

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 85 of 2016**

**STATE**

**V**

**ISIMELI MOCEVAKACA**

**Counsel** : Ms. Moumita Chowdhury for the State  
Ms. Talei Kean for the Accused

**Dates of Trial** : 1-3 April 2019

**Summing Up** : 4 April 2019

**Judgment** : 8 April 2019

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

## **JUDGMENT**

[1] The accused, Isimeli Mocevakaca, was charged with the following offences:

### **FIRST COUNT**

#### **Statement of Offence**

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

#### **Particulars of Offence**

**ISIMELI MOCEVAKACA**, on the 11<sup>th</sup> day of November 2015, at Samabula in the Central Division, had carnal knowledge of **LS** without her consent.

## SECOND COUNT

### Statement of Offence

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

### Particulars of Offence

**ISIMELI MOCEVAKACA**, on the 22<sup>nd</sup> day of January 2016, in Samabula, in the Central Division, unlawfully and indecently assaulted **LS** by kissing her breast and sucking her nipples.

## THIRD COUNT

### Statement of Offence

**ASSAULT CAUSING ACTUAL BODILY HARM**: Contrary to Section 275 of the Crimes Act 2009.

### Particulars of Offence

**ISIMELI MOCEVAKACA**, on the 9<sup>th</sup> day of February 2016, in Samabula, in the Central Division, assaulted **LS** thereby causing her actual bodily harm.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 3 days.
- [3] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [4] The Assessors were directed that in order to prove the charge of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 11 November 2015);
  - (iii) At Samabula, in the Central Division;
  - (iv) Penetrated the vagina of LS with his penis;
  - (v) Without the consent of the complainant; and

(vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

**[5]** Each of the above individual elements were further elaborated upon in my summing up.

**[6]** During my summing up I also explained to the Assessors the salient provisions of Section 210 (1) (a) of the Crimes Act.

**[7]** Accordingly, the Assessors were directed that in order for the prosecution to prove Sexual Assault in terms of the second count, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 22 January 2016);

(iii) At Samabula, in the Central Division;

(iv) Unlawfully and indecently assaulted LS, the complainant, by kissing her breast and sucking her nipples.

**[8]** Each of the above individual elements were further elaborated upon in my summing up.

**[9]** Furthermore, during my summing up I explained to the Assessors the salient provisions of Section 275 of the Crimes Act.

**[10]** Accordingly, the Assessors were directed that in order to prove the offence of Assault Causing Actual Bodily Harm, the prosecution must establish beyond any reasonable doubt that;

(i) the accused;

(ii) on the specified day (in this case the 9 February 2016);

(iii) at Samabula, in the Central Division;

(iv) assaulted the complainant, LS; and

(v) thereby caused actual bodily harm to the complainant, LS.

**[11]** Each of the above individual elements too were further elaborated upon in my summing up.

**[12]** In support of their case, the prosecution called the complainant, LS.

**[13]** 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 2015 and 2016, the victim LS was residing with the Accused Isimeli Mocevakaca.
- 2) It is admitted that the Accused, Isimeli Mocevakaca, and the victim LS are uncle and niece.
- 3) It is admitted that on the 9<sup>th</sup> day of February 2016, the Accused Isimeli Mocevakaca hit LS.
- 4) It is admitted that the victim was medically examined by Doctor Guevara on 11<sup>th</sup> February 2016.

**[14]** I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Admitted Facts*” without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

**[15]** The complainant said her date of birth was 12 April 1999. So she is currently 19 years old. She will be turning 20 on the 12 of this month. She testified that on 11 November 2015, she was residing with the accused, Isimeli. The accused is her uncle and she is his niece. At the time she was residing with the accused at his residence at Namadai Settlement in Samabula.

**[16]** The witness testified that in the night, when she had fallen off to sleep, the accused had started to molest her. When asked as to what she meant by ‘molest’, she said “He touched me. My whole body”. The witness demonstrated as to how the accused had touched her.

**[17]** The complainant said that she was lying down on her bed at the time, and that the accused was lying down close to her at the time he was molesting her. She had looked up and seen the accused inside the room. When asked as to what the accused was doing, the witness said he tried to take off my clothes. “Then I told him don’t,

otherwise I will report him.” The accused had then closed the door and gone outside. She had laid down and gone off to sleep.

**[18]** The complainant was asked as to whether the accused did anything else to her on 11 November 2015, and she said “No”.

**[19]** The Learned State Counsel gave the witness her Police Statement (made by her on 11 February 2016) to read for the purpose of refreshing her memory. After reading her Police Statement, the witness confirmed and admitted that all that was written in the statement was told by her to the Police.

**[20]** In relation to the incident, which happened on 11 November 2015, the witness said “At the time I was sleeping alone in the room that was in the middle of the night. I felt that someone was lying on top of me and the clothes were taken off and my clothes were also taken off.”

**[21]** Although, the complainant used the phrases “He (the accused) had molested me”, “we slept together”, “we stayed together”, “he tried to do me” and “he tried to have sex”, she never explained as to what exactly she meant by these phrases.

**[22]** The witness was asked, “When you say molest, how did he molest you?” She said “He touched my breast and kissed me.” Later she said “He touched me. He touched my breast and my private part. When he was doing it to me then I told him not to do it or I will report him.”

