

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 249 OF 2020

STATE

vs.

SHAHIL DYER RAJ

Counsel:

<i>Ms. Latu L with Mr. Zunaid Z.</i>	-	<i>for State</i>
<i>Mr. Chand P</i>	-	<i>for Accused</i>

Date of Hearing: 4.12.23 – 8.12.23

Date of Judgement: 22.01.2024

JUDGMENT

(The names of the victims are suppressed, as requested by the Prosecution, and will be referred to as AAR – 1 and AAR - 2 in this Judgement)

1. The accused in this matter, **SHAHIL DYER RAJ**, was charged with one count of **Rape** and one count of **Sexual Assault** against AAR - 1 (**Prosecutrix 1**), a child under 13 years of age and with one count of **Rape** against AAR – 2 (**Prosecutrix 2**), a child under 13 years of age, as below:

COUNT 1

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January, 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, penetrated the vulva of **AAR - 1**, a child under the age of 13 years, with his tongue.

COUNT 2

(Representative Count)

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January, 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, penetrated the vulva of **AAR - 2**, a child under the age of 13 years, with his tongue.

COUNT 3

(Representative Count)

Statement of Offence

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

Particulars of Offence

SHAHIL DYER RAJ between the 1st day of January 2019 and 29th day of July, 2020 at Caubati, Nasinu in the Central Division, procured **AAR - 1**, a child under the age of 13 years, to witness an act of gross indecency by displaying and placing his penis on the hand of **AAR - 1**.

2. Upon reading of the charges in Court on 28/09/2020, **SHAHIL DYER RAJ** understood and pleaded not guilty to the charges filed against him. At the trial, the Prosecution led the evidence of 4 witnesses, including the evidence of AAR – 1 and AAR - 2 the victims. At the end of the Prosecution case, since the Court was convinced of the availability of a prima facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused.
3. At this juncture, the Accused opted to give evidence subject to cross-examination and one more witness was called for the Defense. At the end of the Défense case, the Court considered submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

Element of the offence of Rape

4. The main elements of the offence of Rape under **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009** applicable to this matter are:
 - i) The Accused;
 - ii) Penetrated the vulva of the Complainants with his tongue;

- iii) The Complainants did not consent the Accused to penetrate the vagina with his tongue;
 - iv) The Accused knew or believed or was reckless that the Complainants were not consenting for him to insert his tongue in that manner.
5. However, in this matter since the victims were below 13 years of age, the iii) and iv) elements in relation to consent will not apply in this matter by the application of Sub-section (3) of Section 207 of the Crimes Act of 2009, which reads as follows:

“For this, a child under the age of 13 is incapable of giving consent”.

Elements of the Offence of Sexual Assault

6. The main elements of the offence of Sexual Assault applicable under **Sections 210(1)(b)(ii)** of the **Crime Act 2009** relevant to this matter are:
- i) The Accused
 - ii) Unlawfully and Indecently assaulted the Complainant

Burden of Proof

7. The Accused is presumed to be innocent until he is proven 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 guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

8. The first witness for the Prosecution (**PW1**) was AAR – 1. Giving evidence in Court, AAR – 1 informed that she is now in class 8 and she is the eldest in her family, where she has younger brother and a younger sister. She further mentioned that the Accused, Shahil is her cousin, though she calls him brother. She remembered that one day when she stayed overnight at Shahil's house on going there with her grandmother she slept in the living room with other children, where her grandmother and aunt slept in a different room. She mentioned that on this night her cousin sister Shanaya slept next to her, and Shahil slept in the corner. According to her, on that night Shahil had removed her shorts and the panty and started licking her private parts, which she uses to pee, and that Shahil's tongue went inside her private part. She further claimed that at this juncture Shahil told her not to shout or to tell anyone, where she very scared of what was happening and she just laid on the floor. Referring to the light condition in the room, she mentioned that though Shahil told her to switch off the light in the living room initially, she witnessed what took place from the outside light and moon light coming through the window in the room.

