

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 271 OF 2014

STATE

V

SANDEEP NARAYAN DASS

Counsel : Ms. S. Lodhia and Ms. S. Tivao for State
Ms. T. Kean for the Accused

Dates of Hearing : 20 - 22 June 2016

Date of Summing Up : 22 June 2016

Date of Judgment : 23 June 2016

(The name of the complainant is suppressed. The complainant will be referred to as AS)

JUDGMENT

1. The accused is charged for the following offences;

FIRST COUNT

Statement of offence

Rape: Contrary to Section 207 (1) & (2)(b) & (3) of the Crimes Decree No. 44 of 2009.

Particulars of offence

SANDEEP NARAYAN DASS on the 5th of July 2014 at Nasinu in the Central division penetrated the vagina of AS a child under the age of 13 years by inserting his fingers into the vagina of the said AS.

SECOND COUNT

[Representative Count]

Statement of offence

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

Particulars of offence (b)

SANDEEP NARAYAN DASS between the 1st of July 2012 to the 14th of July 2014 at Nasinu in the Central Division, unlawfully and indecently assaulted AS by playing with his penis in front of the said AS before ejaculating onto her.

THIRD COUNT

Statement of offence

Assault Causing Actual Bodily Harm: Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

Particulars of offence (b)

SANDEEP NARAYAN DASS on the 15th of July 2014 at Nasinu in the Central Division assaulted AS thereby causing the said AS actual bodily harm.

2. The accused pleaded guilty for the third count above on 16/12/14. The summary of facts filed on 20/06/16 was read out on the same day and the accused agreed with same. He was accordingly convicted of the third count as charged on 20/06/16.
3. After trial the assessors have returned with a unanimous opinion that the accused is guilty of the first and the second counts above.
4. I direct myself in accordance with the summing up delivered to the assessors on 22nd June 2016 and the evidence adduced during the trial.
5. I have carefully observed the complainant and her brother when they gave evidence who were 10 years and 14 years old respectively. I found that they gave honest and truthful answers. They were not evasive. There was no reason for me to conclude that they had an ulterior motive when they gave evidence. There were certain inconsistencies in their evidence as highlighted by the defence. But in my view, those inconsistencies which I have mentioned in my summing up were insignificant and are not relevant in considering whether or not the elements of the offences charged are proved. Their evidence concerning the elements of the offence was firm.
6. Considering all the evidence led in this case and his demeanour when he gave evidence, I am unable accept the accused as a credible witness. The second defence witness is the

complainant's mother who opted to live with the accused and deserted the complainant and her brother who gave evidence. I did not find her to be a credible witness.

7. The accused is charged with the offence of rape contrary to section 207(2)(b) of the Crimes Decree 2009 on the first count. The said section reads thus;

“(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;”

8. Though the first count alleges that the accused 'penetrated the vagina' of the complainant, the definition of the offence under section 207(2)(b) includes the word vulva as well. Therefore in my view, though the relevant charge only refers to the vagina, it is understood that the element based on penetration of the offence of rape under section 207(2)(b) is established if the vulva is penetrated.

9. Section 162 of the Criminal Procedure Decree provides for the court to convict an accused for an alternative or lesser offence though the accused is not charged with such offence. In my view, the underlying principle in the said section suggests that the court should not hold that the element based on penetration under section 207(2)(b) is not made out, simply because the charge only refers to vagina when there is evidence that the vulva was penetrated.

10. With regard to the first count, the complainant who was 8 years old at the time of the alleged offence and 10 years old when she gave evidence said that, on one morning when only the accused and her brother was at home, the accused took her to the bed in the bedroom, removed her cloths, took off his cloths and got on top of her. She said the accused put something white on her genitalia which came out of his genitalia. The complainant used the words “main part” to refer to the genitalia. She said the accused kissed her and inserted his finger inside her genitalia. The accused pushed her down when the complainant's brother called the accused and came inside the room. She said she felt bad when the accused did this to her and she was crying.

11. Complainant's brother said that he is 14 years old and on 05/07/14 in the morning he heard the complainant crying. He saw the accused on top of the complainant inside the

bedroom. He saw this clearly through a hole in the tin wall which separated the bedroom and the sitting room in their house. He shouted “oye” and entered the bedroom. When he entered the room he saw the complainant lying on the floor naked and that the accused was covering him with a blanket.

12. The doctor who examined the complainant on 16/07/14 said that the complainant’s hymen was intact and there was a slight swelling on the external urethral opening and an abrasion on the inner lip of both labia minora. Her opinion was that there was no digital penetration into the vagina as the hymen was intact and that the abrasion she noticed on the labia minora was 4 to 7 days old. According to the doctor, vagina is a tube which commences from the ‘vaginal opening’. She said the labia minora covers the vaginal opening. If something is to go through the vaginal opening, the hymen will sustain a laceration. She said, the labia minora is found inside the vulva.
13. I accept the above evidence of the complainant and her brother on the first count. The complainant showed one third of her index finger as the extent to which the accused penetrated her genitalia with his finger.
14. The third prosecution witness, the doctor, said the hymen could still be intact if there was a slight penetration up to the vaginal opening. She also said that the injuries she observed were between 4 to 7 days old. According to the case presented by the prosecution the complainant was examined 11 days after the alleged incident. With regard to the age of an injury a doctor can only provide an estimate based on the experience and the medical literature. Therefore, the doctor’s opinion on the age of the injuries cannot be considered as conclusive evidence that the alleged incident did not take place. In my view, the third prosecution witness’ findings are not inconsistent with the evidence of the complainant.
15. Therefore, I am satisfied that the prosecution has proved the elements of the first count beyond reasonable doubt.
16. To find the accused guilty of the second count, the prosecution should prove that the accused unlawfully and indecently assaulted the complainant by ejaculating on her at least on one occasion during the period between 01/07/12 and 14/07/14.

17. I accept the evidence of the complainant that during the period in question on a day she did not go to school, the accused went inside the bathroom when she was bathing and took off his cloths in front of her. From the evidence of the complainant where she said that the accused put some white thing on her genitalia which came out of his genitalia it can be reasonably inferred that the accused masturbated and ejaculated on the complainant's genitalia. This act, without any doubt, was unlawful, indecent and sexual in nature. The question is whether this act can be considered as an assault.
18. Black's law dictionary (6th edition) provides the following definition to the word 'assault';

"Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another."
19. Further, the word 'injury' is defined in the same dictionary as follows;

"Any wrong or damage done to another, either in his person, rights, reputation, or property. The invasion of any legally protected interest of another."
20. Considering the above definitions, forcefully and intentionally entering in to the bathroom when the complainant was naked and having a shower and then taking off his cloths in front of her itself is an intentional display of force which would cause fear in the mind of the complainant. She was subjected to a further assault by the accused ejaculating onto her body.
21. Therefore, I am satisfied that the elements of the offence of sexual assault as charged on the second count are proved beyond reasonable doubt.
22. In the light of the above, I find that the prosecution has proved the first and the second counts beyond reasonable doubt.

23. I am therefore convinced that the unanimous opinion of the assessors in finding the accused guilty for the offence of rape and the offence of sexual assault as charged was not perverse and it was open for them to reach that conclusion.
24. I concur with the unanimous opinion of the assessors that the accused is guilty of the first and second counts as charged. The accused is convicted accordingly.



Vinsent S. Perera
JUDGE

Solicitors for the State: Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused: Office of the Legal Aid Commission, Suva