

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 214 of 2020

THE STATE

vs.

PAULO DOMOKAMICA

Counsel : Ms. U.M.Tamanikaiyaroi with Ms. S. Bibi for State
Ms. M. Ratidara for the Accused

Dates of Hearing : 14, 15 June 2022

Date of Judgment : 16 June 2022

(Name of the Complainant is suppressed. She is referred to as AM)

JUDGMENT

1. The Accused was charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009. The Prosecution alleges that the Accused on 29 June 2020, in Suva, penetrated the vulva of AM, a child under 13 years, with his finger.
2. The Accused pleaded not guilty to the charge. The trial commenced on 14 June 2022 and concluded on the 15 June 2022. The Prosecution presented evidence of the Complainant and two other witnesses. At the end of the Prosecution case, the Accused was put to his defence. Only the Accused gave evidence for the Defence. At the end of the Defence case, the Court heard oral submissions from both Counsel. Having carefully considered the evidence presented at the trial, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. The burden never shifts to the Accused at any stage of the trial.

The presumption of innocence in favour of the Accused will prevail until the charge is proved beyond reasonable doubt.

4. According to the Information filed by the Director of Public Prosecutions, the Accused is charged under Section 207(1) and (2) (b) and (3) of the Crimes Act 2009. The Complainant was only 2 years old at the time of the alleged offence thus she did not possess the necessary mental capacity to consent to any form of sexual activity. Accordingly, the Prosecution is not burdened to prove the third and fourth elements of the offence of Rape. The offence of Rape as charged in this case consists of the following elements.

- (a). The Accused, Paulo Domokamika,

- (b). Penetrated of the vulva of the Complainant AM with his finger.

5. A slightest penetration is sufficient to prove the element of penetration.

Case for Prosecution

6. The Complainant was 5 years of age at the time of the pre-trial conference. Considering that she is a child witness, Prosecution moved that certain special measures be taken to protect this vulnerable witness. The Defence did not raise any objection to this application. Accordingly, I took all protective measures available at my disposal to protect the child witness while ensuring a fair trial to the Accused. That decision was made having had multiple considerations, such as the rights of the witness, in this case a child, the rights of the accused to a fair trial and court's duty to ascertain the truth, in mind. Although the screen blocked the Accused's view of the Complainant it did not preclude the Accused from effective cross-examination. Main purpose of the criminal justice process is to get at the truth. If anything stands in the way in truth seeking exercise, that obstacle must be removed. None of those special measures prejudiced the Accused and had nothing to do with my findings and the judgment.
7. Having considered the tender age of the Complainant, her testimonial competency and her ability to understand the obligation to tell the truth was tested at the very outset. She understood the questions the Court was putting to her at the test and the answers she gave

were understandable or intelligible. She proved to be competent and passed the competency test. She demonstrated that she is capable of understanding the obligation to tell the truth.

8. Complainant at the time of her testimony is 5 years old. She was not under oath. Currently, she is schooling at St. Joseph the Worker Kindergarten. She has three siblings. Her father was running a canteen by the road side in Nakasi which turned out to be the crime scene of this case. The bundle of photographs of the alleged crime scene formed part of the disclosures and were admitted as an agreed fact. Those photographs were recognised by the Complainant.
9. Prosecutor asked the Complainant if she knew Paulo. At the beginning, she was shy and reluctant to answer. Then the Prosecutor wisely changed the track and drew her attention away from Paulo. She seemed comfortable and answered the questions eloquently. Then she was asked to name some of her dad's friends. She mentioned Paulo's name. She said, Paulo is a bad man because he touched her 'tuna'. She was shown a doll (a small model of baby girl) by the Prosecutor and asked her to point to where the dolly's 'tuna' is. She pointed to where the dolly's vagina is supposed to be.
10. AM said that Paulo touched her 'tuna' with his hand when she was at the canteen. He used his fingers to touch her 'tuna'. Paulo had come inside the canteen to touch her. There was blood at 'tuna'. The blood was red in colour. It was a hard touch for a short time. It was paining. Her father had gone to RB Patel to buy rolls (cigarettes) when Paulo touched her. No one was there when Paulo touched her. She was wearing clothes. She told her father that Paulo touched her 'tuna'. Her father punched Paulo. On that day daddy slept at the canteen.
11. Under Cross examination, AM said that she is the eldest in her family. She agreed that plenty people used to come and buy things from the canteen. When father left for RB, the door of the canteen was kept open.
12. When the Defence Counsel suggested that Paulo did not touch her 'tuna' she disagreed. She said that Paulo came inside the canteen to touch her. When the defence counsel suggested that she could have been mistaken that it was Paulo, she insisted that it was Paulo. She knew Paulo because he is her dad's friend. Paulo was a frequent visitor at her dad's canteen, she said.

