

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 272 OF 2019S**

**STATE**

**VS**

**PITA TUNI VUNI**

**Counselors** : Ms. K. Semisi, Ms. U. Tamanikaiyaroi and Mr. J. Nasa for State  
Mr. N. Tuifagalele for Accused

**Hearings** : 8, 9, 10, 11 and 12 March, 2021.

**Judgment** : 15 March, 2021.

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**JUDGMENT**

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1. On the first day of the trial, 8 March 2021, the following information was read over and explained to the accused, in the presence of his counsel:

***"First Count***

***Statement of Offence***

**INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213 (1) (b) of Crimes Act 2009.**

***Particulars of Offence***

***PITA TUNI VUNI, sometime between 01 September 2018 and 30 September 2018, at Nasau Village, Nabukelevu, Kadavu in the Southern Division, intruded***

*upon the privacy of MTLN by pulling up her school uniform, an act likely to offend the modesty of MTLN.*

**Second Count**

**Statement of Offence**

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

**Particulars of Offence**

***PITA TUNI VUNI, on 12 July 2019, at Nasau Village, Nabukelevu, Kadavu in the Southern Division, with his penis, penetrated the vagina of MTLN, a child under the age of 13 years.”***

2. He said, he understood the charge, and pleaded not guilty to the two counts. The prosecution then presented their case by calling five witnesses. They were as follows:
  - (i) Police Officer, WDC 4486, Maraia Matu Toga (PW1);
  - (ii) The Child Complainant (PW2);
  - (iii) Ms. Ulamila Marama (PW3);
  - (iv) Ms. Ana Vono (PW4) and
  - (v) Doctor Alisi B. Waqa (PW5).
  
3. The prosecution tendered the following exhibits:
  - (i) Prosecution Exhibit No. 1 - Booklet of Photos;
  - (ii) Prosecution Exhibit No. 2 (A) - Rough Sketch Plan;
  - (iii) Prosecution Exhibit No. 2 (B) - Fair Sketch Plan;
  - (iv) Prosecution Exhibit No. 3 - Complainant’s Birth Certificate;
  - (v) Prosecution Exhibit No. 4 - Complainant’s Medical Certificate.
  
4. At the end of the prosecution’s case, the parties were invited to make submissions on whether or not there was a case to answer against the accused on both counts.

After hearing the parties, the court found the accused had no case to answer on count no. 1, but he had a case to answer on count no. 2. The reasons for the above decisions are contained in the court record. Consequently, the accused was found not guilty as charged on count no. 1 and acquitted accordingly. On count no. 2, the standard options were put to the accused, and he chose to give sworn evidence (DW1) and called his wife (DW2) and a relative (DW3) as his witnesses. After the witnesses' evidence were heard, the parties made a closing submission to court. The matter was then adjourned to 15 March 2021 for judgment.

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, 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. We will now examine the prosecution's case. In this case, no eye witness saw the accused inserting his penis into the child complainant's vagina, at the material time. Nor was there any evidence that the accused voluntarily admitted inserting his penis into the child complainant's vagina, at the material time. This was obviously a difficulty for the prosecution. At the time of the alleged incident, the child complainant (PW2) was 8 years old. She said, she resided in a village in Kadavu, and she described her village as sketched by PW1 in Prosecution Exhibit 2 (A). She said, on 12 July 2019, a Friday, she left home for school at 6.30 am. She said, she passed through the four trees shown in Prosecution Exhibit No. 2 (A). She said, the sun light was up. She said, suddenly someone put a white sack over her head, and hit her left temple with a stone. She said, she blacked out, that is, became unconscious.

11. She said, she regained consciousness in the bush near the beach as marked by her as X, in the sketch in Prosecution Exhibit 2(A). Obviously, someone must have carried her from the place where she was knocked unconscious to where she regained consciousness. She said, when she woke up, she was lying on the ground naked, facing up. She said, her vagina was bleeding. Given that, that this case was a rape allegation against the accused, the next central question was whether or not the child complainant's vagina was penetrated by a penis while she was unconscious? To answer this question, Doctor Alisi Waqa's (PW5) evidence will have to be examined.
  
12. PW5 said, she medically examined the child complainant at Daviqele Health Centre on 12 July 2019, between 5.18 pm and 5.45 pm (27 minutes). This was approximately 10 hours 15 minutes after the alleged rape. PW5 said, she medically examined the child complainant from head to toe. Because the case was one of rape, PW5 said she examined the child complainant's vagina. PW5 said, she found the complainant's hymen was perforated, that is, the covering membrane to the vagina opening was broken. PW5 said as follows, "...For the perforated hymen, it could be caused by a penile penetration, finger or an object. In this case, it is mostly likely a penile penetration, because the area that is tender to the child, reflects a heavy mass on top of her. It means the perpetrator was on top of the child at the time of penetration. Within the vagina, I did not note any laceration, thus ruling out the use of an object or finger. The laceration was noted outside the vagina at the labia minora. This has to be a finger or object used on the child..."
  
13. Given the complainant and the doctors' evidence mentioned above, it would appear that someone inserted his penis into the child complainant's vagina, while she was unconscious. Was it the accused who penetrated the child complainant's vagina

with his penis, at the material time? Alternatively, since the prosecution had charged the accused with the rape of the child, how can they connect the same to him? The prosecution relied on what is often termed “circumstantial evidence”.

