IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 194 of 2020

STATE

vs.

JOSEFA TUINAWASABULA ULUDOLE

Counsel:	Ms. U. Tamanikaiyaroi with Ms. S. Bibi for the State Ms. L. Manulevu with Ms. R. Nabainivalu for Accused
Date of Hearing:	28th to 29th March 2022
Date of Closing Submission:	31st March 2022
Date of Judgment:	21st April 2022

JUDGMENT

Introduction

1. The Accused has been charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are that:

Count 1

(Representative Count)

Statement of Offence

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

Particulars of Offence

JOSEFA ULUDOLE *between the 1st day of July 2019 and the 17th day of July 2019 at Vanuabalavu, in the Eastern Division, had carnal knowledge of* ***UNAISI ROSI TALEI****, without her consent.*

Count 2

(Representative Count)

Statement of Offence

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

Particulars of Offence

JOSEFA ULUDOLE, *between the 1st day of July 2019 and the 17th day of July 2019 at Vanuabalavu, in the Eastern Division, unlawfully and indecently assaulted* ***UNAISI ROSI TALEI****, by touching her breasts and buttocks.*

2. Consequent to the plea of not guilty entered by the Accused, the matter proceeded to the hearing. The hearing commenced on the 28th of March 2022 and concluded on the 29th of March 2022. The Prosecution adduced the evidence of four witnesses, including the Complainant. The Accused exercised his right to remain silent, hence, adduced no evidence for the Defence. Subsequently, the Court heard the oral submissions of the parties. In addition to that, the learned Counsel for the Prosecution and the Defence filed their respective written submissions. I must commend both counsel for submitting comprehensive oral and written submissions.

3. The Prosecution alleges the Accused had carnal knowledge of the Complainant without her consent during the period between the 1st day of July 2019 and the 17th day of July 2019. It is further alleged that the Accused had unlawfully and indecently assaulted the Complainant by touching her breasts and backside.

4. The Complainant stated in her evidence that the Accused had taken her to his house and made her lie down on the floor. He had then touched her breast and then her backside. The Accused then put his "polo" on her vaginal area. She felt pain inside when he put his "polo" in that manner.

Elements of the Offence

5. The main elements of the offence of Rape are that:

   i) The Accused,
   ii) Penetrated the vagina or vulva of the Complainant with his penis,
   iii) The Complainant did not consent to the Accused to penetrate her vagina or vulva with his penis,
   iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

6. The main elements of the offence of sexual assault are that:

   i) The Accused,
   ii) Unlawfully and Indecently,
   iii) Assault the Complainant.

Unsworn Evidence of the Complainant & the Expert Evidence

7. I shall first draw my attention to consider the competency of the Complainant as a witness. The date of birth of the Complainant as stated in her birth certificate is 17th of August 2004. The Prosecution alleges this incident occurred between the 1st of July 2019 and the 17th of July 2019. Accordingly, the Complainant was fourteen years and eleven months in July 2019. She was a young person as per Section 2 of the Juvenile Act when this offence took place. Based on her physical age, the Complainant could not be considered as a child of tender years, hence, does not come within the meaning of Section 10 of the Juvenile Act.

(***vide; Dass v State [2018] FJCA 67; AAU59.2014 (1 June 2018), and Section 10 of the Juvenile Act***).

8. If the Court is satisfied that any person is able to give material evidence or is in possession of any material evidence, the Court could summon that person to provide evidence in any criminal proceedings. (***vide; Section 110 and 116 of the Criminal Procedure Act***). Such witnesses are required to give evidence in the Court on oath or affirmation. (***vide; Section 117 (1) of the Criminal Procedure Act***). However, Section 117 (2) of the Criminal Procedure Act has stipulated certain instances of exception where a witness is allowed to give evidence without taking an oath or affirmation. Section 117 (2) of the Criminal Procedure Act states that:

> *"The court may at any time, if it thinks it just and expedient, take without oath the evidence of any person—*
>
> *i) declaring that the taking of any oath whatsoever is according to religious belief unlawful or impermissible; or*
> *ii) who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath.*
>
> *The court shall record the fact that evidence has been taken in accordance with subsection (2), and the reasons for allowing the evidence to be taken without oath.*

9. Accordingly, the Court has the jurisdiction to obtain unsworn evidence on the basis of religious beliefs, religious rules or immature age if the Court finds obtaining such unsworn evidence is just and expedient. Section 117 (3) of the Criminal Procedure Act has stated explicitly that the Court must record the fact that evidence was obtained without oath or affirmation and the reasons for doing that.