9. To assist this witness to explain the incident better, the Prosecution hands over a Doll to the witness. Taking the Doll into her hand, the witness shows the groin area of the Doll and says that the Accused licked that part in her body. Testifying further, this witness claimed that thereafter the Accused put his private part on her hand, which was long and oval shaped. To explain further, this witness draws the shape of the private part of the Accused on a paper, which was marked by the Prosecution as **PEX4**. Describing the place where the incident happened, she referred to booklet marked **PEX3** photo 8 and mentioned that this happened on the bottom left below the pink painting and she clearly saw this from the light that came through the window next to the pink painting. She further informed Court that at this time no one else was awake and everyone else was sleeping and since Shahil told her not to tell anyone, she was afraid and didn't tell anyone.
10. **PW1** further informed this Court that Shahil did the same thing the next day when she visited her grandmother's house during daytime. According to her, at that time Shahil had called her to the room in photo 9 in **PEX3** and taken off her shorts and panty on the bed and licked her private part with his tongue by putting his tongue inside her private part. She claimed that she saw this, since there was sunlight in the room that came through the window. She alluded that she did not tell anyone what happened, since the Accused told her not to tell anyone. She further claimed that an incident of this nature happened again, in her grandmother's house depicted in photo 5 of **PEX3**. According to her, on that day, when she went to wake up the Accused on the instructions of her grandmother, the Accused had called her and her sister and pinned her sister on the bed. When her sister threatened to tell her grandmother, the Accused had given her a Lolly and he told her to go to the other bed. At that time on his bed, Shahil had removed her cloths and under garments and licked her private part. In finishing this, the Accused had grabbed her sister and licked her private part, where AAR – 1's garments had been removed by Shahil.
11. This matter has come into attention of the adults, since one to two weeks after her brother and sister had been playing under a blanket in the house and had been doing the same thing Shahil did to them by licking private parts, which her mother had seen, and they have told her that Shahil said licking the private parts is a game. At that point her mother had got very angry and when she questioned her, she had told her everything that Shahil did to her and her sister by licking private parts. Thereafter this matter had been reported to the police. **Witness identified the Accused on the dock.**
12. The second witness for the Prosecution (**PW2**) was **Dr. Losana Burua**. In testifying in Court, she mentioned that she is a GP and in 2020 she worked at Medical Services Pacific Clinic and she has been practicing since 1998 and she has specialized in family practice, especially women and children. According to her on 30/07/2020 she had been at Medical Services Pacific. On that day, when produced by the police, with her mother she had medically examined **PW1** at 1300 hours and filled in the police medical examination form and signed, which was marked as **PEX5**. According to her in D 11 of **PEX5** she had mentioned that the patient was oblivious to what was going on and was carefree. She had mentioned that the patient had nil physical injuries together with her genital area. Her hymen had been intact. However, the patient had informed that the act done was a game. This witness had recommended further counselling for the patient, since she was not aware of anything further. Furthermore, Doctor had mentioned that there were nil signs of penetration, but she opined that she couldn't exclude that the tongue was used, since they hardly see any injuries in incidents where the tongue was used to lick the vulva. She further mentioned that, if the use of the tongue was very aggressive, she could have noticed some abrasions in the first week, but vulva could be penetrated with a tongue without causing any injuries. On the same day she had examined AAR – 2 and filled the form and signed, which was marked as **PEX6**. She

had examined her at 1.30 pm. AAR – 2 had been very carefree and had acted as a normal child. On examination no abrasions had been noted in her genital area and her hymen had been intact. Further, since this patient also had been of the view that the act was a game, she had recommended her for counselling.

