

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Crim. Case No: HAC 04 of 2021

STATE

vs.

MOSESE NAVETAU

Counsel: Ms. A. Vavadakua for the State
Ms. S. Devi for Accused

Date of Hearing: 07th and 08th August 2023

Date of Closing Submission: 08th August 2023

Date of Judgment: 15th September 2023

JUDGMENT

1. The name of the Complainant is suppressed and referred to as **AB**.
2. The Director of Public Prosecution, on the 4th of August 2023, charged you with one count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and two counts of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act. The particulars of the offences are:

COUNT 1

[Representative Count]

Statement of Offence

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

Particulars of Offence

MOSESE NAVETAU *sometimes between the 1st day of January 2015 and the 31st day of December 2015 at Naruwai, in Bua, in the Northern Division penetrated the vulva/vagina of **AB**, a child under the age of 13 years, with his penis.*

COUNT 2

Statement of Offence

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

Particulars of Offence

MOSESE NAVETAU *sometimes between the 1st day of January 2017 and the 31st day of December 2017 at Naruwai, in Bua, in the Northern Division penetrated the vulva/vagina of **AB**, a child under the age of 13 years, with his penis without her consent.*

COUNT 3

Statement of Offence

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

Particulars of Offence

MOSESE NAVETAU *sometimes between the 1st day of January 2018 and the 31st day of December 2018 at Naruwai, in Bua, in the Northern Division*

penetrated the vulva/vagina of AB, a child under the age of 13 years, with his penis without her consent.

3. The hearing commenced on 07.08.2023 and concluded on the 08.08.2023. The Prosecution presented the evidence of two witnesses, including the Complainant, while the Accused gave evidence for the Defence. Subsequently, the learned Counsel for the Prosecution and the Defence filed their closing submissions. I now pronounce the judgment after carefully considering the evidence adduced during the hearing and the respective closing submissions.

Burden and Standard of Proof

4. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offence

5. The main elements of Rape as charged under count one are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis.
 - iii) The Complainant was a child under the age of 13 years.
6. The main elements of the Rape as charged under counts two and three are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,

- iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
7. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences to the Complainant. There is no dispute about the identification. The Accused and the Complainant are known to each other as neighbours. The dispute is whether this alleged incident happened involving the Accused.
 8. Evidence of the slightest penetration of the vagina of the Complainant with the accused's penis is sufficient to prove the element of penetration.
 9. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
 10. The Complainant must have the freedom to make a choice. It means she must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
 11. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

The Admitted Facts

(a) *The Complainant in this matter is AB.*

(b) *That the Complainant and MOSESE NAVETAU were neighbours in 2015 – 2018.*

12. The Accused tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.

Prosecution's Case

13. The Prosecution alleged that the Accused, a neighbour and a village church elder, had raped the Complainant, who was residing in the same village with her grandparents more than once in the years 2015, 2017. The Prosecution further alleged in count three that the Accused raped the Complainant again in 2018.
14. The Complainant stayed with her grandparents at Naruwai Village as her mother was married to another village. She was attending school in 2015. On an unknown day, between the 1st of January 2015 and the 31st of December 2015, the Complainant returned home from school and went to her room to change her clothes. Her grandparents were not at home. She entered the house through the door in the kitchen. While changing her clothes, she found the Accused came to the room. He then touched her and made her lie down on the mattress. She tried to yell but was scared. The Accused then removed her clothes and then his own. The Accused tried to penetrate her vagina with his penis but only managed to insert his penis in her vagina slightly. The Complainant felt pain in her vagina when he did that. The Accused then threatened her not to tell anyone and left.
15. On an unknown day between the 1st of January 2017 and the 31st of January 2017, she saw the Accused waiting under a sandalwood tree when she returned home from school. Her grandparents were not at home that day. The Accused followed her when he saw her. When she went to her room to change, the Accused also came. He then touched her and threw her on the mattress. He removed her clothes and then his own. The Accused came on top of the

Complainant and penetrated her vagina with his penis until he ejaculated. Afterwards, he left the Complainant.

