

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 205 of 2017

STATE

V

- 1. SEMI NAIKAU**
- 2. ISIKELI NASAKU**

Counsel : Ms. S. Naibe for the State.
: Ms. K. Vulimainadave for the First Accused.
: Ms. J. Singh for the Second Accused.

Dates of Hearing : 01, 02 and 03 December, 2020
Closing Speeches : 07 December, 2020
Date of Summing Up : 08 December, 2020
Date of Judgment : 10 December, 2020

JUDGMENT

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

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SEMI NAIKAU, on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted "SN" by touching her breast.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SEMI NAIKAU, on the 17th day of October, 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted “SN” by touching her vagina.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI NASAKU, on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of “SN” with his penis without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI NASAKU, on the 18th day of October, 2017 at Lautoka, in the Western Division, penetrated the vagina of “SN” with his penis without her consent.

2. After the prosecution closed its case this court ruled that the first accused had a case to answer in respect of both counts of indecent assault as charged. In respect of the second accused, this court had ruled that this accused had a case to answer for the third count of rape.

3. In addition to the above, in the summing up on the basis of the evidence before the court a direction was given to the assessors to consider whether

the first accused had aided or abetted the second accused to commit the offence of rape although he was not charged with this offence in accordance with section 45 of the Crimes Act.

4. The three assessors returned with a unanimous opinion that the first accused was guilty of the two counts of indecent assault as charged and one count of rape. For the second accused the assessors unanimously found him guilty of one count of rape as charged.
5. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced in trial.
6. The prosecution called two witnesses, the first accused exercised his right to remain silent and the second accused gave evidence on oath.
7. The complainant informed the court in 2017 she was 16 years of age and a form 4 student. On 16th October, after completing her Fiji Junior Exams she went to the house of her maternal uncle the first accused.
8. Her uncle was living with his wife and their infant baby at Paipai. At about half past six in the evening, her uncle returned from his farm, he was happy to see her at his house. They all had their devotion and after dinner they slept.
9. The house of her uncle did not have any bedrooms there was an open space in the living room with a partition separating the eating area from the sleeping area. The sleeping area had a curtain in between.
10. The next day after devotion her uncle started questioning her whether she had a boyfriend. The complainant responded that she did not. The next question her uncle asked her was whether she had sexual intercourse. The complainant replied she did not at this time she was afraid since it was her uncle who was asking her such questions which he was not supposed to.

11. In the afternoon whilst sitting down, her uncle again asked her whether she had sexual intercourse. The complainant again responded that she had not, her aunt was present during the conversation. Upon hearing her response, her uncle came close to her and touched the top portion of her breast from on top of her clothes.
12. The complainant was wearing a t-shirt and a sulu after this, her uncle touched her vagina from on top of her sulu. The complainant was afraid because her uncle wasn't supposed to do what he had done.
13. After the first accused had finished touching her vagina and her breasts he said "*you can have sexual intercourse and get married*". The complainant did not like what her uncle had said and done to her. When her uncle was touching her breasts and vagina, the complainant's aunt was sitting with them and watching.
14. After this, her uncle told her and her aunt to take off their tops so that he could see their breasts. The complainant did as she was told because her aunt had done so. The first accused then asked his wife to see the breasts of the complainant and see if she can have sexual intercourse the complainant's aunt agreed. The complainant was afraid since she could not believe what was happening, the complainant had a good relationship with her uncle.
15. Next morning on the 18th, the first accused told the complainant that he will start looking for a man to date her. The complainant was afraid since he said this in an aggressive manner.
16. On this day in the evening, the second accused Tai Sike who is her grandfather came to the house of the first accused. Tai Sike is her grandfather by virtue of being the uncle of her mother. After dinner, her uncle, her aunt and the second accused were talking amongst themselves when the complainant went to sleep on the bed.