13. Complainant's father Alivereti Nagiri gave evidence next. Alivereti had come to Nakasi to run his canteen, leaving his wife behind in Lagilagi, because she had just given birth to the fourth child. Accompanied with him was his two children, eldest one of whom was AM, who was only 2 years old at that time.
14. On 29 June, 2020, in the afternoon, his friend Paulo came to his canteen. They were having a talk at the door way. Since the cigarette rolls he was selling had finished, he asked Paulo to be with his children while he went to buy cigarettes from the RB Supermarket and come back. He told Paulo to go inside the canteen and close the door as he feared that the children might come out. Paulo agreed. Alivereti then went to the RB Supermarket which is 2 to 3 minutes' walk away and returned in 10 to 15 minutes time, at around 6 to 7pm. When he returned, two of his children and Paulo were all inside the canteen and the things looked normal.
15. Alivereti and his two children slept at the canteen that night. When they woke up in the following morning, AM told him that Paulo touched her 'tuna' or her private part when he had gone to buy the cigarettes. He checked her and saw blood on her panty. Alivereti and Paulo were friends and he could not believe what had happened. He was angry. He carried her directly to Paulo's house but Paulo was not there. He only wanted to speak to Paulo and his family and to solve it there.
16. Then he took his children back to their mother and came back together to report the matter to police. They then went to the hospital where AM was checked to confirm what had happened. Alivereti said that he had known Paulo from 2016. Paulo used to come to the canteen almost every day. AM was staying at the canteen and she knew Paulo.
17. Under cross- examination, Alivereti did not agree that the canteen area would be a hangout for young people. He denied that Paulo was selling cigarette rolls outside his canteen. He denied that Paulo was outside the canteen when he left for RB Supermarket. He admitted that Paulo had a twin brother that looked like him but denied that his daughter must have been mistaken.
18. Under re-examination, Alivereti said that Paulo's twin brother did not usually come to the canteen. He could clearly distinguish Paulo from his twin brother Sikeli because the latter was bald headed whereas Paulo had hair.

19. The final witness for Prosecution was Doctor Losana Burewai. She had examined AM on 15 July 2020, about two weeks after the alleged incident. She recognised the Fiji Police Medical Examination Form she had filled up upon the examination of AM. That report was tendered in her evidence marked as PE.1.
20. Doctor described the patient as a care free young child who was very talkative and bright. She found no physical injuries at the general examination. Upon the genital examination, she found child's hymen to be intact. There was an abrasion, 2-3 weeks old, present at the right *labia minora* and she also noted a slight yellowish vaginal discharge which was stained on the panty.
21. Doctor described the 'abrasion' as a superficial injury or a scratch on the skin of the right *labia minora*. *Labia minora* is the inner lip or the inner fold of the female genitalia whereas *labia majora* is the outer lip. She found the vaginal discharge to be not normal as it looked yellowish, probably due to an infection, most likely from the abrasion. The abrasion was in line with the alleged incident. According to her professional opinion the genital injury is indicative of a trauma by a sharp object, for example, finger or nail. This injury could not have happened in that particular area of the female *genitalia* otherwise than by the said phenomenon.
22. Under cross examination, the doctor ruled out the possibility that this abrasion could have been self-inflicted- that if the child had scratched that particular area due to itchiness or infection. Justifying her opinion, the doctor added that if it was due to itchiness or infection there would have been other surrounding signs along the area that could indicate progressive infection and other changes in the skin and also fever. Answering a question from the Court, the doctor confirmed that *labia minora* is part of vulva.