10. In this case, the Prosecution called Doctor Kiran Gaikwad, the Medical Superintendent of St Giles Hospital, to provide the evidence regarding the Complainant's psychiatric evaluation. According to the Prosecution, the purpose of calling Doctor Gaikwad is to establish the mental capacity of the Complainant as well as the competency of the Complainant as a witness.

11. I shall now proceed to determine whether the psychiatric opinion given by Doctor Gaikwad regarding the Complainant's capacity to make decisions about sexual activities and her intellectual capacity is admissible and relevant in evidence.

12. The Court of law determines the disputes based on legal proof rather than scientific proof. (***vide; State v Ratuwaqa [2021] FJHC 180; HAC135.2019 (10 March 2021)***). It is a human judgment based on facts and evidence presented before the Court. The Court of Appeal of England in **R v Turner (1975) 1 All ER 70)** explained the relevancy and admissibility of evidence of expert opinion by quoting the view expounded by Lord Mansfield CJ in **Folkes v Chadd (1782) 3 Dug KB 157)**, where Lowton LJ said that:

> *"The foundation of these rules was laid by Lord Mansfield CJ in Folkes v Chadd ((1782) 3 Doug KB 157 at 159) and was well laid: 'The opinion of scientific men upon proven facts', he said, 'may be given by men of science within in their own science.' An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does."*

13. Evidence of an expert opinion only requires where the expert could provide the Court with any scientific or technical information that is likely to be outside the experience and

knowledge of the Court. On that account, the evidence of an expert explaining how an ordinary person not suffering from any mental disorder would react to a particular situation and what reliance the Court should give to such conduct are not relevant as they are well within the knowledge and experience of the Court.

14. In this case, the Prosecution adduced Doctor Gaikwad's evidence to establish the Complainant's medical condition. In **G v Director of Public Prosecution [1997] 2 All ER 755),** the Queen's Bench Division, referring to the judgment of **R v Davice (3 November 1995, unreported**), found that the characteristics of a medical condition of the witness, such as mental illness, are not to be known to the Court without the assistance of experts. However, such experts cannot express an opinion on whether such witnesses are reliable or truthful witnesses since it is strictly within the exclusive domain of the Court.

15. It was held in **HM Advocate v Grimmond (2001 SCCR 708, 2001 Scot (D) 31/8)** that the evidence to establish the mental illness of the witness is relevant to determine the quality of the evidence given by that particular witness. The High Court of Judiciary of Scotland held that:

> *"As a general rule, apart from statutory rules, evidence affecting the credibility of a witness, apart from the evidence of the witness himself or herself, was inadmissible unless the facts were also relevant to the questions at issue. While it might be that, if it were established that a witness suffered from some form of mental illness which was relevant to a consideration of the quality of evidence of that witness, psychiatric evidence concerning the implications of the evidence might be admissible..."*

16. The above judicial precedents of England and Scotland affirm that the evidence of a psychiatrist explaining the mental condition of the witness is relevant. Having considered these judicial precedents, it is my view that these cases undoubtedly provide instructive assistance to this matter. Wherefore, I find the evidence of Doctor Gaikwad is admissible and relevant.

17. Doctor Gaikwad said that the Complainant is an intellectually impaired child whose mental maturity is not similar to her physical age. However, she can engage in conversation and answer questions appropriately.

18. The learned Counsel for the Prosecution posed several questions to the Complainant, asking about her surroundings, for which she answered appropriately. Having observed how she understood those questions and the answers she gave, and the expert opinion given by Doctor Gaikwad, the Court recorded her unsworn evidence under Section 117 (2) (b) of the Criminal Procedure Act.

