

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 277 of 2024

STATE

vs.

KB

Counsel: Ms. S. Bibi for the State
Mr. E. Veibataki for Accused

Dates of Hearing: 01st April 2025

Date of Closing Submission: 10th April 2025

Date of Judgment: 25th April 2025

JUDGMENT

1. The Names and Identities of the Juvenile Accused and the Complainant are suppressed.
2. The Acting Director of Public Prosecution filed this Information on the 6th of November 2024, charging the Juvenile Accused with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act. The particulars of the offence are:

COUNT 1

Statement of Offence

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

Particulars of Offence

KB on the 17th day of June, 2023, at Lau, in the Southern Division, penetrated the vagina of HT, a child under the age of 13 years, using his tongue.

3. Following the plea of not guilty entered by the Juvenile Accused, the matter proceeded to a hearing that commenced and concluded on the 1st of April 2025. The Prosecution presented evidence from two witnesses, including the nine-year-old Complainant. The Accused chose to exercise his right to remain silent; therefore, he did not provide evidence for the Defence. Subsequently, the Court heard the closing submissions from both parties. Additionally, the Learned Counsel for the Prosecution and the Defence also submitted written submissions. After considering the evidence presented, along with the respective oral and written submissions, I am now pronouncing judgment on this matter.

Burden and Standard of Proof

4. The Accused is presumed innocent until proven guilty. The burden of proof for the charge against the Accused lies with the Prosecution, as the Accused is presumed 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.

Main Elements of the Offences

5. The main elements of Rape are:
 - i) The Juvenile Accused,
 - ii) Penetrated the vagina of the Complainant with his tongue,
 - iii) The Complainant was a child under the age of 13 years at the time of the alleged penetration,

5. The first element is the identity of the Juvenile Accused. It is the Prosecution's responsibility to prove beyond a reasonable doubt that the Juvenile Accused committed this offence against the Complainant.
6. Evidence of even the slightest penetration of the Complainant's vagina by the Juvenile Accused's tongue is adequate to establish the element of penetration.
7. The Defence did not dispute the Complainant's birth date and the birth certificate.

Admitted Facts

8. The Juvenile Accused tendered the following facts as admitted facts pursuant to Section 135 of the Criminal Procedure Act.
 1. *That the person charged in this matter is KB.*
 2. *That the Complainant in this matter is HT.*
 3. *That the Accused and the Complainant is known to each other therefore identify is not in dispute.*
 4. *That at the time of the alleged offence KB also reside at Moce Village, Lau.*
 5. *The following can be tendered in consent and the content is not in dispute:*
 - i) *Medical Examination Report dated 09.07.23 of HT.*
 - ii) *Birth Certificate of HT registration number 168922.*

Prosecution's Case

9. The Complainant testified that this alleged incident occurred when she was six years old and was in class 1 at school. According to the Complainant, she played hide and seek with her friends in the village, including the Juvenile Accused. While she was near the bush by her house, the Juvenile Accused came and pushed her to the ground. He then removed her clothes and started to lick her vaginal area.

10. When she returned home, the Complainant informed her sister and later to her grandmother. The matter was then reported to the Police. The grandmother stated in her testimony that the Complainant told her that the Juvenile Accused had called her into an old woman's house, which was empty, and then licked her private part. According to the grandmother, this incident occurred in 2022 when she was in class 1.

Closing Submissions

11. The central argument of the Defence's closing submissions is that the Prosecution presented evidence relating to an incident that allegedly occurred in 2022, when the Complainant was six years old, rather than an incident that was alleged to have taken place on the 17th of June 2023, as explained in the Information. Hence, the Learned Counsel for the Defence argues that the case presented by the Prosecution's witnesses differs from the allegation made against the Juvenile Accused in the Information.
12. Additionally, the Learned Counsel for the Defence submitted that the evidence presented by the Complainant and her grandmother is materially contradictory regarding this alleged incident. As per the Complainant, this alleged incident occurred in a bush while playing hide and seek with her friends, including the Juvenile Accused. On the contrary, the grandmother testified, stating that the Complainant told her that the Juvenile Accused took her into an empty house in the village and then licked her vaginal area.

Evaluation of Evidence

13. The Complainant was nine years old. The evidence provided by the child witness must be evaluated by considering factors relevant to her strengths and weaknesses regarding her age, mental development, understanding, and ability to communicate. (*vide*; **Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021)**).
14. The Court needs to consider two aspects when deciding the testimonial trustworthiness of the evidence: the credibility of the witness and the reliability of the evidence. Credibility is

linked to the correctness or veracity of the evidence, while reliability relates to its accuracy. In this process, the Court should consider promptness or spontaneity, probability or improbability, consistency or inconsistency, contradictions or omissions, interestedness or disinterestedness, bias, demeanour, and deportment in court, as well as the evidence of corroboration where relevant. (**vide; Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**)

15. As outlined in the particulars of the offence in the Information, the allegation against the Juvenile Accused is that he had allegedly penetrated the vagina of the Complainant with his tongue on the 17th day of June 2023. The Complainant was born on the 27th of October, 2016. As outlined above, she stated in her evidence that this incident occurred when she was six years old. She further testified that she was attending Class 1 at that time.
16. The Fiji Court of Appeal in **Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019)** at para 69, held that:

*“This court, in the case of **Lal v State**; AAU 154.2014; [2018] FJCA 147 (04 October 2018) adopted the ruling of the Supreme Court of Canada in **H. M the Queen v N. H. Rooke and R. C. De Vries**; [1990] 1990 CanLII 1131 (SCC) and **Morozuk v The Queen**; 1986 CanLII_72 (SCC), [1986] 1 S.C.R. 31, which held that it was a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved; and, permitting the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full Defence and a fair trial.”*

17. It is apparent from the above judicial guideline that the Prosecution must prove the offence as particularized in the Information. In this matter, the nature of the alleged conduct, as testified by the Complainant, does not materially differ from the outlined particulars of the offence in the Information. However, the time of the alleged conduct described by the

Complainant and the grandmother in their respective testimonies is notably different from the particulars of the offence as stated in the Information.

18. As stated in the Information, this alleged incident occurred on June 17, 2023. Conversely, the testimonies of the Complainant and her grandmother assert that the incident described by the Complainant in her evidence took place in 2022, thus creating reasonable doubt as to whether the Complainant and her grandmother were testifying about the same incident that the Prosecution alleged in the Information or another incident of a similar nature that had occurred in 2022 when the Complainant was six.
19. I shall now proceed to discuss the contradictions highlighted by the Learned Counsel for the Defence in his closing submissions so as to determine whether those contradictions affect the credibility and reliability of the evidence given by the Complainant.
20. The Prosecution tendered the evidence of the grandmother as a witness to the recent complaint. According to the grandmother, the Complainant had informed her that the Juvenile Accused had taken her to an empty house in the village and then licked her vaginal area.
21. Gates CJ in **Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014)** has defined the evidence of a recent complaint, outlining its scope and application. Accordingly, the evidence of the recent complaint is not evidence of the facts complained of but rather evidence that connects to the issue of consistency or inconsistency of the evidence provided by the Complainant. Hence, the evidence of the recent complaint could enhance the credibility and reliability of the evidence presented by the Complainant. The evidence of the recent complaint does not establish the facts to which the Complainant testified or disprove those facts. It only establishes the consistency of the Complainant, showing that she has stated a similar version of events in her evidence to the recent complaint witness. The Complainant is not required to disclose the details of the offence, covering all the ingredients. It is sufficient to explain the material and relevant alleged sexual conduct purportedly committed by the perpetrator.

22. In the present case, the Complainant testified that the alleged incident of sexual assault occurred in the bush while she was playing hide and seek with her friends, including the Juvenile Accused. However, the grandmother stated that the Complainant mentioned an incident in an empty house in the village, indicating that the Complainant was not consistent in reporting this incident to her grandmother.
23. Taking into account the issues outlined above, it is not safe to conclude that the Complainant's evidence is credible and reliable. Therefore, I conclude that the Prosecution failed to prove that the Juvenile Accused committed the offence of Rape as charged in the Information beyond a reasonable doubt.
24. In conclusion, I find the Juvenile Accused not guilty of the offence of Rape as charged and acquit him of the same accordingly.
25. Thirty (30) days to appeal to the Fiji Court of Appeal.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe".

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

At Suva

25th April 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.