

IN THE HIGH COURT OF FIJI AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 311 of 2022

STATE

-v-

SALOTE NAMESA

Counsel : Ms. Kumar P for State
Ms. Dean. A for the Accused

Date of Trial : 20th May 2024

Date of Judgment : 4th March, 2025

JUDGMENT

1. The complainant's name will be referred to as "ABBL" pursuant to the name Suppression Order.
2. Salote Namesa, the accused, had pleaded not guilty to two counts of Rape pursuant to section 207 (1) and (2) and (3) of the Crimes Act, 2009 laid out as follows in the Information filed by the Director of Public Prosecutions dated 13th October, 2022;

FIRST COUNT

Representative Count

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SALOTE NAMESA, between the 1st day of January, 2021 and the 31st day of December, 2021, at Yanuca Island, Serua, in the Central Division, penetrated the vagina of **ABBL**, a girl under the age of 13, with her fingers.

SECOND COUNT

Representative Count

Statement of Offence

RAPE: contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

SALOTE NAMESA, between the 1st day of January, 2021 and the 31st day of December, 2021, at Yanuca Island, Serua, in the Central Division, penetrated the vagina of **ABBL**, a girl under the age of 13, with her tongue.

ADMITTED FACTS

3. Both parties agreed to the following facts;
 - 1.1 That the person charged in this matter is Salote Namesa ["Accused"]
 - 1.2 That the Complainant in this matter is ABBL ["Complainant"]
 - 1.3. That the Accused and the Complainant are related therefore are known to each other.
 - 1.4. That at the time of the alleged offending, both the Complainant and the Accused were living in Yanuca Village.
 - 1.5 That the Accused's date of birth is 07/05/1997.
 - 1.6 That in 2022, the Complainant was attending Yanuca Primary School as a class 8 student.
 - 1.7 That during the Covid outbreak in 2021, the Accused was often sleeping over at the Complainant's home.
 - 1.8 That the Complainant's grandmother also lives in their home in the village.
 - 1.9 That the Accused is known to Jordon Richard who is a student at Yanuca

PROSECUTION EVIDENCE

4. During the trial, the State summoned only the complainant to provide sworn evidence. Prosecution Witness 1 - ABBL testifies that she is 15 years old. She resides with her uncle, aunt and their children at Cunningham Road.
5. She further states that she was born on 13th March, 2009. PW1 identified her Birth Certificate and tendered same as **Prosecution Exhibit No. 1.**
6. In 2021 she was staying at her grandmother's house at Yanuca Island. She was living alone with her grandmother. Her family house is close to that of her grandmother's. Since her grandmother is old, she was there to assist her.
7. The house consists of two bedrooms. She occupies one room and the other room is vacant as her grandmother sleeps in the lounge. Her room has a door.
8. In 2021 she was 12 years old and a Class 7 student at Yanuca Primary School. She was living with her grandmother. One night Salote (Accused) came to their house. At that time, she was in the bedroom and her grandmother was in the living room.
9. She heard Accused and her grandmother conversing. Thereafter, she heard her grandmother informing Accused to sleep with her in the bedroom. She was lying in the bedroom when Accused entered and called her. Accused suggested to her that they communicate.
10. After conversing with the Accused, she fell off to sleep. As she was sleeping she felt the Accused touching her all over her body. At that time, she was wearing shorts and a t-shirt. Underneath she was wearing a sports bra and panty. The Accused was touching her from the outside and also inside of her clothes. She felt scared. The Accused then enquired from her as to which school she would attend in Form 3. She was not aware of the reason for her enquiry. Thereafter, Accused kissed her lips and inserted her fingers into her vagina.
11. PW1 then states that the Accused is her aunt from her paternal side. The Accused full name is Salote Namesa. She had known Salote since birth. She has no knowledge as why Accused had visited her grandmother's house.

12. She also testified that when the Accused inserted three of her fingers into her vagina, she was naked. The Accused had removed her pants. Accused inserted her fingers for quite sometimes. In the process, she felt scared. She also experienced pain on her lower abdomen.
13. At the time the Accused was inappropriately touching her, her grandmother was in the living room. She did not react as she was scared. Accused had also threatened her as to not to reveal their relationship to anyone. She said “relationship” because the Accused is fond of her.
14. She further states that the Accused also licked her vagina with her tongue. She did so for quite sometimes. When Accused was licking her vagina – she was just lying down. The Accused was on lying top of her. She did not shout out to her grandmother because she was scared that the Accused might do something to her or even punch her. Accused had already warned her about reporting this matter to anyone.
15. This witness states that she is aware of the whereabouts of her vagina. She placed a mark on the diagram to indicate where her vagina is located. [Prosecution tendered the diagram of a Female Child as **Prosecution exhibit number 2**].
16. PW1 further states that she was able to identify the Accused from a bulb light that was shining from the lounge into her bedroom. She was able to see the Accused face clearly.
17. She did not report the incident to her parents and the Head Teacher because she was scared that the Accused might assault her.
18. One of her friend’s namely Richard saw the Accused forcing her to kiss. Richard then enquired from her about that incident. She confided in Richard by relating to him what had happened. Richard reported the matter to the Head Teacher. The latter questioned her and she related to him what had happened. The Head Teacher reported the matter at the Navua Police Station.
19. She identified the Accused person in court. [Defence Counsel informed the court that identification is not an issue].
20. In cross examination she confirmed that the Accused came to her grandmother’s house and slept with her in the bedroom. It was during that time that the Accused penetrated her fingers into her vagina. Accused also penetrated her vagina with her tongue.
21. She denied having a relationship with the Accused.
22. No re-examination.
23. At the close of the Prosecution case, the Defence did not make any application before the Court. The Court ruled that there is a case to answer pursuant to **section 231** of the **Criminal Procedure Act, 2009**.
24. The court provided the Accused with her rights pursuant to **Section 231 (2)(a)(b) and (c)** of the **Criminal Procedure Act 2009**.
25. The Learned Defence Counsel informs the court that the Accused wishes to provide sworn evidence. They do not have other witnesses.

