

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 140 OF 2022

STATE

-v-

VINOD KUMAR

Counsel : Ms S. Shameem / Ms P. Mishra for State
Counsel : Mr. S Kumar for Accused
Submissions filed : 25 March 2024 and 26 March 2024
Date of Ruling : 3 April, 2024

RULING ON VULNERABLE WITNESSES - CHILD FRIENDLY
COURT PROCEDURE

1. The accused is charged with two counts of Rape of a child under the age of 13, one count of Sexual Assault and one count of Criminal Intimidation.
2. The accused pleaded not guilty to the above charges and the trial is scheduled for 2 to 5 April, 2024.

State's Application

3. On 25 March, 2024 the State made the following application;
 - i. *That the trial be conducted with the complainant child and child witness providing evidence and a screen placed before the accused;*
 - ii. *That the trial be conducted in camera closing the court to public.*
 - iii. *That the name of the child complainant and child witness be suppressed.*
 - iv. *That a support person be present with the child witnesses when they provide evidence.*
4. The reasons for the State making this application are based on the following;
 - i. *That the accused person is the step-father of the complainant child who is currently 12 years (she was 11 years at the time of the alleged offending);*

- ii. *That the accused is also the biological father of the other child witness who is currently 9 years old (she was 7 years old at the time of the alleged offending).*
- 5 Given that their main two witnesses are children and that this is a sexual offence in a domestic setting, their application falls under the ambit of vulnerable witnesses.
 6. The State provided the Court with the relevant law governing their application –
 - i. **Screen** – Section 295 and 296 of the Criminal Procedure Act, 2009-
 - ii. **Closed Court** – Section 9 of the Juveniles Act
 - iii. **Name Suppression** – Section 17 of the Juveniles Act
 - iv. **Support Person** – Section 15 (9) of the Constitution

Objection by the Defence

- 7 The Defence objects to the State’s application by stating that they believe in the accused’s rights to a fair and transparent trial under the Human Rights Convention and codified in the Constitution of Fiji.
8. Furthermore, they imply that the State’s application stems from a practice and procedure of “convenience” in trials of sexual offences and in that of rape to gain advantage against the accused person.
9. Additionally, the Defence submitted section 131 of the Criminal Procedure Act where evidence is to be taken in presence of the accused.

Court’s Decision

10. Having read submissions filed by Counsel for both sides on this matter, I allowed the applications made by the State. I provide my reasons as follows:

Special Arrangements for Child Witnesses or Vulnerable witnesses

11. There is an increase of sexual offence cases in Fiji whereby the victims are children of a tender age. These children are brought into contact with the criminal justice system.
12. Being presence in court is a dramatic experience for an adult. Therefore for a child witness, the psychological dilemmas can affect a child victim and increase his/her fear of giving evidence in court.
13. The law not only protects an accused person’s rights to an independent and fair trial. It also protects a child complainant or a child witness when they are in court to provide evidence.
14. It is common knowledge that testifying can be a traumatic experience even for adult witnesses [The Supreme Court in *Kumar v State* [2016] FJSC 44; CAV0024.2016 (27 October 2016)]; revisiting the abuse in courtroom testimony adds to that trauma.

15. There are pressure groups and courts that have made recommendations for changes in current procedures when a child victim testifies. Shameem J in *State v Nadruguca* [2005] FJHC 31; HAC0030D.2004S (21 February 2005), allowed child friendly special arrangements (which include the steps proposed by the State in this case) to ensure that the evidence of children is taken without prejudice to the accused's right to a fair trial.
16. It is the duty of the Court to ensure that the accused has a fair trial, but also that the child victim has equal access to justice. In considering the latter, the court has a duty to consider the particular vulnerabilities of a child witness.
17. Since Fiji in 1993, ratified the Convention on the Rights of the Child (CRC), by ratifying the Convention, Fiji has undertaken to fulfill the obligations under the CRC and to take all appropriate legislative measures to protect the children from all forms of physical or mental violence, injury or abuse, or exploitation or sexual abuse.
18. Article 3 of CRC states as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration”.
19. The CRC recognizes the need to respect right to privacy of children (Article 16). It also emphasizes the need to support children who have been neglected, abused or exploited to recover physically and psychologically and reintegrate into society (Article 39). The justice system of the State party is required to pay special attention to restoring their health, self-respect and dignity.
20. In addition to the obligations undertaken under the CRC, the Government of Fiji has incorporated the provisions relating to rights of the child into its Constitution and subordinate legislation.
21. Section 41(2) of the Constitution recognizes best interests of a child as the primary consideration in every matter concerning the child. Section 15(9) of the Constitution provides that if a child is called as a witness in criminal proceedings, arrangements for the taking of the child's evidence must have due regard to the child's age.
22. Section 21 of the Juveniles Act allows Juvenile Courts to craft child friendly criminal procedure to cater for special needs and protections of children. In view of Section 3(2)(b) of the CPA, all other courts too are at liberty to apply the special procedures applicable to the hearing of criminal proceedings involving juveniles. Accordingly, the law permits this court to evolve special procedures to accommodate child witnesses without jeopardizing the right to a fair trial of the accused.
23. Our laws, the Constitution, the CPA and the Juveniles Act in particular, allow the promotion of child friendly courts and procedures in the best interests of child victims and witnesses. The use of videotaped testimony, the extension of hearsay exceptions, and closed-circuit television, early docketing of cases involving child victims, and the use of expert witnesses to testify about the effects of sexual abuse are some of the special measure that can be taken under legislative provisions. In addition, courts are being asked to rule on the use of innovative procedures in individual cases. The purpose

