

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 32 of 2015

STATE

V

APAKUKI SAUDROMU

Counsel : Ms. S. Naibe for the State.
: Mr. K. Tunidau for the Accused.

Dates of Hearing : 22, 23, 24, 25, October, 2018
Closing Speeches : 29 October, 2018
Date of Summing Up : 30 October, 2018
Date of Judgment : 01 November, 2018

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "MB").

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act 2009.

Particulars of Offence

APAKUKI SAUDROMU between the 1st day of January, 2014 and the 31st day of January, 2014 at Lautoka in the Western Division, unlawfully and indecently assaulted “**MB**”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

APAKUKI SAUDROMU between the 1st day of September, 2014 and the 30th day of September, 2014 at Yasawa in the Western Division, penetrated the vagina of “**MB**” with his penis, without the consent of “**MB**”.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of both counts.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called two witnesses and the defence called seven witnesses including the accused.
5. The complainant “MB” recalled in the year 2014 she was 17 years of age and a Form 5 student her father died when she was in class three and her mother remarried. In January, 2014 the accused who was her paternal uncle came to her house and sought permission from her elderly grandfather with whom she was staying to take her to his house at Kashmir and support her education. Thereafter the complainant started schooling from the house of the accused.

6. After the school started she had a boil on her right breast, as a result of this boil during night time she did not wear any top and slept wearing her skirt only. One night whilst sleeping she felt someone was sucking her breast. When she woke up she saw it was the accused her uncle, at this time she was alone in the bedroom. When the complainant saw her uncle she was scared and nervous, he sat on the bed and told her not to tell anyone about what he had done.
7. The complainant shared the bedroom with the daughter of the accused who on that night was sleeping in the sitting room. The light in the bedroom wasn't on but there was light from the bathroom which was opposite the bedroom.
8. The next day she told the baby-sitter who was a live in house girl and Niko the son of the accused. They said nothing after this the complainant left school and went home to stay with her grandfather she did not go to school thereafter.
9. In September, 2014 the accused came to the house of the complainant. She was surprised and nervous to see him, the accused asked permission from the complainant's grandfather so that he could take the complainant to Yasawa. The complainant's grandfather granted permission for the complainant to go to Yasawa and they were to bring some fish for him upon return.
10. The complainant went with the accused to the Lautoka wharf and both went to Yasawa an elderly man also accompanied them to Yasawa. At Waya Island the complainant saw that the hotel was under construction and there were a few workers there. There were two quarters, in one of the quarters the complainant stayed with the accused.
11. In the room the complainant slept on the mattress whereas the accused slept on the bed. While sleeping the complainant felt someone sitting beside

her. When she woke up she saw her uncle. At this time he pushed her back on the mattress and told her to take off her pants. After this the accused inserted his penis into her vagina for about three minutes. The complainant was scared and ashamed of herself at this time.

12. The complainant did not consent to what the accused had done to her. The accused forced her she did not raise an alarm because she was afraid of the accused. The accused told her not to tell anyone about the incident.
13. When the accused went to sleep the complainant started to cry. Next morning both came to Lautoka wharf and from there she went home alone. When the complainant arrived home her grandfather was there but she did not tell him anything about what the accused had done to her she was afraid of her grandfather and she did not know how he will react if she told him since he suffered from high blood pressure.
14. The complainant did not report both the incidents to the police immediately thereafter because she was afraid the police will arrest the accused and he will fight with her aunty (his wife) and what her parents will do to her if they came to know about what the accused had done to her.
15. Furthermore, on a Sunday at lunch time the complainant went to her cousin's house, after 2pm she came home and was afraid when she saw the accused at home. After having lunch the accused asked the complainant's grandfather if the complainant could show him the house of her cousin Inoke who lived at Tagaloli. Her grandfather granted her permission to go with the accused. The complainant went with the accused because there was nobody at home to take him to Tagaloli.
16. At Tagaloli the accused had a chat with her cousin since it was late in the afternoon about 5 pm no bus service was available so it was suggested by the complainant's cousin Inoke that the accused and the complainant stay overnight and leave the next day.