DEFENCE CASE

26. Defence Witness 1 (DW1) – Salote Namesa, states that the complainant is her niece. She had known her since infancy.
27. DW1 further states that in 2021, she was staying at Yanuca, Serua. She lived with her parents. Their house is located besides the steps leading to the school. ABBL's house is besides the seashore.
28. In 2021, the complainant was not staying at their house. She was staying with her grandmother. She has visited ABBL's grandmother's house. However, she cannot recall as to how many times she had visited the house. She confirmed that she had slept at the complainant's grandmother's house.
29. She also confirmed that sometimes from 1st January, 2021 to 31st December, 2021, she had slept in ABBL's grandmother's house specifically in the complainant's room.
30. When questioned about the alleged incident, she totally denied inserting or penetrating the complainant's vagina with her fingers or tongue. She further states that she was in a relationship with the complainant and only her cousin Loraini knows about it.
31. DW1 concedes to kissing the complainant and states that this incident was witnessed by one Richard.
32. Later she received a letter from the Head Teacher of the complainant's school who warned her to set foot in the school compound. She went to the school and the Head Teacher informed her of the allegations against her. The Head Teacher did not specifically inform her as to what she did to the complainant. He warned her to keep away from the school compound since the complainant attends school there.
33. She states that she has no knowledge as to why the complainant would make allegations of her penetrating complainant's vagina with her fingers and tongue.
34. When cross examined she states that the complainant is her niece. The complainant is younger than her. In 2021 she was 25 years old and complainant was in class 7
35. She first denied kissing or touching the complainant when they sleep. Later she admits to kissing the complainant and said that she only touched her face. She denied touching any other parts of her body. She also denied removing the complainant's clothes and penetrating her vagina with fingers or penetrating her vagina with her tongue.
36. No re-examination.

LAW

37. Section 207(1), (2)(b) and (3) of the Crimes Act reads as follows:

*207. — (1) Any person who **rapes** another person commits an indictable offence.*

38. Section 207(2) (b) of the Crimes Act is reproduced below.

*(2) A person **rapes** another person if —
(a); or*

- (b) *the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.*

39. Therefore, when Section 207(1) is read with Section 207(2)(b) it would read as follows:

207. —(1) Any person who **rapes** another person commits an indictable offence.

(2) A person **rapes** another person if—

- (b) *the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.*

40. Section 207(2) (b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

41. Section 207(3) of the Crimes Act provides that “*For this section, a child under the age of 13 years is incapable of giving consent.*”

ELEMENTS OF THE RAPE

42. Therefore, in order for the prosecution to prove the First and the Second count of **Rape**, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 January, 2021 and 31 December, 2021);
- (iii) At Yanuca Island, Serua, in the Central Division.
- (iv) Penetrated the vagina of ABBL with hers fingers; and
- (v) At the time ABBL was a child under 13 years of age.

43. Similarly, in order for the prosecution to prove the second count of **Rape**, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this case between the 1 January, 2021 and the 31 December, 2021),
- (iii) At Yanuca Island, Serua, in the Central Division;
- (iv) Penetrated the vagina of ABBL with her tongue; and
- (v) At the time ABBL was a child under 13 years of age.

ANALYSIS

44. The identity of the Accused is not an issue here as the parties are related to each other and a well acquainted.

45. The issue of consent will not arise in this case. A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. In this case, at the time of the alleged incidents, the complainant was below the age of 13, and therefore, she has no mental capacity to consent.

46. The only issue here is to whose version the court should believe.

47. I observed the demeanour of the complainant. I am not convinced that she had made up this serious allegations against the Accused who is related to her as her aunt.
48. The complainant was calm and confident when providing her evidence to the court. She boldly told the court as to how her aunt inserted her three fingers into her vagina and she felt pain in her lower stomach. She also states that the Accused also inserted her tongue into her vagina.
49. As for the Accused, her evidence is quite unreliable, First, she states that she only slept with the Accused in her bedroom but did not do anything to her. Then she later confesses to kissing the complainant and said she only touched her face.
50. The offence of digital **rape** is established. Prosecution has proved the charge beyond reasonable doubt.

CONCLUSION

51. **Salote Namesa**, you are found guilty for two counts of rape as charged and convicted accordingly.
52. That is the Judgment of this Court.




Waleen George
Acting Puisne Judge

Dated at Suva this 4th day of March, 2025

Solicitors

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