

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 09 OF 2014

STATE

-v-

NAVITALAI TATORO

**Counsel: Ms. S. Kiran for the State
Ms. V. Narara for Accused**

Date of Summing Up : 21st April, 2106

Date of Judgment : 22nd April, 2016

JUDGMENT

[1]. At the last moment, Rape charge against the accused was withdrawn by the Director of Public Prosecution and Amended Information was filed. According to the amended Information, Accused was charged with following counts and tried before three Assessors.

FIRST COUNT

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NAVITALAI TATORO between the 22nd of January 2012 and 27th April 2012 at Lautoka in the Western Division unlawfully and indecently assaulted Selina Tonu Aropio.

COUNT 2

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

NAVITALAI TATORO between the 31st of May 2012 and 01st of June 2012 at Lautoka in the Western Division unlawfully and indecently assaulted Selina Tonu Aropio.

- [2]. Assessors unanimously found the Accused not guilty on the First Count and found him guilty on the Second Count.
- [3]. I direct myself in accordance with my own Summing Up and review the evidence led in the trial. I pronounce my judgment as follows.
- [4]. Prosecution called the Complainant and her school mate Adi Vika to prove the charges against the accused. Accused exercised his right to remain silent and called his partner, Farina, to disprove the prosecution version.
- [5]. Prosecution based its case substantially on the evidence of the Complainant. To support her version, they adduced recent complaint evidence through her school mate, Adi Vika.
- [6]. There is no dispute in this case with regard to the identity of the Accused. Complainant had known the Accused from 2007 as her sister's partner.
- [7]. Case for the Prosecution is that the Accused unlawfully and indecently assaulted the Complainant on two occasions. Defence denied the charges and took up the position that the allegation was made up.

- [8]. I am satisfied that the evidence Complainant gave is truthful and believable. There is no rule for me to look for corroboration of her evidence. However, I considered recent complaint evidence and distress evidence adduced through Adi Vika to test the consistency and credibility of her evidence.
- [9]. Complainant did not report the incident to her mother or sisters soon after the incident. She, however, informed, in the following morning, Adi Vika, her school mate, everything accused had done to her. She had explained to Adi Vika why she did not complain in the first instance to her mother or sisters. Complainant was scared to complain to them. Her other explanations; that even if she told them, they would not believe her, and that they would take her elder sister's side, are probable and believable. Accused was an influential person in her family as her elder sister's partner. In addition to that he was and is still financially supporting them. In that context, it is reasonable for her not to complain at the first available opportunity to the family and to complain to her school mate whom she trusted.
- [10]. Adi Vika explained to court the disposition and demeanor she noticed in Complainant that prompted her to question the Complainant at the time of complaint. Complainant looked distressed in the school washroom.
- [11]. Complainant in her statement to police four days after the incident told that accused inserted his finger into her under garment and into her vagina. She did not tell that part in court. Instead, she said that he only rubbed her thighs up to her under garment. Assessors, having heard my direction on how to approach contradictions *vis-à-vis* previous statements to police, did not consider the contradiction material so as to affect the credibility of her evidence. In my opinion, given the circumstance of this case, assessors were justified in coming to that conclusion.
- [12]. I carefully watched Complainant giving evidence in court. She was straightforward and not evasive. Her conduct in court is consistent with her honesty.
- [13]. There was no evidence before Court to conclude that Complainant had a motive to make up a case against the Accused.

[14]. Farina, the witness called by the Defence, is no doubt an interested witness *vis-à-vis* the accused. Accused fathers the child she gave birth to. They are living together even today as husband and wife. Accused financially supports Farina and contributes toward her family. Farina, in turn, had allowed the accused to come and live with them despite the allegation against him. Complainant also lives in the same house even today. In this context it is not unreasonable to consider Farina as an interested witness coming forward to save skin of the Accused.

[15]. Evidence called by the Defence failed to create any doubt in the Prosecution case.


[16]. However, Prosecution failed to adduce any evidence in respect of the 1st Count. Complainant confined herself in her evidence to the incident occurred on 31st May 2012 and did not recall any incident other than that. Assessors are justified in coming to an opinion of not guilty on the 1st Count.

[17]. I find that an act of rubbing thighs of an underage girl up to her undergarment whilst she is at sleep constitutes the offence of Sexual Assault. Even though Accused could not reach the vagina due to her sudden wakeup, rubbing extended up to her undergarment which covered her private part. His conduct is necessarily having sexual connotations. Assessors correctly formed an opinion of guilty on the 2nd count of Sexual Assault.

[18]. I agree with the unanimous opinion of the Assessors. Prosecution proved the Second Count beyond reasonable doubt. I find the Accused guilty on the Second Count and convict him accordingly. First Count is not proved. I acquit and discharge the accused on the First Count.

[19]. That is the judgment of this Court.




Aruna Aluthge
Judge

**Solicitors: Office of the Director of Public Prosecution for the State
Office of the Legal Aid Commission for Accused**