

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 169 OF 2021

BETWEEN : **STATE**

AND : **ULAIASI KANACUVA**

Counsel : Ms U Tamanikaiyaroi for the State
Ms L Ratidara for the Accused

Date of Hearing : **23 February & 23 May 2023**

Date of Judgment : **1 August 2023**

JUDGMENT

[1] **Charges**

The accused is charged with two counts of rape and one count of sexual assault.

[2] Count one alleges that the accused between 1 November 2016 and 30 November 2016 at Natokalau, Ovalau had carnal knowledge of the complainant, without her consent.

[3] Count two alleges that the accused on 12 September 2021 at Natokalau, Ovalau unlawfully and indecently assaulted the complainant by fondling her breasts.

[4] Count three alleges that the accused on 12 September 2021 at Natokalau, Ovalau penetrated the vagina of the complainant, with his finger without her consent.

[5] **Burden and Standard of Proof**

The burden is on the prosecution to prove each charge beyond a reasonable doubt.

[6] The accused chose to remain silent. He does not carry any burden to prove or disprove anything.

[7] **Elements of Rape and Sexual Assault**

To prove the offence of rape as alleged in count one, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused penetrated the vagina of the complainant with his penis.
2. The complainant did not consent to penetration of her vagina.
3. The accused knew that the complainant was not consenting.

[8] To prove the offence of sexual assault as alleged in count two, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused assaulted the complainant.
2. The assault was unlawful and indecent.
3. The assault was without the consent of the complainant.
4. The accused knew that the complainant was not consenting.

[9] To prove the offence of rape as alleged in count three, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused penetrated the vagina of the complainant with his finger.
2. The complainant did not consent to penetration of her vagina.
3. The accused knew that the complainant was not consenting.

[10] Slight penetration is sufficient to amount to rape. It is not necessary to prove that the accused ejaculated.

[11] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. There is no suggestion in the present case that, if the accused touched the complainant as the prosecution alleged he did, the touching was lawful.

[12] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

[13] The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

[14] Consent involves the conscious and voluntary permission by the complainant to the accused to touch her body in the manner that he did. Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter of inference from all the proven facts.

[15] **Admitted Facts**

Few facts are not in dispute in this case. The accused was born on 7 April 1985. In 2016 he was 31 years old. The accused married the complainant's mother. They have three children from that marriage. The complainant is the accused's stepdaughter. On 16 September 2016, the complainant gave birth to a baby boy. The identity of the Turaga Ni Koro of Natokalau is not an issue.

[16] **The Prosecution Case**

The prosecution led evidence from two witnesses: the complainant and a medical doctor.

[17] The complainant's evidence is that in 2016 she was living with her mother and her younger siblings in a two bedroom house at Natokalau village. Her stepfather, the accused lived with them. In September 2016 she gave birth to a child. She was in an intimate relationship with another person at the time. She spoke about the first incident. It occurred three months after she had given birth. It was daytime. She was in her room feeding her baby. She was wearing a dress. She did not have any underwear on. The stiches from the child birth had not completely healed. Her mother was in the kitchen cooking. No one else was in the house. After breastfeeding her baby she fell asleep. When she woke up she was shocked to find the accused on top of her. He was caressing her breasts. He was not wearing clothes. He put his penis into her vagina. It was painful for her. She shouted. Her mother came inside the room. Her mother hit him with a timber used for clothes line. Her mother was angry with the accused. On the same day the complainant packed up her clothes and went to live with her uncle at Nukutocia village.

[18] The complainant returned to Natokalau village in 2021 to live with her mother. Her stepfather was still living with her mother. She returned to Natokalau because she was concerned about her mother. The second incident occurred in September 2021. On that day she went and drank alcohol with some youths from the village.

[19] After the drinking party, the complainant came back home and went to sleep in her bedroom. Her son was sleeping with her mother in the kitchen. She had no light in her bedroom but she could see as the light from her neighbour's house lit her room. While she was asleep she felt that someone was touching her breast from underneath her t-shirt. She recognized the person using the lights from the neighbour's house. He was standing beside her bed. She was lying facing up. The person was her stepfather, the accused.