17. The accused went to sleep while the complainant, her cousin and his wife watched a movie. In the middle of the night Inoke came and woke the complainant since her mother and grandfather were there. At this time the complainant's mother came into the house grabbed her, started to punch and slap her, took her to the car and then to the Police Station.
18. At the Police Station the complainant lodged a complaint against the accused. According to the complainant her mother knew about what had happened to her in Yasawa Island since her mother had told her to tell the police about what had happened to her at Yasawa Island.
19. Furthermore, the complainant recalled making a withdrawal of complaint statement. She was with her mother when the wife of the accused called her mother asking them to meet at their house in Kashmir.
20. At the house of the accused she was given a piece of paper by the wife of the accused which was a withdrawal of complaint letter. The wife of the accused also gave a blank piece of paper and told the complainant to copy the contents of the letter in her own hand writing. The complainant copied the letter and they came with the younger brother of the accused and delivered it to the court. The complainant did not want to withdraw this case she wrote the letter because the wife of the accused had told her to write the letter.
21. The complainant did not tell anyone or report the matter despite having lots of opportunities to do so because she was scared something would happen to her.
22. In cross examination the complainant stated even after eight months of the January incident the complainant felt scared and did not want to see the face of the accused but she went to Yasawa with the accused because her grandfather had given permission and if she did not go her grandfather

- would ask a lot of questions and suspect that something was happening or had happened between the two. She did not tell her grandfather about the January incident because of his health.
23. The complainant denied on the night of the alleged incident Paulini and Kelera were sleeping in the bedroom. She stated that she told the truth that the accused had come into the night and sucked her breast. She also denied it was Niko her boyfriend who had sucked her breast.
 24. The complainant agreed that she had hand written the letter withdrawing her case and also signed the same but denied writing the letter with her mother and then had gone to advise the wife of the accused about it. The complainant maintained she copied the letter written by the wife of the accused. She was forced to write the letter by the accused wife who was beside her.
 25. The letter was delivered to the office of the Director of Public Prosecutions by the younger brother of the accused. The complainant denied that she had lied about the two incidents.
 26. The final prosecution witness was Mereani Batiki the mother of the complainant she recalled on 9 November, 2014 at about 10.30pm the witness received a call from the complainant's grandfather asking that she should go and look for the complainant since she was not at home after going with the accused to show him her cousin's house at Tagaloli.
 27. From Tagaloli they went and reported the matter to the Police because of the complainant's age. The witness did not receive any complaints about the complainant from anyone including the wife of the accused.
 28. In cross examination the witness denied influencing the complainant with her husband to write the letter of withdrawal. She explained that the complainant came to her home since the wife of the accused had already

called the complainant telling her that she will write a letter for the complainant who has to copy it in her own handwriting, that's the reason why the accused younger brother came with them to the DPP's office. They left him to deliver the letter and then they went home.

29. The witness maintained that the wife of the accused had called her for the purpose of writing a letter but she did not ask what the letter was about and it was the wife of the accused who had written the letter and the complainant copied it. Before the witness went and delivered the letter she could have torn or burnt the letter but she did not.
30. In re-examination the witness clarified that the letter was given to the accused younger brother to go and deliver it at the DPP's office. The wife of the accused had wanted to give the letter to the witness but the witness refused to take the letter so the letter was given to Viliame the younger brother of the accused.
31. The accused denied both the allegations and stated that the complainant was lying in court.
32. In January 2014 the complainant went to stay at the house of the accused. The accused has a three bedroom house the 3rd bedroom was occupied by the complainant, Kelera and Paulini. The accused stated that he did not suck the breast of the complainant as alleged the complainant was lying.
33. The accused also said the complainant was lying when she said they had slept together at the hotel quarters because the hotel rules did not allow this, one section was occupied by workers from Lautoka and the other section was occupied by workers from the villages. The accused denied raping the complainant as alleged he said the complainant had lied to the court.

