

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 315 of 2019

STATE

vs.

SANYAAL ROHITESH CHAND

Counsel: Ms. J. Fatiaki for the State
Ms. S. Narayan for Accused

Date of Hearing: 5th December 2022

Date of Closing Submission: 7th December 2022

Date of Judgment: 21st December 2022

JUDGMENT

1. The Accused is charged with one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act; three counts of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act and one count of Rape, contrary to Section 207 (1) (2) (c) and (3) of the Crimes Act. The particulars of the offences are;

COUNT ONE

Statement of Offence

INDECENT ASSAULT: *Contrary to Section 212 (1) of the Crimes Act
2009.*

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Nasimu in the Central Division, unlawfully and indecently assaulted **AYAANA DIPSHIKA LAL**, a child under the age of 13 years, by rubbing her vagina with his hand from on top of her clothes.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Nabua in the Central Division, procured **AYAANA DIPSHIKA LAL**, a child under the age of 13 years, to commit an act of gross indecency by forcing the said **AYAANA DIPSHIKA LAL** to touch his penis.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Sakoca Settlement in Valelevu in the Central Division, penetrated the vagina of **AYAANA DIPSHIKA LAL**, a child under the age of 13 years with his penis.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Nasimu in the Central Division, penetrated the anus of **AYAANA DIPSHIKA LAL**, a child under the age of 13 years with his penis.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Nasimu in the Central Division, penetrated the mouth of **AYAANA DIPSHIKA LAL**, a child under the age of 13 years with his penis.

COUNT SIX

Statement of Offence

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

Particulars of Offence

SANYAAL ROHITESH CHAND between the 1st day of January, 2018 and the 6th day of July, 2019 at Nasinu in the Central Division, penetrated the anus of **AYAANA DIPSHIKA LAL**, a child under the age of 13 years with his finger.

2. The Accused pleaded not guilty to these six counts. Consequently, the matter proceeded to the hearing. The hearing commenced on 5th December 2022 and concluded on the same day. The Prosecution presented the evidence of two witnesses, including the Complainant. At the conclusion of the Prosecution's case, the Court found the Prosecution presented no evidence to establish the first, fourth, fifth and sixth counts as charged, thus; the Accused was acquitted from the said four counts pursuant to Section 231 (1) of the Criminal Procedure Act. The hearing proceeded with one count of Sexual Assault (Second Count) and one count of Rape (third count). The Accused gave evidence for the Defence. Subsequently, the Court heard the submissions of the parties. In addition to their oral submissions, the learned Counsel for the Prosecution and the Defence filed their respective written submissions. Having carefully perused the evidence presented in the hearing and the respective oral and written submissions, I now pronounce the judgment as follows.

Burden and Standard of Proof

3. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offences

4. The main elements of the offence of Sexual Assaults are that:

- i) The Accused,
 - ii) Unlawfully and indecently,
 - iii) Assaulted the Complainant.
5. The main elements of Rape are that:
- i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant was a child under the age of 13 years.
6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed these offences against the Complainant.
7. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.

Admitted Facts

8. The Prosecution and the Defence admitted the following facts under Section 135 of the Criminal Procedure Act.
1. *The Complainant is Ayaana Dipshika Lal, hereafter referred to as 'Ayaana' of Sakoca Settlement, Valelevu, Nasinu.*
 2. *The Accused is Sanyaal Rohitesh Chand, hereafter referred to as 'Sanyaal' of Labasa.*
 3. *Ayaana's father is Mahend Chand and Sanyaal's father is Dewan Chand.*
 4. *Sanyaal and Ayaana are cousins i.e. their fathers are biological brothers.*

5. *Ayaana has a younger brother namely Aryan Lal.*
6. *In early 2018, Ayaana and her family lived in Nabua.*
7. *When Ayaana and her family lived in Nabua, Sanyaal would visit them.*
8. *Sometimes in 2018, Ayaana and her family lived in Nabua, Sanyaal would visit them.*
9. *When Ayaana and her family moved to Sakoca Settlement, Valelevu, Nasimu in 2018, Sanyaal lived with them.*
10. *The following document and its content have been agreed to be tendered by Prosecution and Defence –*

a) Birth Certificate of Ayaana

9. The Accused is the Complainant's cousin and used to visit her home in Nabua often between the 1st day of January 2018 and the 6th day of July 2019. One day, when the Complainant was playing with the Accused and her younger brother in the room, the Accused had put her hand on his private part. He was still wearing his clothes when he put her hand on his penis. The younger brother was in the room when he did that to her. Her parents were in the kitchen, preparing their dinner. When he put his hand on his penis, she saw white liquid come out of his penis. She then made an excuse, saying she wanted to wash her hands and leave the room. The Complainant explained that she did not tell anyone about this incident because she was scared of the Accused.
10. During the same period, the Accused and the Complainant played hide and seek inside the bathroom. While they were inside the bathroom, hiding, the Accused had placed her hand on his penis.

11. In 2019, the Complainant and her family moved to Sakoca. The Accused also lived with them. One day, between the 1st of January 2019 and the 6th of July 2019, the Accused came to pick up the Complainant from school as she was sick and vomiting. Her parents had gone to the hospital as it was her mother's checkup day. When they came home, the Complainant changed her clothes and lay on the bed for a while. The Accused then came and removed her clothes and penetrated her vagina with his penis. The Complainant had not told anyone, including her parents, about this incident, as the Accused told her not to tell anyone. Eventually, the Complainant told her sister-in-law about what the Accused had done to her. The sister-in-law had then informed other elders of the family and confronted the Accused. The Accused then denied the allegation and suggested they should go to the Police to find out the truth. The Accused had suggested and volunteered to go to the Police.
12. The Accused denies this allegation and states in his evidence that he had not done such things to the Complainant. He explained the strained relationship he had with the sister-in-law of the Complainant.

