

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 149 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ASHOK NARAYAN

Counsel : Ms. K. Semisi for the State
Ms. A. Singh with Ms. S. Hazelman for the Accused

Hearing on : 10 - 12 June 2019

Summing up on : 13 June 2019

Judgment on : 14 June 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AN". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

JUDGMENT

1. The accused was charged with the following offences;

COUNT ONE

Representative Count

Statement of Offence

Rape: contrary to section 207(1) and (2) (a) and 3 of Crimes Act of 2009.

Particulars of Offence

ASHOK NARAYAN between the 1st day of March 2015 and the 5th day of April 2016 at Nasinu in the Central Division had carnal knowledge of **AN**, a child under the age of 13 years.

COUNT TWO

Representative Count

Statement of Offence

Rape: contrary to section 207(1) and (2) (c) and 3 of Crimes Act of 2009.

Particulars of Offence

ASHOK NARAYAN between the 1st day of March 2015 and the 5th day of April 2016 at Nasinu in the Central Division penetrated the mouth of **AN**, a child under the age of 13 years, with his penis.

COUNT THREE

Statement of Offence

Sexual Assault: contrary to section 210 (1) (a) of Crimes Act of 2009.

Particulars of Offence

ASHOK NARAYAN between the 1st day of March 2015 and the 31st day of March 2015 at Nasinu in the Central Division unlawfully and indecently assaulted **AN**, a child under the age of 13 years, by rubbing her vagina.

2. During the trial the complainant did not give evidence regarding the allegation on the second count. Accordingly, a finding of not guilty was recorded in relation to the second count after the prosecution case was closed in terms of section 231(1) of the Criminal Procedure Act and the trial proceeded only in respect of the first and the third counts.
3. The assessors have returned with the unanimous opinion that the accused is not guilty of the said counts.

4. I direct myself in accordance with the summing up delivered to the assessors on 13th June 2019 and the evidence adduced during the trial.
5. The prosecution led the evidence of three witnesses including the complainant. The accused exercised his right to remain silent.
6. When the evidence is taken in its totality, I have noted that the account given by the complainant was not consistent.
7. With regard to how the accused approached her before committing the alleged offences, the complainant initially said that the accused woke her up; then bounced on her; rubbed her vagina with spit on his hand; and then inserted his penis inside her vagina. Thereafter when she was questioned on the issue of identifying the accused, she said that the same night she saw the accused standing near the door and then saw him come inside the room.
8. Then with regard to whether someone else was present inside the room during the alleged incident, initially, the complainant said that there was no one else apart from the two of them and the three brothers were sleeping in the sitting room. Thereafter, when she was cross-examined on her statement made to police, her position was that one of the brothers was sleeping on the same bed when the accused was having sexual intercourse with her. Further, the complainant said in her evidence that the accused punched her, but it was pointed out during cross-examination that what is stated in her police statement is that the accused was going to punch her.
9. With regard to what happened immediately after the incident, initially, the complainant said that after inserting the penis inside her vagina the accused told her not to tell anyone and then went to sleep. Later she said that the accused, after he

stopped inserting his penis, got off the bed and went to put on his clothes and then she lied to him and went to the washroom. She said the accused was sleeping when she came back from the washroom.

10. When dealing with the above inconsistencies it is pertinent to take note of the complainant's evidence that the accused continuously did whatever she said in her evidence from March 2015 to April 2016. I have also noted that the complainant did not get much assistance to recall the events clearly as the prosecutor with her questions tried to confine the complainant's evidence to one night in March 2015 and there was no attempt to have the above inconsistencies clarified. I would not expect a rape victim, specially a child victim to keep a tab of the exact time of offence. Especially, if there were multiple sexual encounters there may be a possibility that the memory of a victim about a particular experience to be interfered with the memory of another similar experience. Therefore, I consider it appropriate not to rush into the conclusion that the entire evidence given by the complainant is incredible or unreliable given the above inconsistencies.

11. One of the positions suggested to the complainant during cross-examination was that the complainant had made these allegations due to her mother's instigation. Therefore it would be appropriate to take a look at the complainant's mother's role in this case as revealed in the evidence. It was an admitted fact that the accused and the complainant's mother were separated since March 2015. The complainant was living with her father since then until the complaint regarding the allegations in this case was made. It was the complainant's mother who took the complainant to the police station and to the doctor (PW3) for medical examination. It was the complainant's mother who had signed on the complainant's police statement. The complainant also said that she was scared of the accused because of the manner the accused used to assault the mother. The complainant also agreed during cross-

examination that she wants to stay with her mother and she would do anything her mother would tell her to do. Given this background, I observed how the complainant spontaneously disavowed the suggestion that whatever she said in her evidence was what her mother had told her to say.

12. Moreover, according to the medical report PE1, the doctor had been informed that the accused had had both anal and vaginal sexual intercourse with the complainant. The complainant in her evidence said that the accused only tried to insert his penis inside her 'bum', but he was unsuccessful. As I have stated before the complainant's mother accompanied the complainant for the medical examination. In view of these circumstances, it appears that the complainant's mother is a person who may have a motive to put the accused in trouble, and the evidence adduced does not rule out the possibility of her inducing the complainant to make a false complaint against the accused.

13. PW3 who examined the complainant on 06/04/16 did not find any injuries in the complainant's genitalia including the hymen. As stated above, according to PE1 PW3 was informed that the accused had had sexual intercourse both anal and vaginal with the complainant from March 2015 to 03 weeks before the date of the medical examination. PW3 was a doctor who had 5 years' experience as a medical doctor at the time she examined the complainant. However, she admitted that she had not studied forensic medicine and she did not mention that she had any experience or expertise in gynaecology. Even though she said in her evidence that the fact that there were no injuries in the complainant's genitalia does not rule out penetration, that opinion was not based on her experience or expertise. That was based on a study she had read in the internet. Therefore, I would disregard the opinion given by PW3.

14. It follows that the only evidence that could be accepted from what PW3 said in court is that there were no injuries consistent with penile penetration of the complainant's vagina on 06/04/16. In my view, taking into account the evidence of the complainant regarding the duration and the manner of penetration and the fact that PW3 was informed that there was penetrative sexual intercourse until 3 weeks prior to the examination, the absence of any injury as mentioned above raises a doubt as to whether the evidence given by the complainant regarding the accused penetrating her vagina is true.

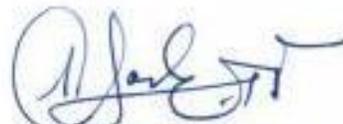
15. Taking into consideration the above factors, that is, the inconsistencies in the evidence given by the complainant; the fact that there is doubt about the complainant's mother's involvement in this case; the inconsistency between the complainant's evidence and PE1 regarding the accused penetrating the complainant's anus; and the fact that there were no injuries consistent with penetration of the complainant's vagina, I have a reasonable doubt as to whether the second element of the first count, that is, penetration of the complainant's vagina is established. All in all, I find that the prosecution has failed to prove the first count beyond reasonable doubt.

16. In relation to the third count, the complainant's evidence was that the accused spat on his hand and then rubbed her vagina. Considering all the evidence led in the case, the complainant's demeanour when she gave evidence and the manner she explained the said conduct of the accused, I accept that evidence to be credible and reliable. I find that the credibility and the reliability of that evidence on the third count is not affected by the issues I have highlighted above in relation to the first count. This conduct of the accused was unlawful, indecent and also sexual. Therefore, I find that the prosecution has proven the third count beyond reasonable doubt.

17. In the circumstances, I agree with the unanimous opinion of the assessors in relation to the first count. I find the accused not guilty of the first count and hereby acquit him accordingly.

18. I would decline to conform to the opinion of the assessors in relation to the third count. I find the accused guilty of the third count and hereby convict him accordingly.




Vinsent S. Perera
JUDGE

Solicitors;

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