IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 384 OF 2018

STATE

V

ARE AMAE

Counsel	: Ms. U. Tamanikayaroi for State
	: Ms. L. David for for Defence

Date of Summing-Up	: 22 October 2020
Date of Judgment	: 23 October 2020

(Name of the Complainant is suppressed)

JUDGMENT

1. The accused is the uncle of the complainant. He was tried before three assessors over a period of four days. The Information on which he was tried is as follows.

COUNT 1

Statement of Offence

RAPE : Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

ARE AMAE on the 5th day of October 2018 at Samabula in the Central Division penetrated the vulva of MN, a child under the age of 13 years, with his tongue.

COUNT 2

Statement of Offence

RAPE : Contrary to section 207(1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

ARE AMAE on the 5th day of October 2018 at Samabula in the Central Division penetrated the vagina of MN, a child under the age of 13 years, with his penis.

Count 3

Statement of Offence

RESISTING ARREST: contrary to Section 277(b) of Crimes Act 2009.

ARE AMAE on the 5th day of October 2018 at Suva in the Central Division resisted Special Constable 4349 Tevita whilst effecting arrest in the due execution of his duty.

2. The Prosecution called four witnesses. At the end of the Prosecution's case the Court decided that there is a *prima face* case for the accused to answer on each count. The accused elected to give evidence under oath. After my Summing-Up, the assessors unanimously returned an opinion that the accused is guilty on first two (rape) counts and not guilty on the third count (Resisting Arrest). Having directed myself on my own Summing-Up, I pronounce my judgment as follows:

3. The accused denies all the allegations. The Defence's case on the two rape counts is that the complainant is not telling the truth. He raised an *alibi* to show that he was not at the alleged crime scene on that particular time.

4. There is no dispute that the complainant was under 13 years of age at the time of the alleged rape offences. Therefore, the Prosecution was not required to prove the lack of consent on the part of the complainant. It had to prove the identity of the perpetrator and the two penetrations alleged in the information.

5. The Prosecution established that the child complainant told the truth in court and that she was not mistaken as to the identity of the accused. The accused is complainant's uncle and, according to her, it was him that had accompanied the complainant to the place where she was raped on that day. It was in broad daylight that she had boarded the bus with her uncle at around 3 pm. When the alleged rapes occurred it was dark. However, she was sure no one else other than her uncle Are was present at the crime scene at that time. She could even see uncle's face in close proximity from the light coming from the street lamp. I am sure that the complainant is not mistaken.

6. The complainant is a child witness and was very straightforward in her answers. Her subsequent conduct and her demeanour are consistent with her honesty and with her evidence that she was raped.

7. The doctor's evidence does not incriminate the accused. However it does establish the fact that the complainant was vaginally raped that evening. The complainant was medically examined by the doctor a few hours after the alleged rape incidents. The doctor found soil and/dirt particules on complainant's back as well as on her perennial region. This finding is consistent with complainant's evidence that she was pushed to the mud before being raped. A 0.3 cm laceration found on the vaginal introitus and the discontinuity of the hymen at the 6 o'clock position are consistent with complainant's evidence that she was vaginally raped.

8. The doctor said that the most common cause of those kinds of injuries would be things such as penetration, either by penis or any foreign object. It was never suggested to the doctor (by the Defence) that the injuries found on complainant's vagina could have been caused by any other way than by a penile penetration. It was never suggested to the complainant that she was engaged in any other activity that could have ruptured her hymen and that she had been penetrated by somebody other than the accused. I appreciate that the Defence Counsel maintained a high level of professionalism by not putting that latter suggestion to the complainant in the absence of a proper foundation to that effect. In the absence of any other plausible explanation as to how those injuries could have been caused to the complainant's vagina, it was open for the assessors to draw the inference that it was the accused and no one else had penetrated the complainant.

9. The subsequent conduct of the accused is consistent with his guilt. According to the police officers, the accused had tried to flee when he was being approached by a police officer in uniform. The complainant confirmed the evidence of PC Tevita that one police officer approached them was in uniform.

10. The Defence Counsel highlighted certain inconsistencies between complainant's evidence and her previous statement made to police. None of them in my opinion are material enough so as to discredit the version of the complainant. The complainant also gave explanations for those inconsistencies which are tenable and acceptable. She had recorded her statement soon after the incident and she described what type of a mental condition she was in at that time.