**[23]** With regard to the second incident, which allegedly took place on 22 January 2016, the complainant said that the accused started to molest her while she was lying on her bed. He had sat on the bed and tried to take off her clothes. She had told him not to do it. “He asked me to but I did not allow him to touch me.” She stated that the accused had kissed her on her mouth and cheeks. She had tried to push him away but he held her tightly. The accused had then taken off her bra and touched her breast with his hands.

**[24]** The witness was asked as to whether the accused did anything else to her on that particular night, and she said “No”.

**[25]** The witness next testified to the incident which took place on 9 February 2016. On that day there had been a funeral at the Settlement. Since their house was crowded with people, she had gone and slept the night at her friend Leba's place.

**[26]** In the morning, she heard that the accused had been asking for her. When she arrived home, the accused had scolded her and asked the reason why she had gone and slept at her friend's house. The witness had responded by saying because the house was crowded. The accused had then taken off his belt and hit her on her back. The witness demonstrated in Court by pointing to the upper and lower portion of her back. When asked as to how many times the accused hit her with the belt, she said she couldn't remember. When asked as to whether the accused hit her on any other part of her body, she again said she doesn't remember.

**[27]** Based on the evidence, at the close of the prosecution case, I directed the Assessors that it is clear that the prosecution has failed to establish the elements in relation to the count of Rape beyond reasonable doubt. Therefore, I directed the Assessors that the accused cannot be found guilty for the offence of Rape as charged.

**[28]** However, I directed the Assessors that if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 11 November 2015, committed Rape, has satisfied beyond any reasonable doubt that the accused, on 11 November 2015, unlawfully and indecently assaulted the complainant by touching her breasts or any part of the complainant's genitalia; as an alternative, they are 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.

**[29]** Therefore, in order for the prosecution to prove Sexual Assault in terms of the first count, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 11 November 2015);
- (iii) At Samabula, in the Central Division;
- (iv) Unlawfully and indecently assaulted LS, the complainant.

**[30]** Each of the above individual elements were further elaborated upon in my summing up.

**[31]** As to count two, although at the conclusion of the prosecution case, I had informed the accused that he has a case to answer in relation to this charge, I explained to the Assessors that consequent to hearing the testimony of the complainant it is clear that the prosecution has failed to establish the elements in relation to the count of Sexual Assault beyond reasonable doubt. Therefore, the accused cannot be found guilty for the offence of Sexual Assault as charged in count two.

**[32]** However, I directed the Assessors that if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 22 January 2016, committed Sexual Assault, has satisfied beyond any reasonable doubt that the accused, on 22 January 2016, unlawfully and indecently assaulted the complainant by touching her breasts; as an alternative, they are then allowed to look at the lesser offence of Indecent Assault, in terms of Section 212 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the second count.

**[33]** Accordingly, I directed the Assessors that in order for the prosecution to prove Indecent Assault in respect of the second count, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 22 January 2016);
- (iii) At Samabula, in the Central Division;
- (iv) Unlawfully and indecently assaulted LS, the complainant, by touching her breasts.

**[34]** Each of the above individual elements were further elaborated upon in my summing up.

**[35]** In respect of count three, I directed the Assessors that if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 9 February 2016, committed Assault Causing Actual Bodily Harm, has satisfied beyond

any reasonable doubt that the accused, on 9 February 2016, unlawfully assaulted the complainant; as an alternative, they are then allowed to look at the lesser offence of Common Assault, in terms of Section 274 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the third count.

**[36]** Accordingly, the Assessors were directed that in order to prove the offence of Common Assault, the prosecution must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 9 February 2016);
- (iii) at Samabula, in the Central Division;
- (iv) unlawfully assaulted the complainant, LS.

**[37]** Each of the above individual elements were further elaborated upon in my summing up.

**[38]** In this case, the accused opted to remain silent. However, he called his son Mosese Koroi to testify on his behalf.

**[39]** The accused is totally denying that the incidents he is charged for in counts one and two ever took place.

**[40]** Based on the above directions given in my summing up, the three Assessors unanimously found the accused not guilty of Sexual Assault for Count One; not guilty of Indecent Assault for Count Two and not guilty of Assault Causing Actual Bodily Harm for Count Three. By their unanimous opinions they have found the accused guilty of Common Assault for Count Three.

**[41]** I have carefully examined the evidence presented during the course of the trial. I have directed 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.

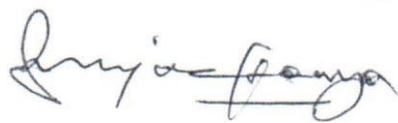
**[42]** In my view, the Assessors' opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.



[43] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charge of Sexual Assault against the accused beyond reasonable doubt in Count One. It is also my considered opinion that the prosecution has failed to prove the charge of Indecent Assault against the accused beyond reasonable doubt in Count Two. It is also my considered opinion that the prosecution has failed to prove the charge of Assault Causing Actual Bodily Harm against the accused beyond reasonable doubt in Count Three.

[44] In the circumstances, I find the accused not guilty of counts one and two and accordingly acquit him of the said charges.

[45] I find the accused guilty of Common Assault in terms of Section 274 of the Crimes Act in respect of Count Three and accordingly convict him of the said charge.



**Riyaz Hamza**

**JUDGE**

**HIGH COURT OF FIJI**



AT SUVA

Dated this 08<sup>th</sup> Day of April 2019

**Solicitors for the State : Office of the Director of Public Prosecutions, Suva.**

**Solicitors for the Accused : Office of the Legal Aid Commission, Suva.**