

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 17 OF 2019

STATE

V

SAKIUSA NAWAIBURE

Counsel : Mr U. Lal for State
 Ms L. Naikawakawavesi for Defence

Dates of Hearing: 18, 19 & 27 October 2023

Date of Judgment: 03 November 2023

(The name of the complainant is suppressed. She is referred to as IB)

JUDGMENT

1. The accused is charged with one count of digital Rape and one count of vaginal Rape. The information filed by the Director of Public Prosecution is as follows:

Count One

Statement of Offence

RAPE: Contrary to section 207 [1] and [2] [b] and [3] of the Crimes Act, 2009. Particulars of Offence SAKIUSA NAWAIBURE on the 10th day of January 2019 at Vatukoula in the Western Division, penetrated the vagina of IB, aged 10 years with his finger.

Count Two

Statement of Offence

RAPE: Contrary to section 207 [1] and [2] [a] and [3] of the Crimes Act, 2009. Particulars of Offence SAKIUSA NAWAIBURE on the 10 day of January 2019 at Vatukoula in the Western Division, had carnal knowledge of IB, aged 10 years.

2. The accused pleaded not guilty to the charges. At the ensuing trial, the Prosecution called the complainant and her mother. At the end of the Prosecution case, the accused was put to his defence. The accused opted to exercise the right to remain silent. At the end of the trial, the counsel filed written closing submissions. Having carefully considered the evidence presented at the trial, and the submissions, I now proceed to pronounce my judgment as follows.
3. The prosecution bears the burden to prove all the elements of the offence of Rape as charged. That burden must be discharged beyond a reasonable doubt. That burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused shall prevail until the charge is proved beyond reasonable doubt.
4. On the first count, the Prosecution must prove that the accused penetrated the vagina of the complainant with his finger. On the second count, the Prosecution must prove that the accused penetrated the vagina of the complainant with his penis. A slightest penetration is sufficient to prove the element of penetration.
5. A person under the age of 13 years is considered by law as a person without the necessary mental capacity to give consent. The complainant in this case was 10 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. Once it is proved that the complainant was under the age of 13 years at the time of the offence, the Prosecution does not have to prove the lack of consent on the part of the complainant.

6. Let me now summarise the salient parts of the evidence led in the trial.

PW 1- IB (The Complainant)

7. IB is now 14 years old and she is schooling at Year 9. In 2019, she was residing in Vatukoula with her mother Mereadani Kuru and father Savenaca Lutu. On 10 January 2019, she went to the river, a walk of ten minutes, to wash doormats with Naomi, Vilikesa, Kemu and Mara. Naomi, Vilikesa and Kemu are her cousins. After washing the doormats, she bathed in the river with her three cousins and Mara.
8. Suddenly, Mara's brother Sakiusa Nawaibure (Saki) came from the back and pulled her leg down to the water. She could feel Saki's hand move inside her trousers and then into her panty. He forcefully inserted his finger into her vagina. It was painful. At that time, they were in the water and her cousins were bathing on top of the river about 100 metres away. She did not say anything to Saki because she was scared.
9. She called Naomi who was swimming 100 metres away. Naomi just looked at her and told Saki not to stay with her and for him to go and play with the boys. At that time Saki swam away. But he soon returned to her. This time, he pulled her towards him and took off her trousers. He then took off her panty, bent her over and inserted his penis into her vagina from the back for about seven minutes. She felt the pain. She did not say anything to Saki as she was scared. Her cousins were still playing on top of the river. Saki told her not to tell her mother or any other person. He kissed on her lips. To kiss her, he moved her face towards him so that he could kiss her on the mouth. After that, she put on her panties and trousers, took the door mats and went home. She did not tell her mother about the incident because she was scared that her mother would beat her up.
10. Roughly a week after this incident, when she came back from school on a Thursday, she could feel that her panty was wet. She asked her mother if she could buy her one pad. The mother told her that pads are used only during the periods and questioned her why she needed to use a pad. Then she told her mother that her panty was wet, and she saw pus on

her panty. Then her mother asked her if something happened to her. She kept on hiding what had happened because Saki had told her not to tell her mother or anybody else.

