sure of at least one incident before finding the accused guilty of a representative count.

[16] The prosecution is not required to prove lack of consent as the complainant was under the age of 13 years during the period alleged in the charge and was incapable of giving consent to any sexual act.

[17] The only issue is whether the accused had penetrated the vulva of the complainant with his finger on at least one occasion during the period alleged in the charge. Slight penetration is sufficient.

- [18] The complainant's evidence is that the accused had touched her genitalia area. There is no evidence whether the act was done over or underneath the clothing worn by the complainant. Counsel for the prosecution submits that an inference can be drawn that the accused made contact with the naked genitalia of the complainant because she pointed to the naked genitalia of the female child on the body map.
- [19] An inference is a logical deduction from facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused having committed the act. To find the accused guilty an inference of guilt has to be the only rational conclusion to be drawn from the combined effect of all the facts proved.
- [20] The accused in his evidence denies committing any sexual act on the complainant. However, I do not believe him. He admits that he had access to the complainant. He admits that he had given candies to the complainant whenever she came to his home. But his evidence that the complainant's mother had a grudge against him because of a land dispute is not logical. When the complainant's mother gave evidence there was no suggestion made to her that she had a motive to fabricate the allegation because of a land dispute between her and the accused. Further, it is not logical to be in conflict with the complainant's mother and at the same time entertain the complainant by giving her candies.
- [21] Not believing the accused does not mean that he is guilty.. The prosecution must prove that the accused committed the act of penetration as alleged in the charge.
- [22] The complainant despite being of a tender age struck me as an honest witness. I do not accept she lied in cross examination when she said that the picture she had drawn of the accused touching her genitalia area was wrong. The question was vague and confusing to the complainant. In her examination in chief she clearly communicated to the court that the accused had touched her genitalia area.

[23] I believe the complainant's account that the accused on at least one occasion had touched her genitalia area. Apart from the act of touching, there are no other proven facts from which an inference can be drawn that the accused had penetrated the vulva of the complainant with his finger as alleged in the charge. I believe the account of the complainant that the accused had touched her private area with his hand but I am not sure whether penetration occurred or not. The prosecution has failed to prove the element of penetration beyond a reasonable doubt. But that does not mean that the accused is absolved from all criminal responsibility.

[24] Section 162 (1) of the Criminal Procedure Act states:

Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser offence or alternative offence, the court may record a conviction made after due process for (f) any sexual offence where the charge has been for rape.

[25] Section 162 (2) of the Criminal Procedure Act states:

The court may record convictions for certain offences in accordance with sub-section (1) notwithstanding that no charge has been laid for the lesser or alternative offence in accordance with the provisions of this Act.

[26] Before the commencement of the defence case, I gave the accused notice of the court's power to convict him of sexual assault in the event the element of penetration required for rape is not proven beyond a reasonable doubt.

[27] Sexual assault is an offence contrary to section 210 (1) (a) of the Crimes Act.

[28] 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. 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.


[29] I believe and accept the evidence of the complainant that the accused had touched her genitalia area on at least one occasion when she went to his house in the year 2021. It does not matter whether the touching was over or beneath the clothes worn by the complainant on the day in question. The act of touching the genitalia area of a 4 year old girl by an elderly relative was clearly without any lawful excuse and contrary to the ordinary standards of respectable people in this community.

[30] I feel sure that the accused is guilty of sexual assault.

[31] **Verdict**

The accused is found not guilty of rape but guilty of the lesser offence of sexual assault. He is convicted of sexual assault contrary to section 210 (1) (a) of the Crimes Act.




.....
Hon. Mr Justice Daniel Goundar

Solicitors:

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