

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 50 OF 2021

STATE

.vs.

JEMESA TUVUNIWAI

Counsels: Ms Lomaloma. M - for Prosecution
Mr. Gade. P - for Accused

Date of Trial: 4th – 6th July 2022

Date of Judgment: 07th July 2022

JUDGMENT

1. The accused in this matter, **JEMESA TUVUNIWAI**, was charged with one count of **Rape**, contrary to **Section 207 (1) and (2) (a)** of the **Crimes Act of 2009**, as the first count, and one count of **Sexual Assault** contrary to **Section 210(1)(a)** of the **Crimes Act of 2009**, as the second count. The Prosecution alleges that the Accused on 17th of August 2021 at Wailevy Settlement, Taveuni, Labasa had carnal knowledge of the Prosecutrix (AD) without her consent and unlawfully Sexually Assaulted her in the same transaction.
2. The accused pleaded not guilty to the first count, but pleaded guilty on his own volition to the second count. At the trial, the Prosecution presented the evidence of the Prosecutrix (AD) and her father. Also, the doctor who had conducted the medical examination was made available for the Defense cross-examination upon Defense request. At the end of the Prosecution case, since the Court was convinced of the availability of a case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused. At this juncture, the Accused gave evidence for the Defense under cross-examination. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment on count 1, as follows.

3. Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. That burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused shall prevail until the charge is proved beyond reasonable doubt.
4. According to the Information, for the first count the accused is charged under **Section 207 (2) (a) of the Crimes Act 2009**. Under this section, the offence of Rape is defined as follows: “a person rapes another person if the person has carnal knowledge with or of the other person without the other person’s consent”. In the context of this case, ‘carnal knowledge’ could be defined as an act of penetration of the vagina of the Prosecutrix with the penis of the Accused. A slightest penetration is sufficient to prove the element of penetration. According to **Section 206 of the Crimes Act of 2009**, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
5. The Prosecution must also prove the fourth or the mental element of Rape that the accused knew or believed that the Prosecutrix was not consenting or that the Accused was reckless to ascertain whether the complainant was consenting or not.

Prosecution Case

6. As the prosecution witness 1 the Prosecutrix (AD) gave evidence under oath. She appeared matured as she took to the stand. Considering that she is a child witness, this Court took all protective measures available at the disposal of Court to protect this witness and make it comfortable for her to give evidence. However, none of those measures taken by Court will influence the judgement of this Court and this Court has not drawn any negative inference from them against the Accused.
8. Giving evidence in Court, she testified, as below:
 - “I was born on 10th of July 2007 in Taveuni and I reside with my parents in Qali Settlement. I have 12 siblings and I am the 9th child in my family. I am currently schooling and I am now in year 9.
 - On 17th August 2021, I went to get some cabbage to our farm in Wailevu, which is ½ an hours walk from home, I went at around 8am. After collecting some cabbage from the farm, I went to the Farm House and washed the cabbage and left it on the table
 - The Farm House was where Jamesa, the accused, was living and we call him Tuvu. No one else was there at the farm house, only Tuvu.
 - I came inside the house and was standing beside the door and Tuvu also came inside. We were talking about the dogs outside and Tuvu was standing beside me.
 - He came close to me and started touching me and I told him not to.
 - I sat down and he started pulling my pants. He was pulling it down. I was wearing pants and a west.
 - I wanted to stand up, but Tuvu pulled me down by my hand and I fell down and I was facing up

- Then Tuvu lied on top of me and removed my pants down to my knees.
 - Then he put his penis on me, meaning on my private part.
 - Private part is where I urinate, I call this part vagina. He put his penis in my vagina. He inserted the penis and it was painful. My vagina was paining for about 3 minutes. He touched my vagina when he was inserting his penis into my vagina. At that time I started crying. Though Tuvu was initially wearing pants he removed that when he was inserting his penis.
 - After doing so, he stood up and went outside and wore his pants. Then it was about 11 o'clock.
 - There was light in the house coming from the window. I saw his face. When he was lying on me his face was 1 ½ feet above me.
 - After Tuvu went outside, I wore my pants and went outside, where the accused was sitting on the chair outside. At that time Tuvu asked for forgiveness from me.
 - At that time, I took my shopping bag and went where the cabbage plantation was and Tuvu followed me. He told me not to tell anybody and if I do he will kill himself.
 - I went back home I told my cousin what happened and at home I told my parents what happened.
 - My parents took me to the police next day morning, I went there with my father and my mother. After recording a statement at the Police, I was taken to the hospital, where a doctor examined me.
 - Tuvu is my uncle, I have known him from class 3. I trusted Tuvu".
 - Witness identifies the Accused on the dock.
9. In cross examination, this witness was challenged by the Defense in relation to the incident she claimed. It was the Defense position that the Accused did not inset his penis to her vagina and the accused only touched her private parts under her cloths when she was still wearing her cloths. In this regard, while admitting that the accused touched her private parts when she was still wearing her cloths by putting his hand through, she firmly claimed that the Accused inserted his penis to her vagina.
10. Further in cross-examination, Defense brought to the attention of Court a very pertinent omission of the initial statement made by the Prosecutrix to the Police. In this regard, Defense suggested to the witness that though she made a Police complaint the very next day after the incident in issue when she went to the police station with her parents, she did not state in the police statement that the Accused inserted his penis to her vagina, which she denied.
11. The second Prosecution witness (PW2) was **Silivatore Talemaisuva**, the father of the Prosecutrix (AD). He claimed that currently he resides in Qali Settlement with his wife and children. He confirmed that the Prosecutrix is his 9th child. He mentioned that the Prosecutrix complained to him and his wife at around 7 pm on the 17th August 2021 that the Accused raped her at the farm house where Tuvu's staying at around 5 pm the same day. He claimed that when informing this the Prosecutrix was crying. He further stated that the Prosecutrix informed them that she had already informed this incident to a cousin. He testified that he took her daughter to the Police Station the same day to make a complaint. This witness confirmed that the Accused is related to him through marriage and there was no ill-will between them.
12. The third Prosecution witness (PW3) was Dr. Namita Natasha Naidu, who was summoned on the request of the Defense for cross-examination. This witness confirmed that she had

