

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

LAUTOKA CRIMINAL CASE NO. HAC 109 OF 2018L

STATE

VS

AKUILA KUNAVUNI

Counsel : Ms. U. Tamanikaiyaroi for State
Ms. Narara and Ms. N. Singh for Accused
Hearings : 22, 23 and 24 February, 2021.
Judgment : 25 February, 2021.

JUDGMENT

1. On 22 June, 2020, in the presence of his counsel, the following information, was read and explained to the accused:

“Count 1

Statement of Offence

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

Particulars of Offence

AKUILA KUNAVUNI between the 1st day of January 2016 and the 31st day of December 2016 at Sigatoka, in the Western Division, penetrated the vagina of SNK, a child under the age of 13 years, with his finger.

Count 2

Representative Count

Statement of Offence

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

Particulars of Offence

AKUILA KUNAVUNI between the 1st day of January 2016 and the 31st day of December 2016 at Sigatoka, in the Western Division, had carnal knowledge of SNK, a child under the age of 13 years.

Count 3

Representative Count

Statement of Offence

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

Particulars of Offence

AKUILA KUNAVUNI between the 1st day of January 2017 and the 31st day of December 2017 at Sigatoka, in the Western Division, had carnal knowledge of SNK, a child under the age of 13 years.

Count 4

Representative Count

Statement of Offence

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

Particulars of Offence

AKUILA KUNAVUNI between the 1st day of January 2018 and the 19th day of June 2018 at Sigatoka, in the Western Division, had carnal knowledge of SNK, a child under the age of 13 years."

2. The accused said, he understood the charge, and he pleaded guilty to count no. 1, but not guilty to count no. 2, 3 and 4. The prosecution then presented her summary of facts for count no. 1. Briefly they were as follows. Between 1 January to 31 December 2016, the complainant (PW1) was residing with the accused in the same

house in a village in Sigatoka. The house had three bedrooms, one was occupied by the accused, another bedroom was occupied by the accused's sister and the third bedroom was occupied by the complainant, her parents and three siblings. The complainant was 10 years at the time while the accused was 57 years old. They were related.

3. According to the prosecution, the complainant was playing with her 3 younger siblings in the house. The accused came and took the complainant into his bedroom. He made her lie on the floor. He then laid on top of her and inserted his finger into her vagina. The court then checked with defence counsel on whether or not the accused agreed to the above. She said, the accused agreed to the above, including the particulars of the offence in count no. 1. As a result of the above admission, the court found the accused guilty as charged on count no. 1 and convicted him accordingly. Sentencing was postponed until the conclusion of the trial on count no. 2, 3 and 4.
4. Count no. 2, 3 and 4 was set for trial from 22 to 26 February 2021. At this time, trial with the aid of assessors was abolished by virtue of the Criminal Procedure (Amendment) Act 2021, with effect from 15 February 2021. The trial judge was now judge of fact and law.
5. The burden to prove the accused's guilt beyond reasonable doubt still rest on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. There is no obligation on the accused to prove his innocence. He is presumed innocent until proved guilty beyond reasonable doubt in a court of law.
6. For the accused to be found guilty of rape, as alleged in count no. 2, 3 and 4, the prosecution must prove beyond reasonable doubt the following elements:

- (i) the accused
 - (ii) penetrated the complainant's vagina with his penis,
 - (iii) without her consent, and
 - (iv) he knew she was not consenting to 6 (ii) above, at the time.
7. The slightest penetration of the complainant's vagina by the accused's penis is sufficient to satisfy element 6(ii) above. There does not need to be full penetration of the complainant's vagina by the accused's penis.
8. "Consent" is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina being penetrated by a penis. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.
9. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. The court will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by the accused's penis. This policy was put there to protect children.

10. The charges in the information were drafted as “representative” counts. This meant that the alleged incidents of rape occurred between two dates, that is, in this case, between 1 January and 31 December 2016 (count no. 2), between 1 January to 31 December 2017 (count no. 3) and between 1 January and 19 June 2018 (count no. 4). The alleged incidents could happen multiple times between the above periods, but if one incident of the alleged rape occurred within that period, that was enough to find the charge proved beyond reasonable doubt. The above is often done because in most cases children often forget the actual date of the alleged offence. It was not unusual.
11. We will now examine the prosecution’s case. The prosecution only called the complainant as their sole witness. She gave evidence in court on 22 and 23 February 2021. She said, on two separate occasions in 2016, the accused came into their bedroom and made her lie facing up on the floor. She said, he took off her underpants and clothes. She said, he then inserted his penis into her vagina. She said, she felt pain in her vagina, when the accused inserted his penis into the same. She said, she was under 13 years old at the time. She said, both incidents happened in the daytime and she could clearly see the accused’s face. He was lying on top of her moving his penis up and down into her vagina. She said, on both occasion, he did the above for about 10 seconds. She said, he was an arm’s length away from her. She said, she knew the accused well because he was her grandfather’s cousin.
12. In 2017, the complainant said, she went to a nearby house, 40 footsteps away from their residence, at 6 am in the morning, to turn off the lights in the house. She said, the sun was already up by then. She said, she opened the windows in the house and the morning sunlight lit up the house. She said, the accused then came into the house. They were alone in the house. She said, the accused made her lie on the

floor facing up. She said, the accused took off her underpants and pants. She said, he then inserted his penis into her vagina, and was moving up and down on the same for about 5 seconds. She said, she saw his face clearly and he was on top of her when he was doing the above. She said, she felt pain in her vagina, while he was inserting his penis into the same. Afterwards, she said, the accused stood up, put on his clothes and left. She said, the accused did the above again to her in 2017. She said in 2016 and 2017, she was under 13 years old. She said, her date of birth was 19 April 2006.

13. For 2018, the complainant said the accused did not insert his penis into her vagina. The prosecution later closed their case. Both parties agreed that the accused had a case to answer on count no. 2 and 3, but not on count no. 4. The court agreed with them and found the accused not guilty as charged on count no. 4, and acquit him accordingly on that count. The accused was given the standard options in defending himself on count no. 2 and 3. He was given the option to remain silent, give sworn evidence in his defence and call any witness. He chose to remain silent, and nothing negative whatsoever should be imputed to him for choosing to exercise his right to remain silent. He also chose not to call any witness. I heard the parties closing submission on 24 February 2021.
14. The State's case against the accused stands or falls on whether or not the child complainant's evidence was credible. I had heard her evidence on 22 and 23 February 2021. I had carefully examined her demeanor while she was giving evidence in court. The accused chose to remain silent and called no witness. After carefully examining all the evidence that had been presented in court, and given the matters mentioned above, I find the female complainant a credible witness and I accept her sworn evidence given in court. I accept her version of events. I find, as a matter of fact that:

- (i) between 1 January and 31 December 2016, at Sigatoka in the Western Division, the accused penetrated the child complainant's vagina with his penis (count no. 2);
- (ii) between 1 January and 31 December 2017, at Sigatoka in the Western Division, the accuse penetrated the child complainant's vagina with his penis (count no. 3).

15. As a result of the above, I find the accused guilty as charged on count no. 2 and 3, and I convict him accordingly on those counts. I order so accordingly.

A handwritten signature in blue ink, appearing to be "Salesi Temo".

Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Legal Aid Commission, Suva.**