34. According to the accused after three weeks of work the workers from Lautoka would leave the Island. The accused denied having any knowledge about the withdrawal letter written by the complainant.
35. In cross examination the accused stated he came to know about the letter of withdrawal when he came out of remand he was informed by his children that a letter was given to office of the DPP. Kelera had told the accused that she with the complainant had written the letter of withdrawal. The accused then agreed Kelera had said that she wrote the letter, upon further questioning the accused then also said that according to Kelera the complainant wrote the letter while sitting with Kelera.
36. The second defence witness Niko Koroi the son of the accused informed the court that in 2014 he had a boyfriend girlfriend relationship with the complainant. During the time the complainant was at his house nothing unusual happened. The witness knew the complainant had a boil on her breast which was in the month of January, 2014.
37. The complainant did not tell the witness that the accused had sucked her breast and he does not know why she left his house.
38. In cross examination the witness agreed when the complainant was staying with them she maintained good behaviour. The witness maintained he did not know why the complainant had left his house, despite being in a relationship he did not have time to ask her for the reason since he did not have any time to contact her. The witness thought the complainant had gone home for a visit he did not inquire with his family members why she had left their house. He found out the reason when his father was remanded and that's when he realized the complainant left his house for good.
39. The witness agreed he was close to his father, respected him and as a son he does not want to see anything happening to his father and that he wants to see that his father is protected and that nothing happens to him.

40. The third defence witness was Melaia Galio Koroï the wife of the accused. They have been married for 23 years with 4 children. The family never had any difficulties, no family problems, a happy family the accused is a good hearted man.
41. The witness knows her husband faces two charges there was an investigation carried out by the police but they did not approach her for a statement. The witness did not go to the resort since it was under construction even being the wife of the accused she was not allowed.
42. The complainant slept in one of the bedrooms with Kelera and Paulini. The accused and the witness slept in one bedroom there hasn't been any night both have not slept together. The witness stated that she will know if the accused leaves the bed.
43. The complainant stole about \$400.00 belonging to the aunt of the accused. The accused was angry with her and that was the reason why the complainant left their home.
44. The witness was not aware of any day the accused had gone to the Island with the complainant. When shown the letter of withdrawal the witness did not recognize the document she mentioned that she did not know about the contents of the letter as well.
45. The witness recalled in 2015 when the accused was in remand the complainant, her stepfather and mother had come home to apologize for what the complainant had done because she was a liar. They came asking the witness to do something she told them she could not do anything.
46. According to the witness she had not called the complainant and her parents home. They had come during midday and were sitting in the

kitchen while the witness was preparing tea. At this time the accused brother Viliame was at home with his six Filipino friends, Kelera was also at home that day.

47. The witness stated that she did not force the complainant to write the letter the complainant and her parents told the witness that they wanted to go to the DPP's office so Viliame went with them.
48. The fourth defence witness Avitesh Kumar informed the court that in 2014 he was employed by Liku Sundown Company as a supervisor doing construction and joinery works at the Waya Bay Resort which was under construction at that time.
49. The witness was supervising about 30 workers, at that time they stayed at the dormitories, one was for the boys from the village and the other for the boys from the mainland. It was one building divided by a partition. According to the witness the accused comes to see him when he brings the boat to the Island. The witness is the first person to go and see the accused who sometimes brings building materials and groceries.
50. According to the witness females were not allowed in the resort since it was under construction and to avoid anyone getting hurt. The family members can go during the day for a swim but were not allowed to go to the construction site.
51. The fifth defence witness Viliame Sukanaivalu the younger brother of the accused informed the court that in 2015 he was a crew in a fishing vessel, he came to Fiji from Asia. At home he came to know about the allegations against the accused.
52. The witness was with his friends from Philippines they all went to the house of the accused at Kashmir. Mela the wife of the accused and her children were at home with Buna.

53. After a while the complainant came with her parents she had a letter in her hand and wanted to go to the office of the DPP but they did not know where the office was. The witness did not ask the complainant what the letter was about and also he did not see the contents of the letter. The complainant and her parents stayed at the house for 10 minutes. The witness did not hear the discussions that took place between Mela, the complainant and her family.
54. The witness joined the complainant and her parents in going to the office of the DPP he knew where the office was. At the DPP's office all went into the office where the complainant gave the letter to an officer there.
55. In cross examination the witness agreed that the accused was his elder brother but he could not recall the age difference. The witness has a good relationship with the accused and they are very close.
56. In respect of the letter the witness stated it was already folded and the complainant was holding it in her hand. The complainant did not tell him so he didn't know what it was.
57. The wife of the accused did not ask the witness to take the complainant and her parents to the DPP's office. The witness agreed he wanted to do everything in his power to help the accused.
58. The sixth defence witness was Nasivo Sera the accused was her uncle she has been staying at her uncle's house from 2013 till now, she is the baby-sitter.
59. The witness slept in the sitting room with the youngest son of the accused Apakuki Junior. In 2014 the complainant had a boil on her breast. According to the witness the complainant never told her anything about the