medically examined the Prosecutrix on the 18th of August 2021. According to her, the Prosecutrix had been anxious and had displayed hesitancy in providing the history of the incident. As per genital examination, there had been no scars or abrasions visible. Also, there had been no swelling or bleeding around the genital area of the Prosecutrix. Further, the Prosecutrix had not sustained any injuries to the vaginal tissues.

13. Expressing her professional opinion, this witness confirmed that if the Prosecutrix experienced pain during the alleged act of rape, she would have expected to see obvious injuries. Further, she claimed that the possibility of a victim sustaining injuries in a forced rape is high if the victim is underage. She affirmed that in this matter, considering the tender age of the victim, the fact that she was brought for medical examination within one day and the claim of the victim that she experienced pain in her genital area during the act complained she would have expected to see some form of injuries in the genital area of the Prosecutrix.

Defense Case

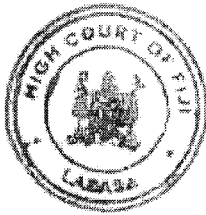
14. In giving evidence, the Accused admitted that on this day when the Prosecutrix came to his farm house he touched her on top of her genital area inside the cloths the Prosecutrix was wearing. However, the Accused vehemently denied inserting his penis to the vagina of the Prosecutrix. Further, he admitted that he asked the Prosecutrix for her forgiveness for his conduct at that moment.
15. The accused was comprehensively and exhaustively cross-examined by the Prosecution in relation to the alleged rape of the Prosecutrix. In this process, this Court observed the tenacity of the Accused, where he faced many allegations skillfully explaining circumstances. Therefore, this Court was impressed with the demeanor and deportment of the Accused and sees no reason to disbelieve the evidence of the Accused.

Analysis and Finding of Court

16. In this matter, the Prosecutrix claims that she was raped by the Accused on the 17th of August 2021. On the same day of the incident, the Prosecutrix has informed of this incident to her parents promptly and they have made a complaint to the police. However, as marked as an omission by the Defense, the Prosecutrix has not informed to the police of this act of rape by the Accused. Her statement to the police only claims of Sexual Assault committed by the Accused by touching her genital area.
17. Further, when questioned by Court, she confirmed that she went to the police station with her parents and she was under no pressure or stress at the police station. In addition, she confirmed that her statement was recorded by a female police officer.
18. In this background, the most pertinent question this Court needs to ascertain is as to why the Prosecutrix did not complain of the most heinous offence committed on her by the Accused to the police. This situation is further compounded by the fact that when the Prosecutrix was making the statement to the police she was in very comfortable circumstances with her mother and the father before a female police officer.
19. Further, this Court perceives that the medical evidence deduced in this matter cuts across the version of the Prosecutrix. In this regard, though the Prosecutrix claimed that she experienced

pain when the Accused inserted his penis to her vagina, this position was not supported by medical evidence.

20. According to the doctor, when she examined the Prosecutrix the very next day after the alleged incident, the doctor had not noticed any injuries in the genital area of the Prosecutrix. In that, doctor claims that considering the tender age of the Prosecutrix, the fact of her examining the Prosecutrix the very next day after the incident and the Prosecutrix claiming that she underwent pain during the insertion of the penis of the Accused to her vagina the Prosecutrix should have sustained some form of injury, which the doctor should have noticed.
21. Considering the above analyzed factors, this Court perceives that a reasonable doubt exist regarding the claim of rape made by the Prosecutrix. However, the Accused has already pleaded guilty to the second count of Sexual Assault.
22. Therefore, this Court acquits the Accused from the first count and convict him for the second count.
23. Parties have 30 days to appeal to the Fiji Court of Appeal



.....
Hon. Justice Dr. Thushara Kumarage

**At Labasa
07 July 2022**