13. The third witness for the Prosecution (**PW3**) was **Komal Raj**, the mother of AAR – 1 AAR – 2. She mentioned that her husband has a sister named Beetha and she had 3 children Shahil, Shanam and Shanaya. According to her, in 2020 AAR -1 had been 10 years and AAR -2 had been 8 years and these kids had visit Beetha's house with her mother-in-law. As such, Shahil had been her children's cousin, where Shahil also came to their house regularly and slept over sometimes, where AAR – 1 and AAR – 2 also slept at Shahil's house on going there with her mother-in-law. She alluded that in early 2020, when I returned from work on a Friday, she had seen her son laying with AAR - 2 on the bed covered in a blanket. She had heard AAR - 2 telling her son to play the game Shahil told them. When she went and pulled out the blanket, she had seen AAR - 2 and her son naked. At that point she had got very angry and asked AAR - 2 what Shahil said and she had informed her that Shahil liked her and her sister's private parts after taking off their cloths as a game. Thereafter, she had asked AAR - 1 whether Shahil had done this and she had concede that it is a game that Shahil told them. Though initially her husband was reluctant to report, after consulting the women crisis center, she had reported the matter to the police with her children. **Witness identified the Accused in Court, as she had known him as her nephew foe over 14 years.**
14. The witness number 4 for the Prosecution (**PW4**) was **AAR – 2**. Giving evidence in Court, she mentioned that her father's sister is Beeta, and she has 3 children and Shahil, the Accused is the eldest. She further confirmed that she has been to aunty Beeta's house and stayed overnight many a times, which house is about 15 minutes' walk from her house. Referring to photographs in **PEX3**, she identified photo 2 as her house and in photo 3 the green house is as her grandmother's and the off-white house behind the green house is theirs. She recognized photo 6 as Beeta aunt's house and photo 8 to be their sitting room. She testified that something happened at Shahil's house, when Shahil, Shanam, Shanaya and herself were sleeping at night on a mattress on the floor in Shanam's room. According to her, at this time she had been wearing shorts, a top and a panty. She claimed that room light was on, and Shahil took off her shorts and the panty and started licking her private part that she uses to urinate with his tongue, where his tongue went inside her private part. **The witness points to the groin area as the private part.** She alludes that she didn't scream then, since Shahil told her that he will give me lollies, she claimed that at that time the lights in the sitting room and bedroom were on and she could see Shahil well.
15. She further clarified that this happened again at her house, where Shahil came and took off her clothes and started licking her private parts during daytime in her brother's room when no one else was in the room. To her understanding, these events had been reported when her mother found out. Where on a particular day when she was playing with her brother the game Shahil had taught them. In this regard, in her mother's room her brother had taken off her shorts and her mother had seen this and questioned them and tried to punish them. As a consequence, AAR – 2 had told the entire story of events to her mom. **Witness identifies the Accused as her cousin Shahil on the dock.**

Evaluation of the Prosecution Case

16. For the Prosecution case, the main witnesses that testified to establish the case were the two Prosecutrix (**PW1**) AAR – 1 and (**PW4**) AAR -2, who were below 13 years of age at the time of the occurrence of the incidents. In testifying in Court, they narrated the

occurrence of events in this matter to the best of their ability at their own pace, especially since they considered the Accused was playing a game with them by licking their private parts. They were prompt in their responses and did not try to evade from questions and maintained a very candid and carefree attitude, as you could expect from any child of that age. In fact, it was noticeable from their evidence that they did not suspect the Accused to be doing a wrong thing by licking their private parts. Further, since they claimed of several occasions of the Accused licking their private parts on different dates, they attempted to recall these occurrences to the best of her recollection during their testimony in Court. This Court observed the demeanor and deportment of these two young witnesses in Court and was impressed with their testimony and this Court has no reason to disbelieve the narrated trajectory of events by the two witnesses.

17. In relation to this incident of Rape the Accused is charged with in the information, though the victims had not complained of the incidents to anyone and was found AAR – 2 requesting her brother to play the game of licking as taught by the Accused, both AAR – 1 and AAR – 2 have informed of the incidents in detail to their mother when questioned. In dealing with the impact of the absence of a prompt complaint by the victims of the incidents the Accused is charged with, this Court intends to take guidance from the pronouncement made by **Justice Thomas** in the **Court of Appeal of Wellington, New Zealand** in the case of **R v H [1997]**¹, where he stated, as below:

“In the present context, the word "complaint" is itself archaic. Victims of rape seldom "complain" in the sense that that word is generally understood. Their "complaint" is almost invariably in the nature of a disclosure, a shared confidence, a "confession", a revelation, or the like. The recent complaint rule is applied regularly in the criminal Courts. Yet the rule is indefensible, the relic of the medieval requirement of the "hue and cry". The expectations of medieval England as to the reactions of an innocent victim of a sexual attack are no longer relevant. The assumption that there is a common inclination to talk about the incident to anyone must be expressly abandoned as it is without any evidential foundation.”