accused sucking her breast in the night when she had a boil on her breast. She never conversed with the complainant in this regard.

60. In cross examination the witness stated that from 2013 she had been employed by the accused and his family. The witness agreed that the complainant in 2014 was at the house of the accused she left and never came back. The witness maintained that the complainant did not tell her anything about what the accused had done to her.
61. She agreed her relationship with accused family was very strong. The witness stated she knew the accused was in remand for this case but she did not know anything about the case yet she came to court to tell the truth. She had not discussed the case with anyone.
62. The final defence witness was Kelera Adikula also known as Buna, in 2014 she was staying with the accused and his family. The accused was her uncle. She used to sleep with the complainant in a bedroom on the bed whereas Pauline used to sleep on the mattress. The door of the bedroom was always kept closed when they slept. The accused and his wife paid for her education.
63. In 2014 the complainant had a boil under her breast for three days this was shown to her by the complainant. During these days the witness slept with the complainant on the same bed and both were good friends. In March, 2015 the complainant came home with her parents at this time the accused was remanded in custody. The complainant and her parents were talking with the wife of the accused the witness did not know what they were discussing.
64. When the complainant entered the house she was holding a fullscap paper folded in her hand, they were in the house for about 10 minutes. The witness did not speak to the complainant or to her parents during the 10 minutes the complainant and her parents were at home.

65. In cross examination the witness agreed she was older than the complainant, were good friends had a good relationship, went to school together, slept in the same bed, treated the complainant like her own sister, missed her when she left but did not inquire why she had left but came to know that she was scolded for stealing from home.
66. The witness agreed she did not know what was written in that fullscap and agreed it was a blank fullscap. When the complainant and her parents came she was in the kitchen while her aunt and the complainant and her parents were in the living room.
67. The witness agreed she was very close to her uncle and aunt (accused and his wife) and she wouldn't want to see her aunt unhappy or upset because of the accused she denied discussing the case with the accused and her aunty before coming to court.
68. After considering the evidence of the prosecution and the defence witnesses I accept the evidence of the complainant as truthful and reliable I have no doubt in my mind that she told the truth in court, her demeanour was consistent with her honesty. The complainant was able to recall what the accused had done to her some 4 years ago and was able to describe what the accused had done to her. The complainant was able to withstand vigorous cross examination and was not discredited she was forthright in her answers and not evasive.
69. Although the complainant did not tell her elderly grandfather what the accused had done to her immediately after both the incidents does not affect her credibility. The complainant was a 17 year old child living in a typical village setting with her elderly grandfather who was sickly could not be expected to talk to her grandfather about matters of sexual nature.

70. The complainant responded positively when her mother took her to the Police Station to report the matter about what the accused had done to her. I accept the complainant had told the baby-sitter Adisivo Sera and Niko Koroi the son of the accused about the accused sucking her breast.
71. Sera is employed by the accused and she has been living with the accused family since 2013 and continues to do so. Niko was protecting his father as well it is unbelievable that he did not have time to contact his girlfriend the complainant after she suddenly left his house. Both these witnesses did not tell the truth to the court. Both these witnesses have all the reasons to protect the accused.
72. The accused also did not tell the truth when he denied the allegations and stated that the complainant was lying. In cross examination the accused was cautious he chose his words carefully being a longtime employee of the resort under construction he knew when the workers from mainland Lautoka would be leaving for home for a break. The accused told the court that the workers from mainland would leave the Island every three weeks which means one of the dormitories would be empty. This gives credence to the evidence of the complainant that when she went with the accused to the resort one dormitory was empty and there were few workers only. The accused informed the court that his relationship with the complainant was good after she left his house so there was no need for the complainant to make any false allegation against him.
73. I also reject the assertion by the defence that the complainant had left the house because she had stolen the money of the accused aunt. This proposition was not put to the complainant by the defence. Moreover, the accused knew the grandfather of the complainant yet he did not inform him about the complainant stealing money from his house if indeed the complainant had stolen money as stated by the accused.