Case for Defence

23. Only the Accused, Paulo Domokamica, gave evidence for Defence. Paulo confirmed that Alivereti Naqiri is his friend. On the 29 June 2020, he was standing outside the taxi base selling cigarettes right across the highway, opposite Alivereti's canteen. He met Alivereti outside the canteen and asked for a cigarette. He had sold all his cigarettes and Alivereti had

just come back from buying a packet of cigarette. He did not know Alivereti's daughter, AM, but admitted meeting AM when she was inside the canteen. Alivereti called him and he crossed the road to the side of the canteen. Alivereti told him to look after the daughter. He agreed but he did not enter the canteen and stayed outside.

24. Alivereti then went to buy a packet of cigarette from RB. He returned to where he was selling cigarettes. When Alivereti came back he called him to go inside the canteen for them to smoke marijuana. He went inside the house only when Alivereti returned from RB. He denied touching the AM's 'tuna' with his finger.
25. Under cross examination, Paulo admitted that Alivereti was his good friend. He knew their eldest child, AM. He agreed that he was a regular visitor to Alivereti's canteen and he would meet AM at the canteen. He admitted that, on 29 June 2020, through the gap at the corner, he saw AM playing inside the canteen. He denied that he had come closer to the canteen and that's how he managed to see the children play inside. On the day he looked after Alivereti's children, his twin brother, Sikeli, came and bought a cigarette. She admitted that he used to call AM 'Lina' and AM used to call him Paulo. He admitted that Alivereti came to his house the following morning and punched him. Alivereti was asking whether he did something to AM and punched on his face. He was bleeding in his nose. He admitted that he didn't go to Police to make a complaint.

Analysis

26. The case of the Defence was one of complete denial. It was agreed as an admitted fact that the Complainant was under the age of 13 years at the time of the alleged offence. The fact that the Complainant's vulva had been penetrated was not challenged by the Defence. They took up the position that the penetration could either have been self-inflicted or was done by somebody other than the Accused. In view of that, the Prosecution was called upon to prove that it was the Accused and nobody else that had penetrated the vulva of the Complainant.
27. Defence case theory, as it could be gathered from the line of cross-examination and the closing submission, was mainly based on three premises. Firstly, it was maintained that the child complainant was mistaken as to the identity of the perpetrator. Secondly, the penetration could have been self-inflicted. Thirdly, the version of the Prosecution was made-up because the

complaint to police was belated. One would observe the said first and second grounds to be somewhat inconsistent.

28. First, I would turn to the question of identity. Complainant was adamant that it was Paulo. When the Defence Counsel suggested that she could have been mistaken that it was Paulo, she insisted that it was Paulo. She knew Paulo because he is her dad's friend. Paulo was a frequent visitor to her dad's canteen.
29. Complainant's recognition evidence is firm and never shaken. Her evidence on this particular point was confirmed not only by her father, but also by the Accused himself. Alivereti said that he had known Paulo from 2016. Paulo used to come to the canteen almost every day. He admitted that Paulo had a twin brother but denied that his daughter must have been mistaken. He further said that Paulo's twin brother did not usually come to his canteen. He confirmed that the Complainant was staying at the canteen and she knew Paulo. He could clearly distinguish Paulo from his twin brother Sikeli because the latter was bald headed whereas Paulo had hair.
30. The Accused admitted that Alivereti was his good friend and that he had known the Complainant as his eldest child. He agreed that he was a regular visitor to Alivereti's canteen and he would meet AM at the canteen. He admitted that he was tasked to look after AM and her brother on that particular day whilst Alivereti was away. She admitted that he used to call AM 'Lina' and that AM used to call him Paulo. The alleged incident occurred during daytime. Evidence is overwhelming to find that the Complainant was not mistaken. I am satisfied that the Prosecution proved the identity of the Accused beyond a reasonable doubt.
31. Now I come to the suggestion that the penetration could have been self-inflicted. The position of the Defence, as it could be gathered from the cross-examination of the doctor is that the abrasion found at the right *labia minora* could have been self-inflicted - scratching by the Complainant that particular area prompted by itchiness or infection. This suggestion was never put either to the Complainant or to her father when they took stand. Without putting the child witness into difficulty, this simple issue could have been sorted out if she was given an opportunity to comment on this suggestion. That was never done.