[20] Apart from touching her breasts, he touched her panty and vagina. He touched the inside of her vagina with his fingers. She felt pain. She swore at him. She punched him and he shouted. She went and reported to her mother who then reported to the village headman. The police came and took the complainant for a medical examination.

[21] The complainant was medically examined on 12 September 2021 at Levuka Hospital by Dr Lorima Laginikoro. The complainant's medical report was admitted by consent of the defence. The report contains the following specific medical findings:

Vaginal Examination: Slight bruising noted on the left side of the opening of the vagina.

Speculum Examination: Abrasion and bruising noted of the left side of the vaginal walls.

[22] These injuries could have been caused by blunt force trauma and they looked fresh in the sense that there were still a bit of blood around the area.

[23] That is a summary of the evidence led by the prosecution.

[24] **The Defence Case**

The accused chose not to give evidence. That is perfectly his right. I draw no adverse inference against him for not giving evidence. The defence case is that the prosecution has failed to prove the charges beyond a reasonable doubt.

[25] **Analysis**

I approach the evidence dispassionately, without sympathy or value-laden rules regarding how women and men should conduct themselves.

[26] In deciding the facts in this case, it is my duty to decide which testimony to believe and which testimony not to believe. It is entirely up to me whether to believe everything a witness says, or part of it, or none of it. In considering the testimony of witnesses, I have taken into account:

The witness's opportunity and ability to see or hear or know the things testified to;

The witness's memory;

The witness's manner while testifying;

The witness's interest in the outcome of the case, if any;

The witness's bias or prejudice, if any;

Whether other evidence contradicted the witness's testimony; and

The reasonableness of the witness's testimony in light of all the evidence.

[27] The weight of the evidence as to the fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are, and how much weight I think their testimony deserves.

[28] On count one, the identity of the accused is not an issue. According to the complainant, the accused was on top of her and she faced him. Her visibility was clear as it was daytime and that nothing obstructed her view.

[29] The complainant was consistent with her account of the incident. She was logical. She had given birth three months before the incident. She was inside her bedroom. Her mother was in the kitchen cooking. After breastfeeding her baby she fell asleep. She woke up when she felt someone caressing her breast. The accused had sexual intercourse with her. She shouted. Her mother intervened and hit the accused with a stick. On the same day, she left her home with her baby to live with her uncle in another village.

- [30] On count one, I believe the complainant's account. I feel sure that the accused penetrated the vagina of the complainant with his penis. I feel sure that the complainant did not consent. I feel sure that the accused knew the complainant did not consent. The prosecution has proved count one beyond a reasonable doubt.
- [31] Counts two and three were allegedly committed at the same time. The complainant identified the accused using the lights from the neighbour's house which lit her room in the early hours of 12 September 2021. She was asleep when the accused entered her bedroom. He caressed her breast and then penetrated her vagina with his fingers. When she felt pain she shouted and punched him. He shouted as well when he was punched.
- [32] I warn myself of the dangers associated with mistaken identification but I am convinced that the complainant's identification of the accused is correct and is reliable. There was no other adult male inside the house at the time of the incident. The complainant recognized the accused because he is her stepfather and they lived in the same house. She reported the incident and on the same day she was medically examined. The doctor found fresh vaginal injuries consistent with blunt force trauma. I believe the complainant's account of sexual assault and digital rape on 12 September 2021.
- [33] On count two, I feel sure that the accused assaulted the complainant by touching her breast. I feel sure that this act would be considered indecent by the ordinary standards of respectable people in our community. I feel sure that the accused did not have a lawful excuse for what he did. I feel sure that the complainant did not consent and that the accused knew that the complainant did not consent to the touching of her breast. The prosecution has proved count two beyond a reasonable doubt.

[34] On count three, I feel sure that the accused penetrated the vagina of the complainant with his fingers. I feel sure that the complainant did not consent. I feel sure that the accused knew the complainant did not consent. The prosecution has proved count three beyond a reasonable doubt.

[35] **Verdict**

The verdict of the Court is:

Count one: Rape – Guilty – Convicted.

Count two: Sexual Assault – Guilty – Convicted.

Count three: Rape – Guilty – Convicted.



A handwritten signature in black ink, appearing to read "D.G.", is written above a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused