

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

CRIMINAL CASE NO. HAC 02 of 2017

BETWEEN : **STATE**

AND : **ADI MULLAM NAICKER**

Counsel : Mr. T. Tuenuku for the State
Ms. J. Singh for the Accused

Hearing on : 21st of May 2019 – 23rd of May 2019

Summing up on : 23rd of May 2019

Judgment on : 24th of May 2019

JUDGMENT

(The name of the juvenile is suppressed and he will be referred to either by his initial, N or by the witness number, PW1.)

1. The accused, Adi Mullam Naicker is charged with a count of Rape, Contrary to section 207(1) and (2) (c) and(3) of the Crimes Act of 2009 alleged to have committed on N, who is a child below the age of 13 years.
2. The charge was;

Statement of Offence

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

Particulars of Offence

Adi Mullam Naicker, on the 05th day of November 2016 Tuvu, Ba, in the Western Division, penetrated the mouth of N, a child under the age of 13 years, with his penis.

3. The accused pleaded not guilty to the charge and the ensuing trial lasted for 3 days. The juvenile, his elder brother, his mother and his father gave evidence for the prosecution while accused's another grandchild gave evidence for the defence.
4. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused guilty to the alleged count.
5. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
6. Prosecution case was based basically on the evidence of the PW1, the juvenile. His evidence is that;
 - i) He was born on 04th of May 2008.
 - ii) Presently he is staying with his parents and the siblings at Tuvu. He is studying at class 6 at Tuvu primary school.
 - iii) His mother's name is Sarita Devi Naicker and his father's name is Virendra Naidu.
 - iv) He knows Adi Mullam Naicker as he is the maternal grandfather of the witness. The witness calls him Nana (grandfather).
 - v) The witness identified the accused as Adi Mullam Naicker, his grandfather.
 - vi) He could remember the 05th of November 2016. On that day, he was at his grandfather's place as it was the day of his grandmother's funeral rituals. The witness has gone there with his mother and the siblings.
 - vii) The witness had been playing with his siblings and cousins, when his grandfather, the accused called him to go to the shop. When the witness has refused, the accused has forced him to go with the accused. The accused has taken the witness through the shortcut which goes through jungle.
 - viii) While going through the jungle, the accused has stopped near the drain and opening his pants, has asked the witness to suck his penis. When the witness refused to suck the accused's penis, the accused has held him from the back of his head and forced him to suck the accused's penis. The witness has sucked the accused's penis for about one minute. Then something white has come out of the accused's penis and the accused putting on the pants, has gone to the shop. At the shop the accused bought the witness a lolly and has told the

witness to not to tell anyone, of the incident. On their way back they have come home through the main road.

- ix) Having come home the witness has told the incident to his cousin Junior who is elder to him. Later on the same day, the witness has told the incident to his mother.
 - x) The witness identifies the accused as the person who made him suck that person's penis.
7. Answering the cross examination, PW1 says that;
- i) The incident happened at around 11.00am before the lunch. There, the defence elicits a contradiction with his statement to the police. Though his statement states the alleged incident happened after lunch, the witness affirms that he told police that it happened before lunch.
 - ii) The witness denies knowing anyone by the name of Ronish. When the learned counsels suggests on instructions that the witness did not inform the incident to his mother, the witness denies it.
 - iii) The witness, denying the learned counsel's suggestion that accused did not put his penis into the mouth of the witness, re-affirms that the accused did so.
8. The PW2 was the 14 year old Nikil Naidu the elder brother of the PW1. His evidence was that;
- i) He has 3 brothers and a sister. His brothers are, N (PW1), Nohil, and Elvis and his sister is Aniya Nehar.
 - ii) On the 05th of November 2016, he has gone with his mother and the siblings to his grandfather's place as it was his grandmother's death remembrance day.
 - iii) At his grandfather's place he was playing with his brothers and the cousins. While playing, he has seen his grandfather going with his brother, N to the river side.
 - iv) Then the time would have been around 11am or 12 noon. Later he has seen his brother N saying something to his mother.
 - v) The name of the shop close to his grandfather's house is Velappan, but it is also known as Chandu's. There is a shortcut to go to that shop from the

grandfather's house. The witness has gone through it and that path goes through a jungle, towards the river.

- vi) In answering the cross-examination, the witness said that while he was playing he saw his grandfather and brother N going towards the shortcut and though there are other houses close by people use the said shortcut occasionally.
 - vii) The witness has not heard what N told his mother as he was far away, but he has seen it from the playground.
9. The next witness, PW3 was the mother of the alleged juvenile victim. Her Name is Sarita Devi Naicker, and is aged 37 years. She states that;
- i) She is married to Virendra Naidu and resides in Tuvu for 16 years.
 - ii) The accused is her father and PW1 is her second son.
 - iii) On 05th of November 2016, she has gone to her father's place as it was the day of 3 months rituals of her late mother. She has gone there with all her children.
 - iv) At her father's place she had been cooking while her children played. She has seen her second son, N came and informed her nephew Junior, that the grandfather (her father, the accused) has done something bad to him. The nephew has told that to her and she has called N and asked. N (PW1), has told her that grandfather did something to him. The witness states that she did not ask N what his grandfather did to him.
 - v) This witness was not subjected to any cross examination by the defence.
10. PW4 was Virendra Naidu, the father of the PW1. He states that;
- i) He is married to Sarita Devi Naicker and lives in Tuvu. He is a fisherman and once go out in the morning, comes back on the following morning.
 - ii) The accused is his father-in-law (his wife's father).
 - iii) On the 7th of December, while at home he received a message from a person named Sunil that something has happened to his kids. Then he has asked his wife and the kids and they have not told him anything. At that point he has scolded N and asked him.
 - iv) Then N has told him that Nana (grandfather) has done a bad thing to him. Straightaway, he has called the police and had informed the incident.