16. On another unknown day between the 1st of January 2018 and the 31st of December 2018, the Complainant was sent to pick coconuts by her grandmother. On her way to pick coconuts, she saw the Accused was coming with his son and their horse. He told his son to go and tie the horse on the other side. He then came to her and started to touch her. The Accused pulled her to the ground while removing her clothes. The Complainant told the Accused not to do this, but he continued disregarding her request. Once she was laid on the grass, the Accused laid on top of her and penetrated her vagina with his penis without her consent.
17. The Complainant had not told her grandparents about these incidents because she feared the Accused. She eventually related these incidents to Mr. Legelege, the Pastor of the Church. The Pastor had inquired her, asking why she appeared disturbed. She then related these incidents to him. The matter was then reported to the Police.

Defence's Case

18. The Accused denies this allegation, stating that he had never done such things to the Complainant. He admitted that he frequently visited the Complainant's grandparents' house to attend their clan's meetings and church services as he is a village church elder. According to the Accused, he met the Complainant at a farm, where kids usually do not go alone, harvesting chillies when he went to his farm with his son and horse in 2018. She had called him, asking where they were going. Besides that conversation, nothing happened at the farm.

Evaluation of Evidence

19. Accordingly, the Accused denied the allegation, stating such an incident had never occurred. Under such circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has

proven beyond reasonable doubt that the Accused had committed these crimes. In doing that, the Court must evaluate the evidence presented in the Court. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to give evidence. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case.

20. Lord Reading CJ in **Abramovitch (1914) 84 L.J.K.B 397** held that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."


21. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. If the Court rejects the Accused version, that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its own evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the Information.
22. In evaluating the evidence, the Court must determine the testimonial trustworthiness of the evidence given by the witnesses based on the credibility and reliability of their evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide; *Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomon Qurai (HC Criminal - HAC 14 of 2022).*

23. The learned Counsel for Defence extensively cross-examined the Complainant, asking why she did not shout for help or alert the neighbours. The Complainant consistently explained that the neighbours were not at their homes. She further explained that she wanted to shout but was afraid of doing it when the Accused first came to her room. It was revealed during the Accused's evidence that he held a prominent position in the village as a church elder. He had attended church services and meetings held at the Complainant's grandparent's house. Considering the status held by the Accused in the village and the age of the Complainant, it is possible that she surrendered herself without shouting when the Accused unleashed his sexual assault on her.
24. The Complainant testified that she couldn't run away when the Accused sexually assaulted her in the room. The Complainant was a young teenager who was living with her grandparents, and the Accused was a respected village elder. Under such circumstances, finding him attacking her sexually inside her own room unexpectedly would have shocked the young Complainant. Hence, the fact that she did not run away from the room does not affect the credibility of her evidence.
25. The learned Counsel for the Defence raised a contradiction between the statement given to the Police by the Complainant and her evidence in Court regarding the meeting of the Accused and his son at the farm in 2015. The Complainant explained that it was a different occasion than the incident relating to 2018. Moreover, the Accused admitted in his evidence that he met the Complainant at a farm when he went to his farm with his son and the horse in 2018. Hence, the above contradiction has not affected the credibility and reliability of the evidence given by the Complainant.
26. The Complainant had not promptly informed anyone about this incident. She eventually related this incident to Mr. Leqeleqe, a Pastor and an uncle of the Complainant, in 2021. I shall now proceed to determine whether the delay in reporting this incident affected the credibility of the evidence given by the Complainant.

27. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018) has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
28. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (*vide: Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)*)
29. The Complainant explained that the Accused threatened her, telling her not to tell anyone about that incident. As I discussed above, the Complainant was a child, and the Accused was a respected elderly figure in the village. Considering these facts, the delay in reporting has not affected the credibility and reliability of the Complainant's evidence.
30. I observed the manner in which the Complainant gave evidence in Court. She was consistent, coherent and precise in giving her evidence. Accordingly, I find her evidence credible and reliable; hence, it is the truth.
31. The Complainant explained in her evidence that the Accused tried to penetrate her vagina with his penis in respect of the first count, and a little bit of his penis went inside her vagina during that process. Even the slightest penetration of the vagina with the penis is sufficient to constitute the element of penetration. Hence, I am satisfied that the element of penetration is established in respect of the first Count.

32. Based on the above finding that the Complainant's evidence is the truth, I find the evidence of the Accused denying this allegation is not true. Moreover, the Accused failed to create any reasonable doubt in the Prosecution's case.
33. Accordingly, I find the Prosecution has successfully proven beyond reasonable doubt that the Accused had committed these three offences as charged in the Information.
34. In conclusion, I hold the Accused guilty of one Count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and two counts of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act as charged in the Information and convict of the same accordingly.




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Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

15th September 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for Accused.