11. On Saturday night, her mother asked her again because she was suspicious. IB then told her mother everything that Saki did to her on 10 January 2019. Her mother felt sorry for her, and was sad. On Sunday morning, she informed her father. After that, her mother went to one of her father's relatives whose husband is the Village Headman. The Village Headman had called the police. She positively identified the accused in Court as Saki. After that, she was taken to a doctor at Tavua Hospital from where she was transferred to Lautoka Hospital.
12. Under cross-examination, IB said that her trousers did not have buttons or a zip. She agreed that if she screamed from where she was swimming, her cousins could easily hear her. She said she in fact screamed and called Naomi. One place in the river was shallow and another place was deep and where she was standing in the river, the water level reached out to her nose.
13. IB said that she did not leave that swimming spot after the first incident, because she was already scared. Saki was right behind her. She agreed that, in her statement, she had not told that Saki bent her over before inserting his penis into her vagina. She agreed that she informed her mother, roughly one week after the allegation. Her cousins were still swimming 100 metres away when she left home alone. She agreed that even though she felt the pain, she did not scream because she was scared.

PW2 Meredani Kuru

14. Meredani said that on 10 January 2019, her eldest daughter IB went down to the river at around 12 noon to wash the doormat and returned home at 3 pm. On 17 January IB returned home from school at around 3 p.m. and she complained that pus was coming out from her vagina. IB asked for a pad. She told IB to go and wash herself again and told IB that the pads are used during menstruation.

15. She then asked her what had happened. IB then told her what had happened to her while she was in the river. IB told her that Sakiusa inserted his finger into her vagina and had sex with her. When she shared this information with her husband, he told her to inform the Village Headman. On Thursday, she informed the Village Headman who in turn reported the matter to the police. The police came and her statement was taken. After that, they went to the hospital. She knew Sakiusa because they went to school together. He was living on the other side of the river.
16. Under cross-examination, Meredani said that when IB returned from the river on the 10 January 2019, she (IB) looked weak, but she did not ask IB whether anything had happened because she thought that she was tired having come from the river. IB was not showing signs of anything until she complained of the pus. IB was hiding it all along with her. She did not report the matter to the police on the same day IB informed her about the allegation. She was the one who was dragging it and complained to the Village Headman on Sunday, two days after she received the complaint from IB. She doubted what her daughter told her, and it was also because of what IB told her regarding Sakiusa's warning not to tell anybody about what he had done to her. She could not believe that Sakiusa would do such things to her daughter since they were staying together.
17. The Prosecution closed its case without tendering the medical report as the examining doctor was not available in the country.

Evaluation/Analysis

18. The complainant said that the accused dragged her into the water and penetrated her vagina with his finger as well as with his penis. Defence is one of complete denial.
19. There is no dispute with the identity of the accused. The complainant knew the accused as 'Saki' who is Mara's brother. On that day, she had gone to the river with Mara who is the sister of the accused. The age of the complainant was also not disputed. According to

the complainant's birth certificate, the complainant was 10 years of age at the time of the offence. Therefore, the only dispute is whether the complainant told the truth in Court.

20. The complainant is 14 years of age and gave evidence under oath. She knew that she was under obligation to tell the truth in court. The Defence challenged the credibility of the evidence of the complainant.
21. It was argued that the conduct of the complainant at the time of the offence and also her post-incident conduct is not consistent with that of a child who was raped. The complainant did not raise an alarm and did not cry for help from her cousins who were in the river. During the first incident, the complainant said she called her cousin Naomi for help. At that time Naomi and the other girls were swimming in the river about 100 metres away. Naomi had just looked at the complainant and told the accused not to stay with the complainant and for him to go and play with the boys. The complainant said that she feared the accused and of what had happened and that is why she did not say anything to the accused and she made no attempt to move away from that place. Even though she felt the pain in her vagina, she did not cry for the same reason. She was a 10-year-old child, and the accused is a well-built adult. The explanations she gave for her conduct are acceptable.
22. After the incident, the complainant, without going to her cousins, went straight home. She did not complain to her mother Meredani of what had happened in the river. She complained only when she was questioned by her mother for the second time on Saturday.
23. The circumstances under which the matter came to light were explained by the complainant and her evidence was confirmed by Meredani. The alleged rape incident occurred on 10 January 2019 and on the 17th, (Thursday) a week after the incident, she complained about the pus coming out from her vagina. Even then she did not complain about sexual offences. She only complained about the pus because she needed a pad. It was out of suspicion that Meredani questioned her again on Saturday and it was only then she peeled off everything.

24. It was argued that this conduct is not consistent with that of a child who was raped. Two explanations for her conduct are available in the complainant's evidence. Firstly, she said that the accused warned her not to tell her mother or any other person. She was already scared of the accused and of what he did. Secondly, she said that she did not tell her mother because she was scared that her mother would beat her up. These explanations are acceptable to the Court.
25. It is common stereotype even in an adult rape case, that the complainant should complain to somebody at the first available opportunity. However, faced with such a situation, there may be many reasons that inhibit a victim from raising hue and cry after a rape.
26. A late complaint does not necessarily signify a false complaint. Victims of rape can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in our society in relation to an open and frank discussion of matters relating to sex with elders. There is, in other words, no classic or typical response by victims of rape. I am sure that the complaint belatedly made by the complainant to her mother was genuine and true and it is consistent with the allegation of rape although it had not disclosed the full extent of the sexual conduct on the part of the accused.
27. Evidence was led that the complainant looked distressed when she arrived home shortly after the alleged incident. Meredani said the complainant looked weak when she returned from the river. She did not question the complainant because she thought that the complainant was tired having just come from the river. The complainant's distressed condition is consistent with her complaint she later made to her mother.
28. Meredani said she did not believe what she heard from the Complainant. Her suspicion was based on her belief that the accused, who was living with them, would ever do such things. Without rushing to the Village Headman to complain, she also thought twice about the warning her daughter had received from the accused. That was the reason for

her to drag on her feet. It was natural for her to conduct herself in that manner. I am satisfied that Meredani told the truth in Court.

29. It was further argued that the complainant's evidence is not consistent with what she had told the police in her witness statement. In her statement to police, she had told that '*he was holding me from behind and forcefully inserting his erected penis and pushing it into and for into my vagina*'. She told in Court that he '*bent her over before inserting his penis into her vagina*'. I do not see any material contradiction in the two versions.
30. It was suggested that it was not possible for the accused to insert his hand into her vagina because, when he pulled her down, she would go underwater first. She explained and said that the fingering happened after she was pulled into the water by her leg.
31. I am surprised that the Prosecution failed to tender the medical report that it had disclosed to the Defence in advance on the premise that the examining doctor is not available in Fiji. It could have been tendered through any other doctor and take his expert comments on the report under Section 133 (5) of the CPA if the presence of the examining doctor could not be secured. The absence of the medical evidence however did not affect the credibility of the Prosecution case because there is credible evidence that the complainant had a medical condition in her vagina a few days after the alleged incident that produced pus.
32. I observed the complainant's demeanour in Court. She was straightforward and not evasive. Her conduct is consistent with her honesty and that of a victim of rape. I am satisfied that the complainant told the truth in Court. I accept the version of events of the Prosecution case. The cross-examination of the Prosecution witnesses did not create any doubt in my mind as to the credibility or reliability of the complainant's evidence. It is safe for me to act on her evidence to find the accused guilty.
33. The Prosecution proved beyond a reasonable doubt that the accused Sakiusa Nawaibure penetrated the vagina of the complainant with his finger and with his penis. I find the accused guilty on each count.

34. The accused is convicted accordingly.



Aruna Aluthge

Judge

At Lautoka

03 November 2023

Solicitors:

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