Evaluation of the Evidence of Child Witnesses

19. The Complainant is the main witness of the Prosecution. Therefore, it is prudent to briefly discuss the applicable approach in evaluating the evidence of child witnesses. The Fiji Court of Appeal in **Alfaaz v State [2018] FJCA 19; AAU0030.2014 (8 March 2018)** held that:

> *"In R v Powell [2006] 1 Cr.App.R.31. CA it was held inter alia that infants simply do not have the ability to lay down memory in a manner comparable to adults and special effort must be made to fast-track such cases. I think the same reasoning is applicable to a child of 07 years as well. Therefore, one would not expect perfectly logically arranged evidence in the case of a child witness particularly when the child is the victim of the crime and probably carries both physical and psychological scares with her.*
>
> *It had been remarked regarding an adult victim of rape in Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280) that:*
>
> > *"(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen: ..... (3) The powers of observation differ from person to person. What one may*

notice, another may not. ..... It is unrealistic to expect a witness to be a human tape recorder."

The Supreme Court in Lulu v State Criminal Petition No. CAV0035 of 2016: 21 July 2017 [2017] FJSC 19 said referring to Bharwada in the context of apparent discrepancies in an adult rape victim's recollection but which do not shake the basic version 'Their evidence is not a video recording of events.' In my view, one has to be even more generous with and understanding of the evidence of a child witness who may have been traumatized by a completely alien experience in cases of rape and other forms of sexual assaults affecting her ability to narrate the incident in graphic details"

20. In view of the above passage of Premathilaka JA in **Alfaaz v State (Supra)**, it is essential to note that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what they are describing, and they may not have the words to describe it. They may be embarrassed to talk about incidents of sexual nature or use words they think are bad and therefore find it difficult to speak.

21. A child may not fully understand the significance of sexual activities, which may be reflected in how they remember it or describe it. A child's memory is different from that of an adult. A child's memory can fade even within the short term. When recounting events later, even after a reasonably short time, a child's recall of when and in what order events occurred may not be accurate. A child may not be able to speak of the context in which those events occurred. A child may have difficulty dealing with conceptual questions such as how she felt some time ago or why she did or did not take a particular course of action.

22. Accordingly, evidence of the child witness must be evaluated by reference to factors appropriate to her strengths and weaknesses related to her age, mental development,

understanding and ability to communicate. (***vide; Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021)***.

23. Comprehending the above guidelines on evaluating the evidence of child witnesses, I shall now proceed to evaluate the evidence presented before the Court.

Evidence of Recognition

24. It was submitted by the learned Counsel for the Defence that the Complainant's evidence of recognition of the Accused as the alleged perpetrator is unreliable; hence, it should not be accepted. The learned Counsel for the Defence pointed out that the Prosecution failed to correctly adduce the evidence of recognition as per the Turnbull guidelines. In her response, the learned Counsel for the Prosecution submitted that the Prosecution had adduced sufficient evidence to establish the perpetrator's identity as the Accused.

25. The learned Counsel for the Defence pointed out that the Complainant was suffering partial blindness, and the alleged incident had taken place at the night. There is no evidence about the lighting condition of the house of the Accused; hence, it is not safe to conclude that it was the Accused who had committed this crime.

26. Having carefully examined the evidence of the Complainant, including the cross-examination, I find that the Defence had never suggested to the Complainant that she was mistaken in her recognition or the identification of the perpetrator. The Complainant was not given an opportunity to comment on the issue of mistaken recognition. It was only suggested to the Complainant that the Accused had never done anything to her as alleged. The Complainant consistently said that the Accused touched her breasts and backside and then put his *"polo"* on her vaginal area.

27. Under Section 135 of the Criminal Procedure Act, the Accused admitted that he is the uncle of the Complainant's mother. Hence, he is Complainant's grand uncle. The Complainant refers to the Accused as "*Tua Jo*" or "*grandfather Jo*". Moreover, the Accused admitted that he and the Complainant resided at Namalata Village, Vanuabalavu, during the period

between the 1st day of July 2019 and the 16th day of July 2019. The Complainant has been living in the village since her birth, and everyone in the village knows her condition. She was partially blind when she was born. However, the Complainant's mother said that the Complainant now can see things.

28. I observed during the trial that the Complainant had no difficulties in seeing things while giving evidence in the Court. She clearly identified the colours and the people standing around her during the hearing. Furthermore, she identified her house and the Accused's house in the photos without difficulty. The Defence neither challenged nor suggested otherwise about the accuracy of the identifications of her house and the Accused's house in the photos. Accordingly, I am satisfied the vision of the Complainant is not weak to the level that she could not recognize people who are standing within closer proximity.

29. According to the Complainant, the Accused had asked her to lie down, and then he laid on top of her. He then touched her breasts and backside before putting his *"polo"* on her vaginal area. Undoubtedly, during this time, the Accused was very close to the Complainant, giving her adequate time and opportunity to recognize the person standing just next to her clearly.

30. Consequent to the above-discussed reasons, I am satisfied the Complainant had clearly recognized the Accused as the perpetrator who committed this crime.

Leading Questions

31. The learned Counsel for the Defence submitted that three leading questions put to the Complainant by the learned Counsel for the Prosecution must be considered carefully when the evidential values of the answers given to those questions are assessed.

32. Cross on evidence (10th Edition, 17150 p; 541,542) has defined two-forms of leading questions. One form of the leading question suggests the desired or expected answer. The question assuming the disputed facts is the other form of the leading question. The answers obtained to the leading questions are not inadmissible in evidence. However, the objectionable manner by which those answers are obtained would reduce the evidential

weight of those answers. (***vide; Cross on evidence10th Edition,17150 p;541,542, Sounders v R (1985) 15 A Crim. at 118,State v Hussain [2021] FJHC 412; HAC187.2020 (21 December 2021***).

33. The first leading question alleged by the learned Counsel for the Defence is that:

"Ms. Tamani:	*Now this place Una (pointing to the picture) have you ever been here before?*
Unaisi:	*Yes*
Ms. Tamani:	*Who took you to that place?*
Unaisi:	*Tua Jo,"*

34. The second leading question is that:

"Ms. Tamani:	*Now when Tua Jo took you to that place, what else did Tua Jo do?*
Unaisi:	*Tua Jo had touched in between of this (between the breasts) and he said for me to lay down and he laid on top of me"*

35. The third leading question is that:

"Ms Tamani:	*And you told us that Tua Jo put his "polo" this place (meaning top of female private part) inside. How many time did Tua Jo put his "polo" to this place (female part) inside?*
Unaisi:	*3 times,*

36. I first draw my attention to the third leading question. The learned Counsel for the Defence submitted that this question is a leading question as it assumed that the Accused had put his *"polo"* inside her vagina. The Complainant never stated that he put his *"polo"* inside her vagina before this question. She only mentioned that she felt pain inside.

37. The Complainant initially said that he put his ball when she was asked what Tua Jo used to touch her private part. She then pointed to the male genital area of the male doll when she was asked to indicate which part of the Accused's body she referred to as *"polo"*. The Complainant then pointed to vaginal area of the female doll as the place where the Accused put his *"polo"*. According to the Complainant, it was painful, and the pain came from inside. She pointed to the vaginal area between the legs of the female doll as the place where she felt pain. The Accused laid on top of her when he put his *"polo"* on her vaginal area. After adducing these evidence, the learned Counsel asked the above (third) leading question.

38. Accordingly, it appears this alleged leading question was posed to the Complainant after she had already explained the above-discussed facts. Therefore, I do not find this is a leading question assuming a disputed fact.

39. It is submitted that the first leading question suggested that the Complainant had been to Accused's house and she was taken there by someone. It is obvious the first part of the first question is not a leading question as it was posed to the Complainant after she had positively identified the house of the Accused in the photo. To some extent, the second part suggested that someone had taken her to the place, but that does not directly go to the root of this dispute. Before this question, the Complainant had positively identified the house of the accused and also stated that she had been to his house. Therefore, I do not find the answer given to this first alleged leading question has adversely affected the evidential value of the Complainant's evidence.

40. Having considered the Complainant's age and intellectual nature, I do not find the second leading question has suggested any desired or expected answers or assumed any facts related to the main dispute. It has merely asked the Complainant what did the Accused do after she was taken to his house.

