

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 20 of 2023

STATE

V

MELI SAVUIBULITA
SAKIUSA RAILALA KOTOMAIVIANIBAY TEMO

Counsel : Mr. T. Tuenuku for the State
: Mr. I. Rusaqoli for the 1st Accused
: Ms. K. Marama for the 2nd Accused

Date of Hearing : 15 January 2025
Date of Judgment : 12 March 2025

JUDGMENT

(Newton Hearing)

Procedural Background

1. The manner in which this matter has been litigated is regrettable.
2. The proceedings against the 1st accused were commenced in the Juvenile Court at Savusavu (Savusavu Juvenile Case No. 03 of 2023, and transferred to this Court on 21 February 2023 (HAC 17 of 2023).
3. The proceedings against the 2nd accused were commenced in the Magistrates' Court at Savusavu (Savusavu Criminal Case No. 55 of 2023), and transferred to this Court on 21 February 2023 (HAC 20 of 2023).

4. HAC 17 of 2023 and HAC 20 of 2023 were first called on 1 March 2023. In HAC 20 of 2023, Goundar J inquired about the respective ages of the accused and the complainant, and was informed by the prosecutor that the accused was 22 years old and the complainant was 12 years old. The accused was granted bail and the matter was listed for plea on 13 April 2023.
5. On 13 April 2023, HAC 17 of 2023 and HAC 20 of 2023 were called together. Ratuveli J ordered that the matters be consolidated. A Consolidated Information was filed charging both accused with a single count of rape of a child under the age of 13 years (count 1). The 2nd accused was also charged with indecent assault (count 2). The matter was adjourned to 27 April 2023 for plea.
6. On 27 April 2023, both accused entered pleas of not guilty.
7. When the matter was mentioned on 27 June 2023, Ratuveli J inquired whether the prosecution was relying on admissions in the caution interviews, and also made the observation that consent was not an issue since the complainant was under the age of 13 years. Both accused were represented by Mr. Ratule of counsel.
8. When the matter was mentioned on 31 July 2023, Mr. Ratule was not present in court. In response to a direct question from the judge, both accused confirmed that Mr. Ratule was still their lawyer.
9. On 21 September 2023, the accused informed the Court that Mr. Ratule was no longer representing them.
10. On 12 October 2023, the 1st accused was represented by Ms. Devi of LAC, and the 2nd accused informed the Court that he had applied to the Legal Aid Commission.
11. On 29 November 2023, Ms. Raj of LAC appeared for both accused. She raised a conflict of interest between the accused and informed the Court that

there would have to be a reallocation. There followed a discussion about the caution interviews and the fact that the names of other perpetrators were mentioned, and the matter was adjourned to 1 March 2024 to allow the prosecutor to ascertain whether related charges had been brought against them.

12. There followed a number of mentions concerned principally with pending voir dire grounds.
13. When this matter came before me on 30 October 2024, Ms. Marama appeared for the 2nd accused and drew to my attention a predicament she found herself in. In his unchallenged record of interview, her client had made admissions to having consensual fellatio with the complainant. Ms. Marama informed me that they had advised him that he had available to him a viable defence that the oral sex was consensual.
14. This advice was, of course, plain wrong. I am at a loss to understand how competent defence counsel could have given that advice. It would appear that the genesis of the error was that the complainant's witness statement stated her date of birth as 9 January 2010, which would have made her just over 13 years old at the date of offending on 5 February 2023. In fact, her date of birth was 9 January 2011, as appears on her disclosed birth certificate. That means that she had just turned 12 years old at the date of offending.
15. It may be felt that the fact that count 1 was pleaded as rape of a child under 13 years ought to have put defence counsel on notice that consent was not a viable defence.
16. Be that as it may, Ms. Marama and the 2nd accused were in a quandary in that he had no viable defence to count 1 in light of his unchallenged admissions under caution. The 1st accused was in the same difficulty given his indication that he was no longer challenging his statements against interest.

17. I fixed the trial for 13 January 2025, and acceded to Ms. Marama's request for a short mention date to allow her to further advise her client.
18. When this matter was mentioned on 19 November 2024, Mr. Rusaqoli appeared for both accused as Ms. Marama had taken sick leave. Mr. Rusaqoli informed the Court that his client (the 1st accused) was minded to take a progressive approach, whereas the 2nd accused was maintaining his plea of not guilty. I felt that I needed to hear from Ms. Marama directly as to what the triable issues were, and adjourned for a final PTC.
19. On 16 December 2024, the 1st accused was rearraigned and pleaded guilty. Ms. Marama informed the Court that she had further fully advised the 2nd accused, and he was adamant that he would not plead guilty. Ms. Marama was unable to identify for the Court what the triable issues were. I acceded to her request for a final mention on 20 December 2024.
20. On 20 December 2024, Ms. Marama informed the Court that the 2nd accused had decided to take a progressive approach to count 1, but would maintain his plea of not guilty to count 2. He was rearraigned and pleaded guilty to count 1, and not guilty to count 2. I discussed with the prosecutor whether she intended to proceed to trial on count 2 – indecent assault by poking the complainant's clothed buttocks with an umbrella. Ms. Thaggard very sensibly indicated that she would give further consideration to whether it would be in the public interest to proceed to trial on count 2.
21. I directed that a summary of facts be prepared to be read on 13 January 2025 before proceeding immediately to a sentencing hearing.
22. Good judgment prevailed, and a nolle prosequi was entered on count 2 on 13 January 2025. I was bitterly disappointed however to be informed by Ms. Thaggard that the officer in carriage had taken himself off on leave, and was seeking a final 7 days for his summary of facts and sentencing submissions.

