

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

CRIMINAL CASE NO. HAC 267 OF 2022

BETWEEN : STATE

AND : MANOJ KUMAR

Counsel : Ms K Semisi with Ms S Bibi for the State
Ms S Kant for the Accused

Date of Hearing : 27 - 28 March 2023

Date of Sentence : 2 June 2023

JUDGMENT

[1] **Charge**

The accused is charged with rape contrary to section 207 (1), 2 (c) and (3) of the Crimes Act.

Burden and standard of proof

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

[2] The accused chose to give evidence but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond reasonable doubt.

[3] **Rape - Elements**

Section 207 (2) (c) and (3) of the Crimes Act reads:

A person rapes another person if-

- (c) the person penetrates the mouth of other person to any extent with the person's penis without the other person's consent.

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

[4] The charge alleges that the accused on 9 January 2020 at Suva Market in Suva in the Central Division penetrated the mouth of AZC, a child under the age of 13 years, with his penis.

[5] Consent is not an issue in this case as it is not in dispute that at the time of the alleged incident the complainant was under the age of 13 years. She was incapable of giving consent. The issue is whether the accused penetrated the mouth of the complainant with his penis as alleged in the charge.

[6] **Prosecution Case**

To prove the charge, the prosecution led evidence from the complainant and her father.

[7] The complainant was born on 5 November 2014. In 2020, she was six years old. On 9 January 2020, she accompanied her parents and her brother to their shop at Suva market. Her brother is older than her. She was playing outside a DVD shop with her brother and other children when the accused picked her up and took her inside the DVD shop that he was managing. He closed the door and flashed his penis and tried to put it in her mouth. She resisted and he managed to put his penis in her mouth and she felt disgusted. She called out for help but no one came. She then heard her brother knocking at the door and the accused chased him away by telling him to go away. She called out for help again and this time her father opened the door and she ran out of the shop. Her father punched the accused. Her father reported the matter to police.

[8] The complainant's father operates a shoe repairing shop at Rodwell Road next to Suva market. On 9 January 2020 he closed his shop between 7 pm and 8 pm and

went around to look for his children to go home. When he was going past the DVD shop he saw a person inside the shop zipping up his pants. When he went close to the shop he heard his daughter's voice saying don't do it. He saw the accused with his daughter inside the shop. He brought his daughter out and confronted the accused. The accused sought forgiveness from him. He assaulted the accused and then reported the incident.

[9] **Defence case**

The accused is a married man in his early forties. In 2020, he was employed by a company called Midway Entertainment. He managed a small DVD shop located at Suva market with a female colleague. As part of marketing and sales strategy they displayed DVDs outside their shop and also played DVDs on a TV. Children from the market area were also drawn to the TV and at times obstructed the customers from buying DVDs. For that reason the accused's employer instructed the accused to chase the children away whenever they gathered around his shop.

[10] The accused's evidence is that on Thursday, 9 January 2020, after 5 pm he chased away some kids who had gathered around the shop when it was busy with customers. In the process one of the girls fell down and got injured. She started crying and left. After about 10-20 minutes later a person came and struck him with a timber while he was standing at the entrance of the DVD shop. He fell down and went inside the shop. The person came inside and kicked him several times on his ribs, chest, shoulder and head. The accused called out for help and the person left. He was in extreme pain. He was taken to the hospital and after he was discharged he went to Totogo Police Station to lodge a report against the person who assaulted him. That is when he came to know that the person who assaulted him lodged a report of rape against him. He denies the allegation of rape. His evidence is that he did not penetrate the mouth of the complainant with his penis.

[11] The accused's work colleague, Veniana Naikau gave evidence for the defence. She was present at the DVD shop in the afternoon of 9 January 2020. She said that around 7 pm a customer came and wanted a particular DVD. They did not have that DVD at the time but their shop across the road had it. She went across the road and collected the DVD from another employee from the other shop and

returned to her shop within a minute. When she returned to her shop, she saw a man come with a stick and hit the accused. The accused fell down and the man started kicking him. The commotion attracted a crowd from the market but no one helped the accused because the man threatened the crowd. The man fled when two police officers came to the scene. She took the accused to the hospital with the help of their employer.

[12] Ms Naikua said that before the accused was assaulted he had pushed away some children who were obstructing their customers. In the process a girl fell and was injured. She did not see that girl again and that girl was not around when the accused was being assaulted.

[13] **Analysis**

There are two versions of the alleged incident before the court. If the defence version is true or may be true, then the accused is not guilty of the alleged crime. But even if the defence version is rejected, that does not mean that the accused is guilty. The accused can only be found guilty if the prosecution version is true.

[14] The identity of the accused is not an issue. On 9 January 2020, the accused was present at the alleged scene. It is not in dispute that the accused was assaulted by the complainant's father on the evening of 9 January 2020.

[15] The defence case is that the rape allegation was fabricated by the complainant's father in order to deviate the police from investigating him for assaulting the accused without legal justification.

[16] The accused's account of what transpired on the evening of 9 January 2020 is supported by a witness who has no interest in the case. Ms Naikua's account is logical and consistent. She struck me as an honest witness. She gave an honest account of seeing the accused being assaulted by the complainant's father in the plain view of a crowd and that the complainant was not at the scene when the accused was being assaulted. I accept the accused's account that he was assaulted because the complainant's father held him responsible for the physical

injury sustained by the complainant when she fell down after the accused chased her away from the DVD shop.

[17] I am mindful that the complainant is a child and may not remember every detail of the incident. She gave an account of the alleged incident but she struck me as someone who had been coached. Her account lacked cogency when considered in its totality. I do not believe her account that the accused out of nowhere picked her up at a time when the market was busy with city commuters returning home from work, took her inside his DVD shop, closed the door and then penetrated her mouth with his penis. The account given by the complainant's father seeing the accused zipping up his pants inside his shop is not consistent with the complainant's account that the accused had closed the shop door. The father's account suggests that when the accused committed the alleged act he did so in the plain view of the public. The evidence led by the prosecution is not logical and is doubtful.

[18] I feel unsure of the accused's guilt. The prosecution has failed to prove the charge beyond a reasonable doubt.

[19] **Verdict**

The accused is not guilty and is acquitted of the charge.




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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Sairav Law for the Accused