32. The doctor was firm on her opinion and readily ruled out the possibility that the abrasion was self-inflicted. She gave plausible reasons for her opinion. She said that if it was due to itchiness or infection there would have been other surrounding signs along the area that could indicate progressive infection and other changes in the skin and also fever. Doctor's evidence is consistent with the evidence of the Complainant. Prosecution proved beyond a reasonable doubt that the penetration was not self-inflicted.
33. Finally, I turn to the issue of credibility of the version of the Prosecution. The Defence in the closing suggested that the complaint was made-up in view of the delay in making a complaint to police. The alleged incident occurred on 29 June 2020 and the complaint was lodged nearly two weeks thereafter on 15 July 2020.
34. In my opinion, the delay in making a complaint to police is reasonably explained by the circumstances of this case. It is not disputed that the Complainant made a prompt complaint to her father on the following day of the incident. Alivereti said that, as soon as he received the complaint from the Complainant and saw blood on her panty, he carried his daughter and went in search of Paulo but Paulo was not there in his house. Purpose of his visit, according to him, was to speak to Paulo and his family and to 'solve' it there. Complainant said her father punched Paulo and Paulo confirmed that he got punched in his face, causing him to bleed. However, Alivereti was cautious not to mention about this meeting and the punching. He had just fled the village after this incident with the two children. He only returned to Nakasi with his wife to lodge a complaint to police sometime later. It can reasonably be assumed that Alivereti with his anger sought summary justice or 'solve' the issue when he confronted his daughter's rapist. The punch and the blood he saw on Paulo's face must have satisfied him in this regard and discouraged him from going to police immediately due to fear. The delay is reasonably explained and did not affect the credibility of the version of event of the Prosecution.
35. Before I can find the Accused guilty on the count as charged, it is for me to satisfy myself that the complainant's vulva was penetrated at least slightly by the finger of the Accused. There is no direct evidence that Complainant's vulva was penetrated by the Accused. She only said Paulo touched her 'tuna'. A mere touch would not satisfy the element of penetration unless it could be shown that the touch involved an insertion at least slightly. In this case, the Prosecution alleges the vulva and not the vagina that had been penetrated.

36. In a recent decision [State v Mosese Naulu Crim. Case No: HAC 324 of 2020] Kulatunga J observed as follows:

In a count of rape of whatever form, penetration is a necessary component and in the present case the prosecution should prove that the tongue of the accused did penetrate the vulva to some degree. Penetrate as we understand is to go through or to pass through. Thus penetrating the vulva when considered with the above description will be to go through at least in the slightest degree between the labia majora.

37. Britannica dictionary defines vulva as the external female genitalia that surround the opening to the vagina; collectively these consists of the *labia major*, the *labia minor*, clitoris, vestibule of the vagina, bulb of the vestibule, and the glands of Bartholin.
38. A similar definition has been adopted by Justice Prematilaka in *Volau v State* [2017] FJCA 51; AAU0011.2013 (26 May 2017) where His Lordship has vividly described the distinction between the vulva and the vagina, the demarcations of the relevant components of the female genitalia in the following manner;

It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see a female's body. The vulva includes the mons pubis ('public 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.