18. Through the evidence of **Dr. Losana Burua** Prosecution notified the Court that on medical examination the two victims had nil physical injuries and their hymens were intact. Further in her evidence she opined that on medical examination of genital area of victims subject to incidents of this nature, doctors hardly see any injuries in incidents where the tongue was used by the perpetrator to lick the vulva of the victim.
19. By the evidence of PW3, the mother of the victims, Prosecution informed this Court how this matter came into light, when she found her son and the daughter attempting to play the game the Accused had mentioned to them. Further, she testified how her husband was reluctant to report the allegations of the victims to the police, since the Accused was the eldest son in their family and how she sought assistance of the Women Crisis Centre. In relation to the evidence of this witness, this Court recognized that she has had a very cordial relationship with the Accused, and she had trusted him to keep her two young daughters with him alone. In noticing the procedure she followed to complaint against her

¹ [1997] 1 NZLR 673

nephew, this Court has no reason to doubt the inclination of a mother to protect her daughters against any family pressure.

Defense Case

20. Giving evidence in Court, the Accused informed that in 2020 he lived in Caubati with his mother and siblings, where he has cousins, AAR – 1 and AAR – 2 who visit his house regularly and sometimes they stay overnight and sleep in his house, but he had never slept with them, since he sleeps in his room. Further, he admitted that he goes to the victim's house with his mother, and he had never slept over there. Referring to the allegation against his, he mentioned that he never removed AAR – 1's or AAR – 2's cloths and licked their private parts and he had never placed his penis on AAR - 1's hand. Mentioning about the relationship between the two families, he alluded that his mother and the mother of the victims had a dispute and there was animosity between the families that could have prompted this allegation. He conceded that his relationship with the victims was like brothers and sisters. Referring to the light condition of his house in the night, he informed that there is a light in the outside veranda in his house, which comes to the sitting room in the night allowing anyone to see things well.
21. The mother of the Accused, **Beetha** gave evidence as **(DW2)**. She confirmed that AAR – 1 and AAR - 2 used to come to her home with their mother and if they stayed overnight, they slept in the sitting room with her daughters and their grandmother, where the Accused slept in his room. Further, on occasions when they go to the victim's place, they used to sleep in the adjoining house of her mother. She divulged that ever since AAR - 1's mother got married, they always used to have fights and there was animosity between the two families to make this allegation. Referring to the light condition in her living room, she mentioned that there is a light in the veranda, which is on every day, and one could see inside the living room in the night with the light emanated from the veranda light.

Evaluation of the Defense Evidence

22. In this matter, both the Defense witnesses admitted that the victims used to come to their house and stay overnight and they used to go to the house of the victims and sometimes stay overnight in the adjoining house. They also agreed that the victims treated the Accused like their own brother and called him "brother". However, their positions was that due to some long term animosity that prevailed between the mother of the victim's and the mother of the Accused this allegation would have been made. However, considering this evidence of the Defense, the possibility of the Accused being at the places of crime cannot be excluded and the likelihood of the victim receiving the advice of the Accused to play a game of licking private parts is also a possibility. In considering these factors and the trust the victims and their family had in the Accused, this Court is not willing to accept this position of the Defense that this allegation is based on an animosity between the mothers though they cordially interacted with each other. Therefore, this Court rejects the evidence of the Defense.

Finding of Court

23. Considering the elements that needs to be established in relation to Rape for the counts 1 & 2, firstly there is no doubt in relation to the identity of the Accused by AAR 1 & AAR 2. As per the second and third elements, both the victims have testified in this Court that the Accused licked their private parts and put his tong inside their private parts on the pretext of playing a game. Considering the age of the victims, the consent is not a requirement to establish these counts

under our law. In this sense, all the required elements for rape have been established by the Prosecution in this matter through the evidence of AAR 1 and AAR 2 beyond reasonable doubt.

24. In relation to count 3, Sexual Assault, the 1st element is not in any doubt. With regard to the 2nd and the 3rd elements, AAR-1 has testified in Court and Prosecution has established all the elements required beyond reasonable doubt.

Conclusion

25. This Court finds the Accused, **SHAHIL DYER RAJ** guilty in relation to the two counts of Rape and one count of Sexual Assault he is charged with. Therefore, the Accused is hereby convicted for committing the offences of rape contrary to **Section 207 (1) and (2) (a)** of the **Crimes Act 2009** and for committing the offense of Sexual Assault under **Section 210 (1)(b)(ii)** of the **Crimes Act of 2009**.
26. You have 30 days to appeal to the Fiji Court of Appeal.



A handwritten signature in blue ink, appearing to read 'Thushara Kumarage'.

Hon. Justice Dr. Thushara Kumarage

At Suva

This 22nd day of January 2024

cc: *Office of Director of Public Prosecutions*
Legal Aid Commission