

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Crim. Case No: HAC 010 of 2021

STATE

vs.

TEVITA SADE

Counsel: Mr. J. Nasa for the State
Ms. K. Marama for Accused

Dates of Hearing: 15th, 16th January 2024 and 20th May 2024

Date of Closing Submission: 13th June 2024

Date of Judgment: 20th June 2024

JUDGMENT

- I. The Director of Public Prosecution filed this Information, charging the Accused, Tevita Sade, with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are:

COUNT 1

[Representative Count]

Statement of Offence

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

Particulars of Offence

TEVITA SADE, sometimes between the 1st day of January 2017 and the 31st day of December 2018 at Dogutuki, in the Northern Division, unlawfully and indecently assaulted ELINA SIGALOLO

COUNT 2

[Representative Count]

Statement of Offence

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

Particulars of Offence

TEVITA SADE sometimes between the 1st day of January 2017 and the 31st day of December 2018 at Dogutuki, in the Northern Division, had carnal knowledge of ELINA SIGALOLO, without her consent.

2. The Accused pleaded not guilty to the two counts; hence, the matter proceeded to the hearing. The hearing commenced on 15th January 2024 to 16th January 2024 and concluded on 20th May 2024. The Prosecution presented the evidence of four witnesses, including the Complainant. The Accused opted to exercise his right to remain silent and, hence, adduced no evidence for the Defence. At the conclusion of the hearing, the learned Counsel for the Prosecution and the Defence tendered their written closing submissions. Having considered the evidence adduced and the respective closing submissions of the parties, I now pronounce the judgment on this matter.

Burden and Standard of Proof

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is 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 he is 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.

Right to Remain Silent

4. The Accused did not adduce evidence and exercised his right to remain silent. The Court must not make any adverse inferences on the fact that the Accused exercised his rights in this manner.

Elements of the Offence

5. The main elements of Rape under Section 207 (1) (2) (a) of the Crimes Act are:
 - 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.
6. 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 against the Complainant. There is no dispute about the correctness of the identification. The Accused and the Complainant are known to each other. The Accused never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator.
7. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.
8. 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. Accordingly, the "capacity" is essential in making free and voluntary choices about consent.

9. 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.
10. The main elements of the offence of sexual assault are that:
 - i) The Accused,
 - ii) Unlawfully and Indecently,
 - iii) Assault the Complainant.

The Admitted Facts

11. The Accused and the Prosecution tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act.
 - a) *THAT the Accused in this matter is Tevita Sade born on 22nd July, 1970 and was 48 years old in February, 2019.*
 - b) *THAT the Complainant is Elina Sigalolo, 19 years old in February 2019.*
 - c) *THAT the Complainant is the step-daughter of the Accused.*

- d) *THAT the Complainant's mother is Alisi Soroiwaga.*
- e) *THAT the Complainant, her other siblings, their mother Alisi Soroiwaga and the Accused lived in Raiwasa, Dogotuki in the years 2017 and 2018.*
- f) *THAT Sereana Tagimoucia was a neighbour of theirs at Raiwasa, Dogotuki in the years 2017 and 2018.*
- g) *THAT the Complainant was interviewed and examined at St. Giles Psychiatric Hospital on 26th May 2023 and 5th June 2023, respectively.*

Evaluation of Evidence

- 12. The Complainant was a 19-year-old young female with intellectual disability. The Prosecution presented the evidence of her elder sister and Doctor Kiran Gaikwad, the Principle Medical Officer at St Giles Hospital Suva, to establish the intellectual disability of the Complainant.
- 13. The Prosecution called Doctor Kiran Gaikwad to provide the evidence regarding the Complainant's psychiatric evaluation. According to the Prosecution, the purpose of calling Doctor Gaikwad is to establish the mental capacity of the Complainant as well as the competency of the Complainant as a witness.
- 14. Evidence of an expert opinion only requires that the expert provide the Court with any scientific or technical information that is likely to be outside the Court's experience and knowledge. On that account, the evidence of an expert explaining how an ordinary person not suffering from any mental disorder would react to a particular situation and what reliance the Court should give to such conduct are not relevant as they are well within the knowledge and experience of the Court.