23. Having set aside time to dispose of this matter in what was a busy period for child sexual abuse trials, I ordered the prosecution to prepare the summary of facts, and adjourned to 14 January 2025.
24. The summary of facts was prepared and sent to defence counsel. Unfortunately, it emerged that the facts were disputed. The nub of the dispute was that the accused were not prepared to accept that they had forced the complainant to perform oral sex.
25. I took the view that this substantial conflict on the question whether or not the oral sex was coerced would have a material impact on the proper basis for sentencing the accused.
26. In order to resolve this conflict, I conducted a Newton hearing on 15 January 2025.

The Hearing

27. The hearing took place on 15 December in closed court.
28. The prosecution called the complainant.
29. The 1st accused elected to remain silent.
30. The 2nd accused elected to give evidence in his own defence, and did not call any witnesses.

Prosecution case

31. The complainant gave sworn evidence that she is currently in Class 8 at primary school. In January 2023, she went to Buca Village to visit her sick father.
32. On the evening of 5 February 2023, she was at home with her dad when he asked her to light a mosquito coil. She fetched a coil from her cousin's house, and then asked her dad if she could go and watch movies at her cousin's house. As she was about to enter her cousin's house, Junior called her and

said that Tai Paul was waiting for her at the bridge. She described Tai Paul as her 'boyfriend'.

33. When the group got to the bridge, the 2nd accused said for them to go to the Seventh Day Adventist Church hall. When they arrived at the hall, one of the boys said for one of them to guard one of the doors, and also the other door at the back. The 2nd accused then told her to go into another room. When she was alone in the room with him, he told her to suck his penis. He told her that if she did not suck his penis he would tell her father that she was following the boys. She sucked his penis because she was afraid he would tell on her. The 2nd accused held onto her head and pulled it towards his penis. She sucked his penis five times.
34. After she finished, the 2nd accused called the 1st accused inside the room. The 2nd accused said that if she did not suck the 1st accused's penis he would tell on her. As she was sucking the 1st accused's penis, she heard footsteps outside and saw a torch light. All the boys ran outside. She also went outside. When the torch was shone on her she froze. The man with the torch was her uncle, and he explained that they were looking everywhere for her as she was missing from home. She told her uncle what had happened, and the matter was reported to the police.
35. When she was cross-examined by Mr Rusaqoli for the 1st accused, the complainant confirmed that it was the 2nd accused who had told her to suck the 1st accused's penis. When it was suggested to her that the 1st accused had never held her head as she sucked his penis, the complainant said that he was holding her head. Mr Rusaqoli shifted his ground, and asked her to agree that his client was holding her head, but never pushed her head. She agreed with that.
36. The complainant agreed with Ms. Marama's suggestion that her client and Tai Paul had gone to buy suki before joining her and the other boys in the hall.

She also accepted that she was sitting with the boys and kissed each of them in turn.

37. She went inside the small room with Tai Paul and he asked her whether she would have sex with the other boys. She told him that she cannot.
38. When Ms. Marama suggested that her client had not threatened the complainant, she disagreed. She also disagreed with the suggestion that the 2nd accused had not forced her head down to suck his penis.
39. In answering my questions, the complainant said that she had told the 2nd accused on an earlier occasion that she was in Year 11.
40. When she was in the room with the 2nd accused, Tai Paul was guarding the door.
41. At the close of the prosecution case, Mr Rusaqoli informed the Court that his client would not give evidence. The 2nd accused elected to give evidence.

The 2nd accused's case

42. The 2nd accused said that he was 24 years old. He was 22 years old at the material time.
43. He was with two friends between 8 to 9pm on 5 February 2023. He then met up with Tai Paul, who suggested that they go to smoke suki at the bridge. Tai Paul was 18 years old and a friend of the 2nd accused.
44. As they were smoking, the generator went off, and there was silence. He heard a sound from the church about 10 meters away. They went to check it out and saw the complainant sitting in the hall with four boys. Tai Paul had informed him of the plan to meet them there.

45. The complainant said that she wanted to see who was the best kisser, and she kissed all the boys. She then went into a small room with Tai Paul.
46. They tried to peep on them, but it was too dark.
47. After Tai Paul came out of the small room, the 2nd accused went in. The complainant had called “*next*”. The other boys did not want to go first, so he volunteered. His intention was just to see what the complainant wanted to do. He sat with her, and then asked if he could have sex with her. She replied that she was afraid of getting pregnant and “*she can only suck my dick*”. His response was “*okay, that works for me*”. She went down on him five times and he just touched her hair. At no point did he forcefully grab her hair. He did not threaten her. When he stood up, he heard her call “*next*” again. The 1st accused then entered the room. After the 1st accused came out, another boy entered the room.
48. The 2nd accused then heard gumboots outside and saw a torch light. They all ran away.
49. The 2nd accused had asked the complainant how old she was a few days earlier. She told him that she was in Year 11, which he understood to mean she was around 17 years old.
50. When cross-examined by Mr. Tuenuku, the 2nd accused accepted that he was the eldest person in the hall that evening. He is a cousin of the complainant’s father, but did not see fit to take her home. He accepted that when he entered the small room it was his intention to have sex with the complainant. He knew it was wrong, but he did it anyway.
51. The 2nd accused denied having threatened to tell the complainant’s father that she had been following the boys.

Analysis and determination

52. As outlined above, when the prosecution summary of facts was belatedly served on the defence, and shown to the Court, I was concerned that it did not reflect the disclosed evidence. It is undesirable that pleas are accepted on an artificial basis, and it is in the public interest that offenders are properly sentenced for what they have done.
53. As discussed, the conflicting versions were particularly stark as between the complainant and the 2nd accused. He maintained that he had been led to believe that the complainant was around 17 years old, and he was adamant that he had not coerced or threatened the complainant to take advantage of her. The complainant, on the other hand, was saying that she only performed oral sex on the 2nd accused because he threatened that he would inform her father that she was, in effect, behaving inappropriately around boys.
54. The conflict between the complainant and the 1st accused was less stark. The area of dispute was around whether he had forced her head down in order to orally rape her.
55. I heard evidence from the complainant and the 2nd accused in order to make findings of fact which will found the proper basis for sentence. I direct myself in accordance with the normal criminal standard of proof.
56. There is no dispute that the complainant was a 12-year-old child at the date of offending and that, as a matter of law, she was incapable of giving consent.
57. I found the complainant to be a straightforward and truthful witness. She was prepared to accept that she had willingly kissed all the boys. She also accepted that she had informed the 2nd accused that she was in Year 11, and that the 1st accused had not forced her head down.

58. Her evidence was, of course, deeply troubling. It was obvious to me that the complainant, who was plainly naïve and immature, had been manipulated by older boys, particularly her 'boyfriend', Tai Paul, and the 2nd accused.
59. The groundwork for the offending on 5 February 2023 had been done in advance, and I am sure that the complainant was lured to the church hall by Tai Paul, and that the 2nd accused knew very well that the plan was to sexually abuse her there. There is no other reasonable explanation for why she found herself alone with six older boys.
60. Indeed, the 2nd accused admitted that his intention was to have sex with the complainant. I am sure that he coerced her into performing oral sex on him by threatening to inform her father about her following the boys around. I found the 2nd accused's account of the complainant expressing fears about pregnancy, and offering oral sex, to be wholly contrived. Likewise, I reject his account of the complainant having taken the initiative in calling the boys into the room one after the other as implausible. I accept the complainant's evidence that Tai Paul asked her to have sex with all the boys, and she said that she would not. Clearly, that is why the 2nd accused resorted to coercion.
61. Having observed her in the witness box, I am sceptical about the 2nd accused's claim to have believed the complainant when she said she was in Year 11, but I cannot be sure that he knew that she was only 12 years old.
62. On the central issue of whether the complainant freely and voluntarily consented to oral penetration, I am sure that she did not consent. I am also sure that the 2nd accused knew that she was not consenting. As an educated young man, it must have been obvious to him that the complainant only went along with his desires because he had threatened to report to her father.
63. I am also sure that the complainant did not freely and voluntarily consent to oral penetration by the 1st accused, and that the 1st accused knew very well that she was not consenting. I accept that the 1st accused did not use physical

force on the complainant beyond the commission of the offence. I am however sure that he was aware that the complainant had been coerced by the 2nd accused to facilitate the 1st accused's offending.

64. The Court is now in a position to sentence the accused on a proper basis for what they did.
65. As I indicated on the last occasion, the parties are now at liberty to file further sentencing submissions. I have ordered the Social Welfare Department to prepare pre-sentencing reports on both accused, and further submissions may be filed after the parties have had the opportunity of reading those reports.



Hon. Mr. Justice Burney

At Labasa

12 March 2025

Solicitors

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for both the Accused**