- v) In cross-examination the defence elicits a contradiction between his evidence in court and his statement to the police in regards to the time he came home on the 07th of December 2016.
11. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for a defence from the accused, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and offering him the due rights of the accused.
12. The accused having understood his rights properly, elected to remain silent exercising his constitutional right. However, he decided to call a witness on his behalf. The said witness is master Ronish Kunal Samy, aged 16 years, a grandchild of the accused. His evidence is that;
- i) His mother is Arti Ashwini Naicker and the accused is his maternal grandfather.
 - ii) On 05th of November he has gone to the grandfather's house for his grandmothers' 3 month funeral rituals.
 - iii) At the grandfathers' house he was helping with the work.
 - iv) N, who is a cousin brother of him, was also there on that day, playing in the shed prepared for funeral rituals, making the shed dirty.
 - v) He has had a conversation with N on that day. When queried as to what the conversation was about, the witness stated "N was making the shed dirty and my grandfather scolded him". This question had to be repeated and explained several times for the witness to ultimately come out with the answer that N told him that grandfather scolded him.
 - vi) When N informed that the witness has gone and told that to the N's mother, Sarita.
 - vii) In cross-examination, the witness states that the shed was in the compound and N was playing in the shed and making it dirty. The witness has seen his grandfather scolding N and N's elder brother for being naughty.
 - viii) The witness denies that his grandfather went with N to the shop and states that N was playing. He further denies that he was lying to protect his grandfather.

- ix) The witness denies that he told Sarita that N told him that grandfather did something bad to him.
 - x) When queried whether he saw the grandfather scolding N, the witness answers that he did not see, but N told that N and N's elder brother were scolded by the grandfather. Further he reaffirms that he did not see his grandfather scolding any of them. However, later states that he saw grandfather scolding N and N's brother, and admits what he said before was wrong.
 - xi) After about 3 minutes from having seen that, N has come and complained him. When queried that having seen that, why he waited without complaining to Sarita until N came and complained, the witness says that he was on the way to complain to Sarita when N came and complained.
 - xii) The witness admits giving a statement to the police, however, denies his signature when shown.
 - xiii) When asked whether he has been discussing this case with Sarita, the witness answers in the negative. However, later admits to have discussed this case with Sarita. The witness says he has discussed of this case as everyone else was discussing since the day of the incident.
13. When analysing the above evidence I am mindful that only direct evidence which relates to the alleged incidents is the evidence of the PW1. I am also mindful that law does not require any corroboration of the complainant's evidence as per section 129 of the Criminal Procedure Act. Therefore, the ultimate question would be whether his evidence would be trustworthy and reliable.
14. The PW1's evidence is clear. There are no contradictions other than in respect of the time this occurred whether it was after the lunch or before the lunch. The witnesses' explanation was that though he informed the police that this happened before the lunch, they have taken it down wrongly. This incident happening before the lunch is supported by few other witnesses, including the PW2 and PW3. The PW2 says the time his brother went with grandfather towards the river was between 11.00am and 12.00noon. PW3, the mother of PW1 says she had been cooking at that time. Therefore my view is that the explanation offered by the witness is acceptable. Further, the said inconsistency is not fundamental to the issue whether the accused did the alleged act or not directly. Therefore, I conclude the said inconsistency would not affect the reliability of the PW1's evidence.

15. Though corroboration is not required by law, the PW1's evidence is adequately corroborated by the evidence of PW2 and PW3 in relation to the previous and subsequent circumstances. I have to consider the fact that PW3 is a daughter of the accused and DW1 (defence witness 1) is a grandchild of the accused. Therefore their tendency to safeguard the accused should not be adversely considered.
16. Furthermore, as for the witness DW1, if N has complained of a scolding on that day, was there anything much for everyone to talk about or was there anything for Sarita to try to go home immediately.
17. In addition to what I have observed above, when considered in total, I find the evidence led by the prosecution to be acceptable and reliable. There is no doubt in my mind that the accused has committed the alleged act. The assessors who were full with experience and common sense unanimously decided to accept the prosecution version as acceptable and reliable. They have clearly rejected the accused stance as unacceptable.
18. Having thoroughly considered the evidence and all the relevant material before me and being satisfied that the prosecution has proved the guilt of the accused beyond a reasonable doubt, I agree with the opinion of the assessors.
22. In the circumstances, I convict the accused, Adi Mullam Naicker for the offence of rape as charged by the amended information dated 21st of May 2019.
23. This is the Judgment of the Court.



Chamath S. Morais

Chamath S. Morais
JUDGE

At Lautoka
24th of May, 2019

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