

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 125 of 2017

STATE

v.

'AA'

Counsel: Mr. T. Tuenuku for State
Mr. L. Qetaki for Accused

Hearing: 28th June, 2017, 17th, 18th July 2017

Summing Up: 20th July 2017

Judgement: 24th July 2017

JUDGMENT

Introduction

1. The names of the accused and the victim are suppressed. The accused is hereafter referred to as **AA** and the victim is referred to as **BB**.
2. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of the offence are that:

*“AA between the 1st of February 2017 and 28th of March 2017, at Vatudavila Settlement, Waibau, Naitasiri in the Eastern Division, penetrated the vulva of **BB** with his finger”*

3. The accused pleaded not guilty for the offence. Hence, the matter proceeded to the hearing. The hearing commenced on the 26th of June 2017 and concluded on the 18th of July 2017. The prosecution adduced the evidence of four witnesses including the victim. The accused gave evidence on oaths, but did not call any other witnesses for the defence. The learned counsel for the prosecution and the defence made their respective closing addresses on the 18th of July 2017. I then delivered the summing up on the 20th of July 2017.
4. The three assessors in their unanimous opinion found the accused guilty for this offence.
5. Having considered the evidence presented during the hearing, the respective closing addresses of the counsel for the prosecution and the defence, the summing up and the opinion of the three assessors, I now proceed to pronounce my judgment as follows.

Background

6. The prosecution alleges that the accused penetrated the vulva of the victim with his finger. The victim was one year old at the time this alleged offence took place. The accused is the paternal grandfather of the victim. The victim had told her mother that “Tai hurt her” while pointing at her private part.
7. The accused denies this allegation and contends that the person “Tai” as referred to by the victim is another person.

Analysis


8. Having carefully considered the evidence adduced by the prosecution and the defence, I find the main contention in this matter is whether the accused is the “Tai” as referred by the victim.

9. The counselor Ms. Jiokapeci in her evidence explained the cognitive ability of the Victim. According to Ms. Jiokapeci, a child in that age could communicate using either sentences or words. They can answer differently to the different questions. She found the victim could answer differently to the different questions. The victim communicated with her to the level that she could sufficiently make a conclusion about the therapy sessions. The evidence of Ms. Jiokapeci was not challenged or disputed by the defence. Hence, I accept them as truthful and credible
10. The victim in her evidence answered "yes" when she was asked by the learned counsel for the defence whether she knows Tukai. She further said "yes" when she was asked whether Tukai is a small boy. She then said "yes" answering to the question whether she calls Tukai as Tai. Moreover, she said "yes" when she was asked whether she has two grandfathers.
11. The accused in his evidence said that Tukai is the youngest of the seven children of his daughter, who resides close to the house of the victim. Tukai is presently in class one in the school. The accused further said that he looks after Takayawa Vuli, who is an uncle of the mother of the victim at his house. The victim calls Takayawa as Tai as he is also one of the grandfathers of the victim.
12. The mother of the victim in her evidence said that the victim does not call any of the children living in her house or the house of the accused as "Tai". According to her evidence, the victim has two siblings who are living with her in the house. There is only one child living in the house of the accused. That is the little daughter of one of the sons of the accused.
13. In the cross-examination, the mother of the victim admitted that the daughter of the accused also lives in the settlement and her house is very close to their house. The Mother of the victim did not mention anything about the children of the daughter of the accused. She further admitted that Takayawa Vuli lives with the accused in his house. He is also one of the grandfathers of the victim.

14. The mother of the victim further admitted that the victim uses limited number of words when speaking. Ms. Jiokapeci in her evidence said that the level of development of the victim is low as she answered word by word. Normally a child in her age could use few words and form a sentence when communicating.
15. According to these evidence adduced during the hearing, the victim admitted in her evidence that she calls her cousin Tukai as Tai. According to the opinion of the Counselor Ms. Jiokapeci, the cognitive ability of the victim was normal and she could answer to different type of questions. According to these reasons, it is my opinion that there is a reasonable doubt whether the victim is referring the accused as "Tai" or any other person.
16. The prosecution decided not to produce the evidence of any police officers who were involved in the investigation on this matter. If the prosecution called the investigation officer, he would have given the information about Tukai and Takayawa Vuli. The investigation officer would have explained the reasonable suspicion that they have against the accused in order to arrest and charge him for this offence. In the absence of such evidence, it is my opinion that it is unsafe to form a positive inference that the "Tai" as referred to by the victim is the accused.
17. Having considered the reasons discussed above, I find the prosecution has failed to prove beyond reasonable doubt that it was the accused who committed this crime of rape as charged.
18. In view of these reasons, I find there is a cogent reason for me to disagree with the unanimous opinion of guilt given by the three assessors.
19. I accordingly hold that the prosecution has failed to prove beyond reasonable doubt that the accused is guilty for this offence of rape as charged. Therefore I find the accused is not guilty for the offence of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act and acquit him accordingly from the same.

20. Thirty days (30) to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
24th July 2017

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