17. At around 11pm her uncle came and woke her and told her to sleep where they were sitting. When the complainant went to sleep in that part of the room, both the accused persons and her aunt were sitting down.
18. After a while, her uncle told Tai Sike to come and lie down beside the complainant and then he told her aunt to switch off the light. At this time the first accused said whatever he was going to do to his wife, the complainant and the second accused will have to do as well. All were in one room but on either side.
19. The first accused said both the ladies are to lie down and for him and the second accused to take off the t-shirt worn by the ladies and then for them to fondle their breasts. The complainant refused then the first accused got angry and told the complainant to lie down.
20. When the complainant laid down the first accused told Tai Sike to remove the complainant's t-shirt and suck her breast. At this time the complainant started to cry and said that she did not want this to be done to her. The first accused scolded her and told her not to rebel.
21. The second accused did everything the first accused said. The second accused removed her clothes and started sucking her breast. After this, the first accused then told the second accused to lick the complainant's vagina. The second accused started licking her vagina. The complainant struggled and pushed the second accused who told her uncle. Her uncle got angry on her and said don't be stubborn and to lie down there. The complainant said she did not want to.
22. The second accused licked the vagina of the complainant for about 10 minutes. At this time she was pushing the second accused and telling him that she did not like what he was doing to her but the second accused did not stop.

23. Her uncle then said for them to insert their penis into the vagina upon hearing this, the second accused inserted his penis into the complainant's vagina which was painful. She pushed the second accused who told her uncle that the complainant was not willing. The first accused responded by saying just lie still so that Tai Sike could do whatever he was doing and not to be arrogant. The complainant was crying when the second accused had sexual intercourse with her for about 4 to 5 minutes.
24. By this time she was really weak so she said that she cannot take it anymore but the second accused did not stop he continued. After the accused stopped, the complainant got up and went outside she was weak and her clothes were wet she saw blood on it.
25. The complainant had her shower she was feeling weak, her vagina was painful and blood was coming out. After a while, her aunt called her to come inside the house.
26. When she was in the house her uncle said that they have to do it again since this was the last night she has to sleep with Tai Sike. The complainant refused the first accused then agreed that they will not do anything. The complainant went to sleep on the bed.
27. The following day, the first accused asked the complainant whether she had enjoyed what had happened the previous night. The complainant did not reply because she did not like what had happened.
28. In the presence of the complainant the second accused gave the first accused \$100 to buy her clothes. After Tai Sike left, the first accused told his wife to take the complainant to town to buy her clothes. The complainant and her aunt went to town after buying her clothes they went back to Paipai to the first accused's house.

29. The complainant stayed at the house of her uncle for one and a half weeks she told her uncle that she wanted to go home but the accused did not want to give her the phone to call her mother. When her mother called she did not tell her mother what had happened to her but she said that she wanted to come home. When she was talking to her mother, her uncle and his wife were sitting there and also her uncle had told her not to tell anybody about what had happened.
30. The complainant's mother then spoke to her uncle and told him to let the complainant come back home. During the one and half weeks she was at the house of her uncle he had the phone with him. Before leaving her uncle's house he gave her \$20 being her fare to go home.
31. When the complainant reached her home she started crying and then she told her mother everything that had happened to her. She told her mother about her uncle touching her breast, the second accused sucking her breast, licking her vagina and having sexual intercourse with her.
32. The complainant also stated that when her uncle had touched her breast and vagina she did not run away from the house of the accused because he was an aggressive man and she did not have any money with her.
33. When the complainant went to town with her aunt, she did not run away because her uncle had promised to give her a mobile phone.
34. The matter was reported to the police and the complainant was medically examined.
35. The final witness the mother of the complainant Kinisimere Ravutu informed the court that the first accused is her biological brother. He had called her to allow her daughter to go and spend her school holidays at his place and to look after his wife who had just given birth.

