

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 91 of 2016

STATE

V

JOSATEKI VAKACEGU

Counsel : Ms. Moumita Chowdhury for the State
Ms. Shantel Hazelman with Ms. Esiteri Radrole for the Accused

Dates of Trial : 18-20 & 23 April 2018

Summing Up : 24 April 2018

Judgment : 25 April 2018

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AA"

JUDGMENT

[1] The accused Josateki Vakacegu is charged with the following offences:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his finger.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

JOSATEKI VAKACEGU on the 15th of February 2016, at Muslim League Settlement, in Nabua, in the Central Division, penetrated the vagina of **AA**, a child under the age of 13 years, with his penis.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 4 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the first count of Rape, but not guilty of the second count of rape. However, in respect of count two, by a unanimous decision, the three Assessors found the accused guilty for the alternative charge of Sexual Assault.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1), (2) (a) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 15 February 2016);
- (iii) At Muslim League Settlement, in Nabua, in the Central Division;
- (iv) Penetrated the vagina of AA with his finger; and
- (v) At the time AA was a child under 13 years of age.

[7] The above individual elements were further elaborated upon in my summing up.

[8] Similarly, the Assessors were directed that in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that:

- (i) The accused;
- (ii) On the specified day (in this case the 15 February 2016);
- (iii) At Muslim League Settlement, in Nabua, in the Central Division;
- (iv) Penetrated the vagina of AA with his penis; and
- (v) At the time AA was a child under 13 years of age.

[9] The above individual elements were further elaborated upon in my summing up.

[10] The Assessors were directed that the issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 9 years and 11 and a half months of age at the time of the alleged incident, and therefore, she had no mental capacity to consent.

[11] The Assessors were also directed that in relation to the first count of Rape, if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the complainant's vagina with his finger, has satisfied beyond any reasonable doubt that the accused, on 15 February 2016, unlawfully and indecently assaulted the complainant by touching any part of the complainant's external genitalia, but without penetrating the external genitalia; as an alternative, they were then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged in the Information for that offence in the first count.

- [12] Similarly, in relation to the second count of Rape, the Assessors were directed that if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 February 2016, penetrated the complainant's vagina with his penis, has satisfied beyond any reasonable doubt that the accused, on 15 February 2016, unlawfully and indecently assaulted the complainant by placing his penis on any part of the complainant's external genitalia, but without penetrating the external genitalia; as an alternative, they were then allowed to look at the lesser offence of Sexual Assault, in terms of Section 210 (1) (a) of the Crimes Act, though the accused is not formally charged in the Information for that offence in the second count.
- [13] The Assessors were directed that in order for the prosecution to prove the charge of Sexual Assault, against the accused, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 15 February 2016);
 - (iii) At Muslim League Settlement, in Nabua, in the Central Division;
 - (iv) Unlawfully and indecently assaulted AA, the complainant.
- [14] The above individual elements were further elaborated upon in my summing up, in relation to both counts one and two.
- [15] The prosecution, in support of their case, called the complainant AA, her grandmother, Mere Rokotuni, and the Medical Officer, Dr. Kelerayani Namudu. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE1.
- [16] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:
1. It is admitted that in the year 2016, the victim AA was residing at Muslim League Settlement, in Nabua, with her grandmother Mere Rokotuni.

2. It is admitted that the Accused, Josateki Vakacegu and the victim AA are known to each other.
3. It is admitted that on the 15th day of February 2016, the Accused, Josateki Vakacegu, was at the address where the victim AA was residing.
4. It is admitted that the victim AA was born on 1st March 2006.

[17] Since the prosecution and the defence have consented to treat the above facts as "Admitted Facts", without placing necessary evidence to prove them, these facts are considered as proved.

[18] The complainant, inter alia, testified as follows:

- (i) *She used to call the accused Kuku Jo.*
- (ii) *On the day of incident, Kuku Jo had come into the house and told the complainant to wash the cane knife. When she was washing the knife, he came behind her. She said, "He held the knife with me and washed the knife with me".*
- (iii) *The complainant had then gone into the living room. She took the mattress to sun out. The mattress was on top of the settee. Kuku Jo had pushed her with the mattress. When asked what her position was, she said I was lying straight. When asked, lying straight on what? The witness answered, "On the mattress". "Because he pushed me. That's why I was lying straight". She demonstrated on the doll given to her as to how she was lying straight. Kuku Jo was standing beside her.*
- (iv) *The complainant testified that when she wanted to stand up, Kuku Jo had laid on top of her. The witness demonstrated in Court as to how this took place.*
- (v) *When asked, then what happened? The witness testified "He pulled the zip of his trousers down. He pulled my skirt down. And then he pulled down my panty also. Then he spat onto his hand and he rubbed his polo (balls).....he tried to put on my pipi". The witness showed on the doll given to her where Kuku Jo's polo is located, and also showed on the same doll as to where her pipi is located.*

[19] The witness was then asked the following questions to which she answered as follows:

- Q. *Did he put his polo on your pipi?*
- A. *Yes.*
- Q. *Where exactly did he put his polo?*
- A. *On top.*

Q. *On top meaning?*

A. *On top of my pipi. I tried to protect it. He held my hand.*

Q. *Protect it, meaning?*

A. *Protect my pipi. He held my hands using one of his hands. I tried to scream. He closed my mouth using his hand that was holding my hand.*

The witness demonstrated using both her hands as to how she was trying to protect her pipi.

Q. *Then what happened?*

A. *My hand that he let go, he laid on it. He told me not to say it to anyone else.*

Q. *Not to say what?*

A. *(What) he had done to me.*

Q. *You said he put his polo on your pipi? Is there anything else?*

A. *He also put his hand.*

Q. *Which part of his hand?*

The witness demonstrated to Court by showing her index finger.