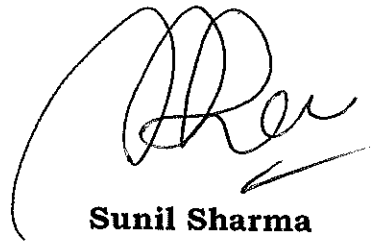
74. Furthermore, I do not accept the evidence of the wife of the accused that every night she slept with the accused when the accused himself told the court that there are instances when he would stay on the Island which was also supported by Avitesh. I also do not believe that the wife of the accused can know when her husband leaves the bed when she was asleep and also it is not just possible for her to know what the accused would be doing after he leaves the bedroom in the night. She did not say in her evidence that she would follow her husband to the bathroom or anywhere else in the house.
75. The fourth defence witness Avitesh Kumar although not related to the accused was known to the accused for a longtime and were workmates. I accept the evidence of Avitesh to the extent that since the resort was under construction due to safety reasons females were not allowed near the constructions site.
76. I reject the evidence of this witness, the accused and his wife when they made specific reference to only females not being allowed at the resort or at the construction site. It is noted that Avitesh did not specifically say that females were not allowed in the dormitory. I accept that this witness would attend to the boat in respect of building materials and groceries that was of interest to him as a construction and joinery supervisor.
77. It is also noted by this court that Avitesh was not specifically asked to recall whether the accused was accompanied by a female in September, 2014.
78. In respect of the letter of withdrawal I accept the complainant told the truth that she did not want to withdraw the complaint and she was forced by the wife of the accused to copy an already written letter. It does not make sense why the complainant and her parents would go to the house of the accused to ask for the address of the DPP's office if they had already drafted the letter of withdrawal. Kelera in her evidence said that during the 10 minutes the complainant and her parents were at the house of the accused she did not talk to the complainant. The witness stated she was in the kitchen while

the complainant and her parents and the wife of the accused were in the living room.

79. The accused on the other hand gave a different version firstly he said Kelera told him that she had written the letter with the complainant, secondly Kelera had said she wrote the letter and finally Kelera had said that the complainant wrote the letter while sitting with Kelera.
80. I do not accept the accused was not aware of the letter of withdrawal when he was in remand. It was to his benefit and yet he was not aware of it does not make sense. Melaia did not tell the truth when she told the court that the complainant wrote the letter of withdrawal and that she had not asked the younger brother of the accused to accompany the complainant to deliver the letter to the DPP's office. This is what Viliame did, he could have told the complainant where the office was but he went with the complainant and her parents making sure the letter was delivered. The letter of withdrawal was for the benefit of the accused I do not accept that the wife of the accused was not behind the writing of the letter of withdrawal, from her demeanour in court and her experience as a Reservations Consultant I am sure she was the one who was behind the drafting of the letter for the complainant to copy. Viliame also did not tell the truth when he informed the court the wife of the accused did not ask him to deliver the letter to the office of the DPP.
81. On the totality of the evidence the defence has not been able to create a reasonable doubt in the prosecution case.
82. This court is satisfied beyond reasonable doubt that for the count of indecent assault the accused between the 1st day of January, 2014 and the 31st day of January, 2014 unlawfully and indecently assaulted the complainant by sucking her breast.

83. Furthermore, this court is also satisfied that the accused between the 1st day of September, 2014 and the 30th day of September, 2014 penetrated the vagina of the complainant with his penis without her consent. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.
84. In view of the above, I reject the unanimous opinion of the assessors that the accused is not guilty for the offences of indecent assault and rape.
85. I therefore find the accused guilty as charged and I convict him for one count of indecent assault and one count of rape.
86. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka
01 November, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.
Messrs. Kevueli Tunidau Lawyers for the Accused.