36. It was after 1 ½ weeks her daughter came home when she was at Paipai the witness had only called twice, on the first occasion her brother had answered the phone and on the second occasion he gave the phone to the complainant to speak.
37. When the witness first saw her daughter getting out of the bus she looked weak as she came nearer the witness could see that something had happened to her.
38. When in the house her daughter started to cry, the witness asked what had happened she was told the first accused had harassed her to stay with Isikeli Nasaku that is to have sexual intercourse with Isikeli.
39. The complainant further told her that Isikeli had pulled her hand to make her lie down and removed her clothes and had sexual intercourse with her. The witness started to cry and called her brother and told him she will report the matter to the police.
40. On the other hand the first accused chose to remain silent and did not call any witness. From the line of cross examination the first accused takes the position that he did not commit the offences as alleged. He did not touch the breast and vagina of the complainant or aid or abet the second accused to rape the complainant by penetrating her vagina with his penis without her consent.
41. The first accused submitted that the evidence of the complainant is not probable in the circumstances as narrated by her the accused is the uncle of the complainant and he cannot do such a thing to his niece.
42. If what the complainant alleges is the truth then she would have resisted, alerted the neighbours and also would have told her aunt but did not because nothing had happened. The first accused did not touch the complainant's breast and vagina if he had, she would have left his house.

43. In respect of the evidence of the second accused the first accused submitted that the second accused is trying to save himself and is pointing a finger at him.
44. The complainant had stayed at his house for 1 ½ weeks instead of three days so if anything wrong had happened to the complainant she would not have stayed at his house for that long. Also the complainant had gone to Lautoka city with the wife of the accused she would have reported the matter to the police and/or run away from her aunt. The complainant made up a story to implicate the first accused because she wanted a mobile phone from the first accused which she did not get.
45. The second accused informed the court that he knows the complainant due to his village ties with the complainant's family particularly the complainant's mother. On 18th October, 2017 he was working in his farm when he received a call from the first accused and the complainant. According to Isikeli, the first accused and the complainant's mother wanted the complainant to be his wife. He told them if the complainant refuses its okay with him.
46. The complainant then spoke and she said that she was waiting for him he then left for Paipai and arrived at the house of the first accused. The first accused was with his wife, his child and the complainant.
47. Thereafter they all talked about the complainant (in her presence) after this they slept. When they went to lie down, it was the first accused who was talking and telling him what to do. He did not do anything since the complainant did not want to.
48. The first accused had told him to kiss the complainant, remove her clothes, suck her breast, lick her vagina and have sexual intercourse with her. He told the first accused that he had done what he had told him but he did not.

49. The second accused did not have sexual intercourse because the complainant did not want to. Next morning the complainant asked for \$100.00 which he had given to her. The second accused denied the allegation made against him by the complainant.
50. Taking into consideration the evidence adduced by the prosecution, the defence raised by both the accused persons and the evidence of the second accused, I accept the evidence of the complainant as reliable and truthful.
51. The complainant was not discredited during cross examination despite some inconsistencies between her evidence in court and her police statement. At one stage of the cross examination the complainant had admitted lying to the police officer in respect of what was mentioned in her police statement. However, this was not in respect of the substantive allegations but a peripheral issue which did not adversely affect the totality of her evidence about what had happened to her at the material time.
52. The inconsistencies between the complainant's evidence and her police statement were not significant to affect the reliability of her evidence. Due to passage of time one cannot be expected to recall and repeat everything he or she had told the police at the time the police statement was recorded. In this case the inconsistencies in the complainant's evidence with her police statement did not shake the basic version of the complainant's evidence.
53. I have no doubt in my mind that the complainant told the truth in court. She was also able to withstand vigorous cross examination.
54. The Court of Appeal in *Nadim v State [2015] FJCA 130; AAU0080.2011 (2 October 2015)* made the following pertinent observations in respect of inconsistencies and omissions between evidence in court and previous statement as follows:

[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see R. v O'Neill [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280).