14. Reference has been made to the type of evidence given in this case. Sometimes a judge is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against him. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a judge can say “I now know everything there is to know about this case”. But the evidence must lead to the sure conclusion that the charge which the accused faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that it is examine with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution’s case. Finally, you should be careful to distinguish between arriving at conclusion based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

15. We will now look at the evidence of the various circumstances relating to the crime and the accused which the prosecution say when taken together, will lead to the sure conclusion that it was the accused who committed the crime.
16. **September 2018 Incident.** PW2 said, she had known the accused as “Tutu Pita” since she was in kindergarten. She said, she was related to the accused and they lived in the same village. She said the accused was her grandmother’s first cousin. She said, the accused’s family and her family lived close to each other in the village. She said, sometime in September 2018, while she was walking to school with her sister, the accused suddenly approached her from the back and closed her mouth with his hands. PW2 said, the accused wanted to pull up her school uniform. PW2 said, the accused only stopped, when her sister called out to him. This evidence seemed to show the character of the accused.
17. **Accused’s house near to Scene of Attack.** PW2 described her village to the court as sketched by PW1, and tendered as Prosecution Exhibit 2 (A) and 2 (B). In the sketch plan, PW2 pointed to where a person put a sack over her head and knocked her unconscious by hitting her left temple with a stone. The scene was among the four trees in the sketch. The accused’s house is near to the scene of the attack. Note that PW2 said that, at the time, after 6.30 am on 12 July 2019, most of the villagers were asleep at the time. PW2 said, at the time, most of the houses, including the accused’s house, were shut or closed.
18. **Ms. Ulamila Marama’s (PW3) Evidence.** PW3 said, she also lived in the same village as the accused and the child complainant, at the material time. PW3 said, she recalled the 12 July 2019, at 7.05 am, she was at home with her baby girl. PW3 said, she went out to dump her baby girl’s diaper in the village dump opposite the main road, as showed in Prosecution Exhibit 2(A) and 2 (B). PW3 said, she met the

accused near the rubbish dump after 7.05 am. PW3 said the accused was wearing a yellow and green t-shirt and long black trousers. This evidence would place the accused near the crime scene at the material time, if accepted.

19. **Doctor Alisi B. Waqa's (PW5) Evidence**. We had discussed PW5's evidence before. The significant finding by PW5 was that, it was more likely than not, that someone penetrated the child complainant's vagina with a penis while she was unconscious. This conclusion was based on her finding the complainant's hymen been perforated and that her body from the belly button down to her thighs were tender, suggesting that someone was on top of her while penetrating her vagina with his penis. The defence did not seriously challenge this conclusion in their closing submission.
20. **Complainant Identifying the Accused when she became conscious**. The complainant (PW2) said, she regained consciousness at the spot she marked X in the sketch plan tendered as Prosecution Exhibit No. 2 (A) and 2 (B). This spot was near the village rubbish dump. PW2 said, she awoke and saw she was naked, lying on the ground, facing up. She said, she saw the naked buttocks of a person, who was putting on his pants. PW2 said, the person was wearing a yellow and green t-shirt. PW2 said, the person came to her. PW2 said, she saw the accused's face. PW2 said, he came to her and wiped the blood away from her bleeding vagina. PW2 said, the accused used her underpants to wipe the blood off her vagina.
21. PW2 said, the sun light was up. PW2 said, the accused was close to her when putting on his clothes and when he came to wipe the blood off her vagina. PW2 said, she observed the accused's face for a while. She said, there was no impediment to her seeing the accused's face. She said, she had known the accused since she was in kindergarten and they are related. She said, she closely saw the



accused, despite her recovering from her blackout. I am warning myself of the special need for caution when relying on identification evidence the defence claimed to be mistaken because an honest and convincing witness could be mistaken. I have carefully considered the circumstances surrounding the identification. There was sun light. The distance between the two was short. She observed the accused for a while. She knew the accused very well. This was a case of recognition. It would appear PW2's identification of the accused, at the material time, was of a high quality.

22. What do the above circumstantial evidence tell the court? The totality of above circumstantial evidence appear to point to the accused as the alleged perpetrator. But I must pause and consider the defence's case.
23. According to the accused, he was at home, at the material time. He denied the complainant's allegation against him. He said, he did not rape the complainant, at the material time. He said, he was at home asleep and was preparing to take his daughter to school. He called his wife as his witness. The wife confirmed he was at home at the material time.
24. I have looked at and carefully considered the evidence of the five prosecution's witnesses, including the defence's three witnesses. I have carefully considered the parties' closing submission. I have carefully examined the demeanors of all the witnesses. I had carefully considered the child complainant's verbal evidence, as against the accused's verbal evidence. I have considered the prosecution's circumstantial evidence, as against the accused's denial and alibi defences.
25. I find the child complainant to be a very credible witness. I accept her evidence and version of events. I find the accused not to be a credible witness. I reject his

denials. I also reject his wife's evidence as not credible. She took a very long time to answer cross examination questions and appeared lost on certain occasions. I accept the prosecution's circumstantial evidence, and in my view, in totality, it pointed to the accused's guilt. I accept the complainant identifying him, when he was putting on his clothes and coming to wipe the blood from her vagina. Why wipe the blood from her vagina, unless you are trying to hide something?

26. Given what was mentioned above, I find, as a matter of fact that, the accused penetrated the child complainant's vagina on 12 July 2019 with his penis. I find him guilty as charged on count no. 2. I convict him accordingly.



  
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JUDGE

**Solicitor for the State** : Office of the Director of Public Prosecution, Suva.  
**Solicitor for the Accused** : N. Tuifagalele, Barrister and Solicitor, Suva.