of these reforms is to minimize the presumed traumatic effects on children of court appearances and maximize children's ability to provide accurate testimony.

24. In considering the aforesaid legal and policy framework the Court in this case has decided to allow the applications of the State for special child friendly procedures.

Screen/Closed Court/Name Suppression/Support Person

25. Prior to the commencement of any trial, the prosecutor can apply to court for directions as to the procedures by which the evidence of a vulnerable complainant or witness is to be given at the trial [s 295(2) of the CPA]. The judge or magistrate is required to hear and determine applications in chambers, and give each party an opportunity to be heard in respect of those applications. During the course of any trial also, the court can hear and consider such applications by either party and make appropriate orders.
26. The judge or magistrate has a discretion to call for and receive any reports from any persons whom the judge or magistrate considers to be qualified to advise on the effect on the complainant or the vulnerable witness of giving evidence in person in the ordinary way or in any particular mode provided for in Section 296 (3) of the CPA.
27. Despite the fact that during hearings of courts must be open to the public, the courts can deviate from this norm when the interests of justice so require [Section 15(4) of the Constitution]. The provision that mandates public hearings does not prevent the making of laws relating to the trials of children, or to the determination of family or domestic disputes, in a closed court. Section 15(5)(a) of the Constitution permits the exclusion by a court or tribunal from particular proceedings (except the announcement of the decision of the court or tribunal) of a person other than parties and their legal representatives if a law empowers it to do so in the interests of justice, public morality, the welfare of children, personal privacy, national security, public safety or public order [Section 15(5)(b) of the Constitution].
28. The Provisions in the [Juveniles Act](#) should be read in conjunction with the Constitutional provisions and [Part XX](#) of the CPA to facilitate child witnesses in court. [Part XX](#) of the CPA provides for protecting vulnerable witnesses in general whether they are adults or children. The law does not define the term “the vulnerable witness”. Therefore, the courts have been given a wide discretion to decide whether the witness before it is a vulnerable witness. Child witnesses can be considered as vulnerable witnesses without specific evidence being led to the effect that the child is likely to be unable to testify through fear, or would suffer emotional trauma from testifying, in open court.
29. In the case of ***State v Doreen Singh*** HAR 005/09 Madigan J confirmed that the test for **name suppression** is whether the order is necessary:
 - (1) *For the due administration of justice; or*
 - (2) *In order to serve the ends of justice.*
30. In the said case, Madigan J further observed:

"... Public embarrassment as one's judicial predicament is not reason enough to seek suppression of name. Despite the fundamental presumption of innocence, if a person's actions bring suspicion upon him(her)self, then that person must bear the consequences of that behavior including having their affairs brought into the public arena. To allow this application would open the floodgates of name suppression by applicants who may wish to apply for high office, or to maybe one day read the news on Fiji One or any other similarly frivolous application."

31. In the case before the Court the child complainant is a minor in an alleged sexual offence in a domestic setting. To have her name published is likely to tarnish her reputation and embarrass her.
32. The court also permits for the presence of a support person to be present when the child witnesses provide evidence.

Conclusion

33. For the aforesaid reasons, I allow the applications of the State and order that following measures be taken to protect and to facilitate the child victim and the child witness in court without prejudice to the accused's right to a fair trial.
 - a. *That a screen be used during the trial and it is to be placed in front of the accused when the children witnesses are testifying in court.*
 - b. *The trial be conducted in camera closing the court to public.*
 - c. *The name of the victim be suppressed.*
 - d. *That a support person from the Women's Crisis Center or whoever the child is comfortable with be allowed to be seated beside the child witness.*
34. I rule accordingly.




Waleen George
Acting Puisne Judge

Dated at Suva this 3rd day of April, 2024.