Penetration

41. It was further submitted by the learned Counsel for the Defence stating that there is no evidence of penetration of the vagina of the Complainant with the penis of the Accused. The

learned Counsel emphasized that the Complainant admitted that she was wearing clothes when Tua Jo put his *"polo"* on her vaginal area. Hence, the above evidence creates a reasonable doubt whether the Accused had actually penetrated the vagina of the Complainant with his penis.

42. Prematilaka JA in **Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) para 13-15)** had meticulously defined the meaning of vaginal area and how to approach the evidence of a 14 years old child in respect of the issue of penetration. Prematilaka JA held that:

> *"Before proceeding to consider the grounds of appeal, I feel constrained to make some observations on a matter relevant to this appeal which drew the attention of Court though not specifically taken up at the hearing. There is no medical evidence to confirm that the Appellant's finger had in fact entered the vagina or not. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina.*
>
> *Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina. Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence state that the Appellant had penetrated the vagina*

with his finger. The complainant stated in evidence that he 'poked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of rape is concerned.

Section 207(b) of the Crimes Act 2009 as stated in the Information includes both the vulva and the vagina. Any penetration of the vulva, vagina or anus is sufficient to constitute the actus reus of the offence of rape. Therefore, in the light of Medical Examination Form and the complainant's statement available in advance, the prosecution should have included vulva also in the particulars of the offence. Nevertheless, I have no doubt on the evidence of the complainant that the Appellant had in fact penetrated her vulva, if not the vagina. Therefore, the offence of rape is well established. It is very clear that given the fact that her body had still not fully developed at the age of 14, cries out of considerable pain of such penetration would have drawn the attention of the Appellant's wife to the scene of the offence."

43. The Complainant said her clothes had blood when she was asked what happened to her clothes when Tua Jo put his *"polo"* in her vaginal area. She specifically pointed to the vaginal area of the female doll as the place where Tua Jo put his *"polo"*, as well as the place where she felt pain from inside. Tua Jo asked her to lie down, and he then laid on top of her. As Premathilaka JA found in **Volau v State (supra)**, the Complainant was not only a 14 years old child but also an intellectually impaired child. Hence, the Court must carefully evaluate her evidence considering the strengths and weaknesses related to her age, mental development, understanding and ability in communication. It is obvious that the Court could not expect her to explain all these details using the words and terms that adults usually employ. Considering the evidence that Tua Jo put his *"polo"* on her vaginal area and she felt

pain from inside, I am satisfied there is an intrusive penetration of her sexual organ with the penis of the Accused, thus establishing the element of "penetration".

Consent

44. The Court further heard the submission of the learned Counsel for the Defence stating that the Prosecution failed to establish that the Complainant had not given her consent to the Accused to have carnal knowledge of her.

45. The consent is a state of mind. Regarding the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Therefore, the Complainant must have a mental and physical capacity to make the consent freely.

46. Doctor Gaikwad stated that the Complainant is an intellectual impaired child. However, he cannot confirm the level of her intellectual impairment as Fiji does not have facilities to conduct a psychometric test. Based on his findings, Doctor Gaikward expressed his opinion stating that the Complainant has no mental capacity to consent to sexual activities.

47. Having carefully observed the manner and how the Complainant gave her evidence, I accept the expert opinion given by Doctor Gaikward regarding the Complainant's mental capacity. Accordingly, I find the Complainant had not given her consent to the Accused to engage in sexual activities with her.

48. According to the Complainant's mother, the whole village knows the physical and mental condition of the Complainant as she has lived her entire life there. Therefore, the Accused knew the Complainant's psychological and physical state that she could not consent to sexual activities.

49. In view of the above-discussed reasons, the Court is satisfied beyond reasonable doubt that the Accused had committed the first Court of Rape as charged. Moreover, the Court is

satisfied beyond reasonable doubt that the Accused had unlawfully and indecently touched the breast and backside of the Complainant.

50. In conclusion, I hold the Accused guilty of the offence of Rape contrary to Section 207 (1) and (2) of the Crimes Act and the offence of Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act. I now convict him to the same accordingly.

.....

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

21st April 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.