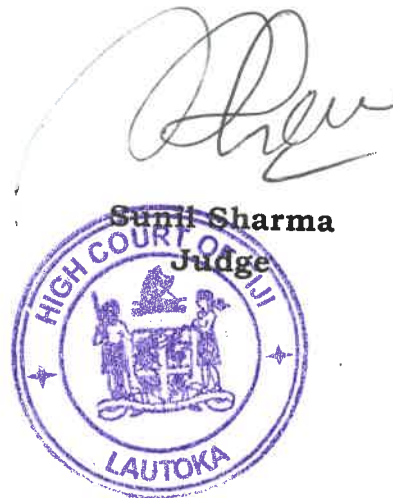
55. I have also directed my mind to the fact whether there was any prejudice or unfairness caused to the first accused resulting from the evidence of aiding or abetting by the complainant and the second accused.
56. Although the first accused was not charged with the offence of rape as an aider and abettor, in accordance with section 45 of the Crimes Act and the decision of the Supreme Court in *Praveen Ram vs The State*, (CAV 0001 of 2011, (9 May, 2011) this court had given a direction to the assessors to consider the evidence whether the first accused was an aider or abettor including the defence raised by the first accused. In my judgment there was no unfairness or prejudice caused to the first accused who had put forward the defence of denial.
57. I also accept the evidence of the complainant's mother as truthful she had narrated what the complainant had told her. Considering the age of the complainant and the relationship between her and the witness, I accept the complainant had told relevant and crucial information to her mother.
58. The circumstances of the complainant at that point in time did not allow her to give all the details of what both the accused persons had done to her. However, the information relayed by the complainant to her mother was

enough to alert her mother that something wrong had happened to her daughter.

59. I reject the line of defence raised by the first accused as unbelievable he had called the complainant to his house to spend her school holidays and I accept that he had touched the breast and the vagina of the complainant as alleged.
60. The complainant could not have run away from the house of the first accused because she did not have any money with her and she was also not familiar with the neighbours to seek assistance this being her first visit to the first accused house.
61. Her aunt was an active observer to what was happening to her, but she did not stop the first accused hence the complainant correctly said there was nothing to tell her aunt about because her aunt had seen everything her uncle and the second accused had done to her.
62. I also accept that the complainant was afraid of her uncle and she could not call her mother because her uncle had the phone with him. Although the complainant was upset that her uncle did not give her the mobile phone as promised, I am not convinced that this motivated the complainant to falsely implicate both the accused persons.
63. As for the issue of aiding or abetting by the first accused to encourage the second accused to commit the offence of rape, I accept the evidence of the second accused to the extent that it was the first accused who was telling him what to do.
64. Although the second accused is an accomplice, the complainant corroborated the evidence of this accused and I don't see any reason why this accused would want to falsely allege anything on the first accused.

65. Furthermore, I find it difficult to accept that the second accused wanted to get married to the complainant when he was fully aware of the relationship between him and the complainant (grandfather and granddaughter). The second accused had never spoken to the complainant about getting married to her before but all of a sudden he wanted to discuss his marriage with the complainant at the house of the first accused is highly suspicious. It is difficult to believe the second accused that he did not know the age of the complainant at the time.
66. I reject the evidence of this accused that the mother of the complainant was behind the discussions to get the complainant married to him as unworthy of belief and a made up story. If there was any talks about the second accused's marriage to the complainant I am sure the parents of the complainant would have been aware of the discussions to be held at the house of the first accused.
67. I also reject the evidence of the second accused as unbelievable when he said he did not do anything to the complainant despite being told by the accused to have sexual intercourse with her. This accused did not tell the truth in court in this regard.
68. The defence has not been able to create a reasonable doubt in the prosecution case.
69. This court is satisfied beyond reasonable doubt that the first accused on 17th October, 2017 had unlawfully and indecently assaulted the complainant by touching her breast and vagina without her consent.
70. This court is also satisfied beyond reasonable doubt that the first accused on 18th October, 2017 had aided or abetted the second accused to penetrate the vagina of the complainant with his penis without her consent.

71. As for the second accused this court is satisfied beyond reasonable doubt that the second accused on 18th October, 2017 had penetrated the vagina of the complainant with his penis without her consent.
72. For the above reasons, I accept the unanimous opinion of the assessors that the first accused is guilty of two counts of indecent assault as charged and one count of rape. I also accept the unanimous opinion of the assessors that the second accused is guilty of one count of rape as charged.
73. In view of the above, I find both the accused persons guilty as mentioned above and I convict them accordingly. As for the fourth count of rape the second accused is acquitted of this offence.
74. This is the judgment of the court.



At Lautoka

10 December, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for both the Accused persons.