Evaluation of Evidence

13. In view of the evidence presented by the Accused and the Complainant, it appears that the different versions of evidence presented by the Complainant and the Accused. In such circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible between the Complainant and the Accused. (vide; **Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Goundar v State [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015).**
14. I shall now proceed to evaluate the evidence. In doing that, I must first draw my attention to determining the evidential trustworthiness of the Prosecution's witnesses. Kulatunga J in **State v Solomone Qurai (HC Criminal - HAC 14 of 2022)** has explained the test of

Determining the testimonial trustworthiness of the witness on the basis of credibility and reliability of the evidence, where His Lordship held that:

"In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide: R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]"

15. Consequently, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide Matasavui v State [2016] FJCA 118; AAU0036,2013 (30 September 2016, State v Solomon Ourai (HC Criminal - HAC 14 of 2022)).
16. I shall first draw my focus on the issue of probability/possibility of the first incident explained by the Complainant. According to the Complainant, her younger brother was in

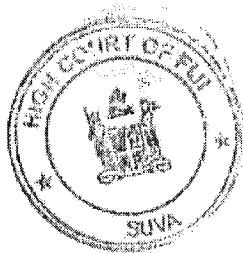
the room when the Accused allegedly put her hand on his penis. He was still wearing his clothes when he put her hand on his penis, suggesting that her hand was on his penis over the clothes. She then saw white liquid come from his penis. The Complainant made an excuse, saying she wanted to wash her hands and left the room. This evidence indicates that the said white liquid was on her hand. The Court heard no evidence confirming that the Accused put his penis out and placed her hand on his naked penis.

17. If the Accused put her hands on his penis over the clothes and not on his naked penis, she could not see any white liquid coming out of his penis. There is no evidence explaining whether the Accused took his penis out to release such white liquid from his penis. The Complainant specifically answered, stating "no" when the learned Counsel for the Prosecution questioned her whether the Accused did anything else to you apart from putting her hands on his penis. The Complainant's answer suggests that he only placed her hand on his penis but did not ask to perform any other act. The Court did not hear evidence of the Complainant explaining that the Accused had performed any other act with his penis.
18. Given these reasons, there is reasonable doubt about the possibility of such an incident occurring, as explained by the Complainant.
19. The third incident occurred when the Accused brought her home from school as she was sick that day. Having penetrated her vagina with his penis, the Accused had told her not to tell anyone about this incident. No one was at home when this incident occurred.
20. The Complainant had not promptly reported these incidents to her parents or anyone else. She eventually confided to her sister-in-law, who is the second Prosecution's witness. I shall now proceed to determine whether the delay in reporting these incidents affected the credibility of the evidence given by the Complainant.
21. Gamlath JA in State v Serelevu [2018] FJCA 163; AAU141.2014 (4 October 2018) has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to

determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.

22. I observed certain contradictions in the explanation the Complainant gave for the delay in reporting. She initially stated that she was scared of the Accused after the first incident that allegedly occurred in the room in the presence of her younger brother and therefore did not inform anyone about that incident. The Complainant did not say that the Accused threatened her asking her not to tell anyone about that incident, leaving a doubt why she felt scared of the Accused. However, she continued to play with the Accused and hid with him in the same bathroom while playing hide and seek. This creates doubt about whether she was actually scared of the Accused and whether the explanation given by the Complainant for not reporting the matter to anyone is true.
23. In contradicting her above position, the Complainant explained during the cross-examination that she did not inform her parents because she was afraid of them. The Prosecution presented no explanation for the contradictory nature of the explanations given by the Complainant for not reporting this incident promptly.
24. The sister-in-law, in her evidence, explained that the Complainant told her the Accused had sexually abused her. The Complainant said to her that the Accused had given his penis for her to touch until he ejaculated. Moreover, the Complainant had told her that the Accused had penetrated her mouth with his penis and ejaculated in her mouth.
25. The evidence of the sister-in-law is not evidence of the fact that could corroborate the Complainant's evidence, but they are relevant to the issue of consistencies in the conduct of the Complainant; hence, they link to the issues of credibility and reliability of the Complainant's evidence. (*vide Gates CJ in Raj v State [2014] FJSC 12; CAV0003,2014 (20 August 2014)*). It is sufficient to disclose some material about the unlawful sexual abuse and not required to explain all the ingredients of the alleged sexual conduct. (*vide Raj v State (supra)*).

26. I observe certain contradictions between the evidence of the sister-in-law and the Complainant. The Complainant, in her evidence, specifically stated that she told the sister-in-law everything done by the Accused. However, she did not mention in her evidence any incident where the Accused penetrated her mouth with his penis and ejaculated inside. Considering this inconsistency, together with the above-discussed issues of the Complainant's evidence, creates a reasonable doubt about the credibility and reliability of the evidence given by the Complainant.
27. Considering the reasons discussed above, I find reasonable doubt in the evidence given by the Complainant; hence, I do not accept them as credible and reliable. Accordingly, I find the Prosecution failed to prove the Accused guilty of one count of Sexual Assault and one count of Rape as charged in the Information.
28. In conclusion, I hold the Accused not guilty of one count of Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and acquit from the same accordingly.
29. Thirty (30) days to appeal to the Fiji Court of Appeal.



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

At Suva

21st December 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.