11. The accused in his evidence denies all the charges and says that the complainant did not tell the truth in court. He says that the complainant made up this story against him to be out of trouble from her family in a context where she was caught with a man in the bus stand at night. I am unable to accept the position advanced by the accused. This child complainant had made a prompt complaint to police upon them being alerted by the

iTaukei man who had initially received the complaint from the complainant. The accused confirmed that the iTaukei man to whom the complainant was talking at the bus stand was being accompanied by the youths (police officers) who effected his arrest. This iTaukei man was not called by the Prosecution for which a reasonable explanation was provided. A police witness said that they could not record a statement from this iTaukei man because he had already left the place while the arrest of the accused was being effected.

12. The accused said that the allegation was made up by the complainant. The complainant's prompt statement to police runs into several pages and I am unable to comprehend how such a long storey was invented by this child in such a short time only to be confirmed in her testimony in court after two years without major contradictions. I do not also believe that the child complainant had such a strong motive to make up these serious allegations against her uncle.

13. The accused raised an *alibi* that he was not present where the alleged rapes were committed and therefore he could not have committed those rapes. He said that he was attending a court case in Lautoka on that day and he had returned to Suva only when it was dark.

14. The *alībi* raised is not acceptable and believable. It is implausible that he had left Suva on that day between 5 am and 6 am to attend court proceedings in Lautoka which was supposed to begin at 9 am. According to his own evidence, it had taken more than 4 hours for the return trip from Lautoka. He is an experienced court attendee who had been travelling up and down fortnightly to attend court proceedings. He should be aware of the time normally consumed for the trip. How come such a seasoned court goer took that risk of being issued with a warrant of arrest by being late? Whilst in Lautoka, he had visited his co-accused, had lunch with them and even played billiard but he never said that he had attended court proceedings on that day, the very purpose he had been there. If he had left Lautoka on that day between 3 and 4 pm., according to his own estimation, he should

arrive in Suva at least by 8 pm. However, he was arrested at around 9.30 pm and there is no explanation what he was doing at the bus stand until then.

15. Defence case was started on Wednesday morning when the Prosecution suddenly closed their case without calling the rest of the listed witnesses. At the outset, the Court was informed that the Defence was taken by surprise and it was unable to secure the presence of their *alibi* witness at a short notice. The Court granted an adjournment after hearing the testimony of the accused so that the presence of the *alibi* witness could be secured on the next day. The *alibi* witness was not present even on Thursday when the trial recommenced. Ms. David informed that the *alibi* witness had already left Lautoka and he should be on his way to Court. It was also informed that his telephone was switched off and that this witness could not find his bus fare in time. Having considered the stated importance of this *alibi* witness for the Defence case, the matter was stood down till 2.30 pm. When the Court recommenced its proceedings at 3.30 pm., the witness was still not present.

16. At the end of the day, the Defence case had to be closed without any supporting evidence for the defence of *alibi*. I take judicial notice that the *alibi* notice had been filed as late as 16 March 2020. It is not clear why this notice was delayed. As a matter of practice, late *alibi* notices are allowed despite the statutory time limitation to ensure a fair trial for the Defence. The explanations given for the non appearance of the *alibi* witness who resides in Suva is not acceptable. According to the accused, this *alibi* witness is co-accused with him in a case and apparently a good friend of the accused. In the circumstances, the evidence of this witness will harness a very little support for the Defence even if his presence was secured.

17. The assessors found the accused not guilty on the third count. I am unable to accept their opinion in this regard. The evidence of the two police witnesses who testified to the arrest of the accused is consistent and plausible. The inconsistency highlighted by the Defence that, in their witness statements, the police officers had not recorded that the accused had used his elbow on PC Tamani, in my view, is not material. They have provided an

acceptable explanation about the omission and why they could not record a statement from the informant who had alerted them about the suspect and the victim. The complainant and the accused had been positioned at a distance from each other when the arrest took place and the absence of any evidence from the complainant about the arrest does not affect the credibility of the police witnesses.

18. Tevita was the arresting officer. He was in uniform. He had ordered the accused to stop when he saw the accused trying to flee. The accused had not heeded the call and tried to escape whereupon PC Tevita had sought assistance from PC Tamani to apprehend the accused. Both officers corroborated each other in their evidence that the accused tried to escape and that he behaved I an aggressive manner using force on the police officers. The Prosecution proved the third count beyond reasonable doubt.

19. I accept the unanimous opinion of assessors on count 1 and 2 and reject their opinion on count 3. I find the accused guilty on all three counts and convict him accordingly.

20. That, is the judgment of this Court.

Aruna Aluthge

Judge

At Suva

23 October 2020

Solicitors: Office of Director of Public Prosecution for State

Legal Aid Commission for Defence