15. In this case, the Prosecution adduced Doctor Gaikwad's evidence to establish the Complainant's medical condition. In G v Director of Public Prosecution [1997] 2 All ER 755, the Queen's Bench Division, referring to the judgment of R v Davice (3 November 1995, unreported), found that the characteristics of a medical condition of the witness, such as mental illness, are not to be known to the Court without the assistance of experts. However, such experts cannot express an opinion on whether such witnesses are reliable or truthful witnesses since it is strictly within the exclusive domain of the Court.
16. In HM Advocate v Grimmond (2001 SCCR 708, 2001 Scot (D) 31/8), it was held that evidence establishing a witness's mental illness is relevant to determining the quality of that particular witness's evidence.
17. The above judicial precedents of England and Scotland affirm that the evidence of a psychiatrist explaining the mental condition of the witness is relevant. Considering these judicial precedents, I believe these cases undoubtedly provide instructive assistance to this matter. Therefore, I find Doctor Gaikwad's evidence admissible and relevant.
18. Doctor Gaikwad said that the Complainant is an intellectually impaired person whose mental maturity is not similar to her physical age. However, she has specific limitations in engaging in conversation and answering questions appropriately.
19. Considering the Complainant's condition, this Court recorded unsworn evidence under Section 117 (2) (b) of the Criminal Procedure Act in an informal court sitting.
20. Before I proceed to evaluate the evidence of this matter, it would be prudent to consider the correct approach to assess the evidence of a witness with intellectual disability. The Fiji Court of Appeal in Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018) held that:

"In R v Powell [2006] 1 Cr.App.R.31, CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable

to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.

It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) that:

“(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] F.JSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version ‘Their evidence is not a video recording of events.’ In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details”

21. Adopting the above dicta of the Premathilaka RJA in Alfaaz v State (Supra), *mutatis mutandis*, the evidence presented by a witness of this nature, must be evaluated by reference to factors appropriate to her strengths, weaknesses, level of focus, mental development, understanding and ability to communicate.

22. Comprehending these legal principles, I shall now proceed to evaluate the evidence of this matter.
23. There is no dispute regarding the identity of the Accused, as he is the stepfather of the Complainant and has lived in the same house for a number of years. Moreover, the Accused raised no issue with the identification on the basis that the Complainant was mistaken in her identification of the alleged perpetrator.
24. The Complainant, using dolls, explained the alleged incident that occurred while no one was home. Her mother and brother had gone out, leaving herself and the Accused home alone. She was sleeping in the bed when the Accused came to her. The Accused touched her body, which she demonstrated, pointing to the places of the dolls as the places where the Accused touched, including her breasts.
25. The Complainant then went on to explain that the Accused had put his "balls " into her things. She pointed out the genital area of the female dolls, indicating that was the place where the Accused put his balls. She then pointed out the genital area of the male dolls, showing the Court that was the balls the Accused put in her.
26. Premathilaka JA in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15 outlined the meaning of vaginal area and how to approach the evidence of a child in respect of the issue of penetration.

"Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes

covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.

Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if

not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

27. In applying the above dicta of Premathilaka JA insofar as relevant to this matter, I am satisfied that there was an intrusive penetration of her vaginal area with the penis of the Accused, thus establishing the element of "penetration".
28. The Complainant specifically stated that she asked the Accused to stop what he was doing when he touched her body and penetrated her vagina with his penis. As such, the Prosecution established that the Complainant did not consent for the Accused to penetrate her vagina and touched her body, yet, the Accused, disregarding her objection, continued his sexual assault on her.
29. The Prosecution presented the evidence of Sreana Tagimoucia as the witness of a recent complaint.
30. The Supreme Court in **Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)** enunciated the purpose and the scope of the evidence of a recent complaint, where Gates CJ outlined that:

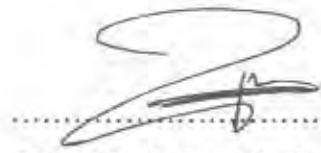
"[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant

to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence

31. The Complainant had told Sereana that the Accused came to her bed when she was sleeping and then removed the mosquito net, and then had sex with her. I am satisfied that Sereana's evidence is presented in line with the Raj guidelines, enhancing the consistency of the evidence given by the Complainant.
32. In consequence of the foregoing reasons discussed, I find the Prosecution has successfully established that the Accused committed the offence of Sexual Assault and Rape as charged in the Information. Hence, I hold that the Accused is guilty of one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act as charged and convict of the same accordingly.




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

At Suva

20th June 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.