A. *He also put his index finger inside my pipi.*

Q. *How do you know it was inside your pipi?*

A. *I can feel it and I saw it.*

Q. *How did you feel?*

A. *I felt pain.*

Q. *What happened after that?*

A. *That's the time he told me not to say it to anyone.*

Q. *Who is this 'he' you are referring to?*

A. *Kuku Jo.*

Q. *What happened first?*

A. *He put his polo and then his finger.*

Q. *How long was his finger inside your pipi?*

A. *A few minutes.*

Q. *What happened after that?*

A. *He told me not to say it to anyone. After that my grandmother pushed the door – the front door. The one that I wanted to exit not the one he entered.*

Q. *What happened after that?*

A. *He stood up. When he pulled up the zip of his trousers, my grandmother was looking. My grandmother screamed at him. He told my grandmother, “No, No, I did not do anything”.*

[20] This court is satisfied that when the complainant referred to the term ‘polo’ she meant the accused’s penis; and when the complainant referred to the term ‘pipi’ she meant her vagina or her private part.

[21] Mere Rokotuni, testified that she is the grandmother of the complainant AA. The accused, Kuku Jo, is her uncle’s son. She recalls on 15 February 2016, when she came back from work, the door was closed from inside. She had come back from work from Milverton Road. It was around 3.00 in the afternoon. When she reached the door (the front door) it was closed. So she pushed the door forcibly. She saw the accused pulling up the zip of his trousers. This was right in front of the door. Her grandchild AA was there. She had stood up and pulled up her skirt. The witness had screamed and looked at the accused and AA and said “Oilei, what did you do to my granddaughter”. The accused had replied that he did not do anything.

[22] The witness was then asked the following questions to which she replied as follows:

Q. *Where was AA at that time?*

A. *She was lying down trying to get up.*

Q. *Lying down where?*

A. *Where I pushed the door.*

Q. *Where was she lying down?*

A. *She was lying on the mattress and trying to get up.*

Q. *Then what happened?*

A. *I looked at the accused and AA and I asked Oilei what did you do to her?”*

Q. *You said AA stood up and pulled up her skirt?*

- A. *She was wearing it, but pulling it up. She was lying down when she got up she pulled up the waist of her skirt. The witness demonstrated how this happened.*
- Q. *Was there anything else she was wearing?*
- A. *Trousers – she was pulling it up. Her panty in pink colour.*
- Q. *So she pulled up her skirt and panty?*
- A. *Yes.*
- Q. *You said you asked Josateki, what have you done to my granddaughter?*
- A. *He said he did not do anything to her. I took AA and we went outside.*

[23] The Medical Officer, Dr. Kelerayani Namudu, testified to the medical examination conducted on AA on 15 February 2016, at 1928 Hours, at the CWM Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit **PE 1**.

[24] The Doctor testified to the specific medical findings as found in column D12 of the Report.

- a) *On preliminary examination (gross examination of genitalia), on 15 February 2016, a small red pin point mark (1cm) was found at the 6 o'clock position of the fossae navicularis.*
- b) *On colposcopic examination, on 16 February 2016, 2 red pin point marks were found at 6 o'clock and 7 o'clock position of the fossae navicularis. Hymenal edges not torn.*

The Doctor also drew a diagram on the whiteboard in Court to illustrate the above injuries.

[25] Dr. Namudu clarified that the fossae navicularis is part of the external female genitalia. The external female genitalia is also referred to as the vulva.

[26] In terms of Section 207(1) of the Crimes Act, read with Section 207(2)(b) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

- [27] Therefore, it is clear that even penetrating the vulva, with a thing or a part of the person's body that is not a penis (in this case a finger), would also amount to Rape.
- [28] The accused is totally denying that the incident took place. The defence position, is that the accused was requested by the complainant's grandmother, Mere Rokotuni to come to her house on the day of the incident to fix the hinge on the front door. Further, the defence position is that when Mere Rokotuni came and saw that the front door of the house was closed and pushed it open and when she saw the accused and AA together, she thought that something had happened.
- [29] However, the Assessors have found the evidence of prosecution as truthful and reliable, as they have by a unanimous decision found the accused guilty of the first count of Rape. Therefore, it is clear that they have rejected the version put forward by the accused.
- [30] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of count one.
- [31] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Rape with which the accused is charged in count one.
- [32] However, in respect of count two, I am of the opinion that the prosecution has failed to establish beyond reasonable doubt that the accused penetrated the vagina of AA with his penis. The complainant has clearly stated in her evidence that the accused had put his polo (his penis) "on top of her pipi" (her vagina), which indicates that there was no penetration at the time. Therefore, in my view, the unanimous opinion of the Assessors in finding the accused not guilty of Rape as charged in count two was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of count two.
- [33] Considering the totality of the evidence in this case, I am of the view that the prosecution has established beyond reasonable doubt that the accused unlawfully and indecently assaulted the complainant by placing his penis on the complainant's external genitalia (her vulva), but without penetrating the external genitalia.

Therefore, I concur with the unanimous opinion of the Assessors in finding the accused guilty in respect of the alternative charge of Sexual Assault in respect of count two. In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence.

[34] In the circumstances, I find the accused Josateki Vakacegu guilty of Rape as charged in count one, and guilty of Sexual Assault in respect of count two.

[35] Accordingly, I convict the accused for the offence of Rape in respect of count one and convict him of Sexual Assault in respect of count two.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 25th Day of April 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.