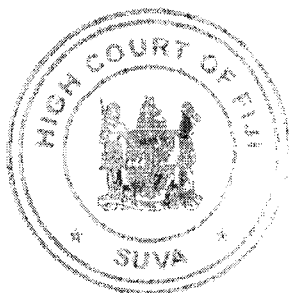
39. The doctor confirmed that *labia minora* is part of vulva. She had observed the abrasion at the right *labia minora* or the inner lip which is part of vulva. This abrasion is consistent with a penetration of vulva by some foreign object like finger. Doctor opined that the abrasion found at *labia minora* is consistent with the complaint that she was digitally penetrated. It has to be accepted that doctor's evidence does not have a corroborative effect on the evidence of the Complainant in so far as it did not implicate the Accused. However, her evidence supported the Complainant's evidence that she was penetrated.
40. In the present case, all the facts and circumstances proved by the Prosecution point to the only inference that the Accused had penetrated the vulva of the Complainant. The Complainant felt the pain of the touch which she described as a 'hard'. She saw blood at what she described in her own language as 'tuna'. When she used the word 'tuna' her father's understanding was that she was referring to her private part. That's why, upon the complaint being received, he had checked that area to find blood stains on her panty. She pointed to where the doll's vagina

is when asked to point to its 'tuna'. The Prosecution proved that the vagina of the Complainant had been penetrated by the Accused with his finger.

41. The Complainant- AM is a child of tender age. Still her evidence is straightforward and not evasive. There are no material inconsistencies or contradictions in her own evidence or with the evidence of others who gave evidence for the Prosecution. Her manner of giving evidence prevents me from treating her as an untrustworthy witness.
42. However, to be on the safe side, I looked at the other evidence adduced by the Prosecution to satisfy myself beyond reasonable doubt that the Complainant told the truth in Court, although no corroboration of Complainant's evidence is required to prove a charge of Rape.
43. The 'complaint' made to her father by the Complainant on the following day of the incident had naturally come from the Complainant. The recipient of the complaint, Alivereti confirmed that he received a complaint of sexual nature. In my opinion, her complaint can be accepted as a recent complaint evidence although it could not be taken to implicate the Accused. The recent complaint evidence is consistent with the allegation of rape and bolstered the Prosecution case. The medical evidence is also consistent with Complainant's evidence.
44. The Accused is a good friend of the Alivereti family. There is no apparent reason for the Complainant or her father to make up this allegation. Even the Accused did not say why they should make up a false allegation against him. Having considered the overall evidence of the Complainant, and her demeanour, I am convinced that the Complainant told the truth in Court.
45. The Defence is not burdened to prove anything in this case. However, upon his rights being explained, the Accused elected to give evidence under oath. Even though I prefer the evidence for the Prosecution, I must not convict unless I am sure beyond reasonable doubt of the truth of that evidence. Therefore it is incumbent upon me to analyse the evidence of the Defence to see if a reasonable doubt has been created in the Prosecution case.
46. I examined the evidence of the Accused who is the only witness for Defence to see if it is believable, bearing in mind that he had nothing to prove in this case. His evidence is one of complete denial. He denied that he had ever entered the canteen when Alivereti was away. However, he admitted that he was tasked and he agreed to look after the Complainant and her


brother on that particular day. His evidence that he did not enter the canteen cannot be believed. He confirmed that he saw the Complainant play inside the canteen. It is not possible for him to watch them play from the place which he said he had been. Alivereti had gone to RB to buy cigarettes before the alleged incident and it is not possible for the Accused to get cigarettes from Alivereti at that point in time. His evidence that he asked for a cigarette from Alivereti when he himself was a cigarette seller was not reasonably explained. The Accused admitted that he never lodged a complaint to police against Alivereti even though he had received a harsh punch in his face. That conduct is consistent with his guilty mind.

47. The Defence had no idea as to why this serious allegation has been levelled against him by the Complainant and her father. In the absence of an apparent motive, it is hardly possible for a girl of her age to fabricate a case of this nature. I am unable to accept Accused's denial. It is apparent that, in desperation, he was trying to save his own skin. I reject the evidence of the Defence and accept the version of events of the Prosecution.
48. Having satisfied with the credibility of the version of the Prosecution, I analysed the evidence to see if all the elements of Rape as charged have been satisfied. I am satisfied that the Accused penetrated the vulva of the Complainant with his finger. Prosecution has proved all elements of the offence of Rape as charged beyond reasonable doubt.
49. I find the Accused guilty on the count of Rape. The Accused is convicted accordingly.



16 June 2022

At Suva



Aruna A. Juthge
Judge

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence