

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 97 of 2016

STATE

V

MITIELI NABORISI

Counsel : Ms. R. Uce for the State.
: Mr. J. Dinati for the Accused.

Dates of Hearing : 19 and 22 July, 2019
Closing Speeches : 23 July, 2019
Date of Summing Up : 24 July, 2019
Date of Judgment : 25 July, 2019

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "AT").

1. The Director of Public Prosecutions charged the accused by filing the following information:

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) and (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

MITIELI NABORISI, between the 1st of January, 2013 and 31st of December, 2013 at Lautoka in the Western Division, unlawfully and indecently assaulted “**AT**”.

COUNT TWO

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

MITIELI NABORISI, between the 1st of January, 2014 and 30th of April, 2014 at Lautoka in the Western Division, penetrated the vagina of “**AT**” with his penis without the consent of the said “**AT**”.

2. The three assessors had returned with a mixed opinion in respect of count one that the accused was guilty of one representative count of sexual assault by a majority of two is to one. In respect of count two the assessors returned with a unanimous opinion that the accused was guilty of one representative count of rape.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called two (2) witnesses, whereas the defence called the accused and another witness.
5. The complainant informed the court that in 2013 she was nearly 14 years of age, her parents had separated and her mother was living in a defacto relationship with the accused. The complainant in 2013 up to early 2014 was living with her mother and her stepfather the accused and his five children.

6. The house of the accused was a one bedroom house the complainant was sleeping on the bed in the sitting room. Her mother and the accused would sleep in the bedroom. At around midnight the accused would molest her, kiss her and sometimes squeeze her breasts and also fondled her vagina.
7. The children of the accused would sometimes sleep in the sitting room on the floor on their mattresses, but most of the time they would sleep at their grandfather's house a few blocks away. Since the complainant had undergone a surgery for appendicitis, she would sleep face up. At first the accused would squeeze her breast and fondle her vagina from on top of her clothes, however, as the days went by the accused would do these things after forcefully removing her clothes. The accused used to do this to her nearly every night.
8. When the accused was doing this the complainant would lay stiff in bed and close her eyes, she could not move because he would lock his thighs in between hers, she would try to push him away, but he would cup his hand on her mouth and tell her to relax.
9. As a result the complainant wasn't able to scream, the accused also threatened her if she screams he will do something to her. At this time the accused's children would be either sleeping on the floor on the other side of the sitting room or would be sleeping at their grandfather's house.
10. One night during the beginning of 2014 while the complainant was asleep the accused came and woke her she was shocked when she saw the accused standing. On this night the complainant had come back from a "soli" or a fundraising organized at a nearby school. According to the complainant it was probably past midnight when the accused and her mother came back home.
11. The accused started to kiss her, molest her, squeeze her breasts and then went on to fondle her vagina at this time he removed her pants. The

complainant tried to stop him, but could not, the complainant saw the accused put some coconut oil on his penis. She felt very scared and started to cry the accused came on top of her spread her legs apart and then penetrated his penis into her vagina.

12. When the complainant told the accused to stop he cupped his hand on her mouth and threatened her that he will do something to her or to her mother. She tried to push him away, but could not since she was feeling weak.
13. The accused penetrated his penis into the vagina of the complainant three times after the accused ejaculated she forcefully turned over since she felt pain from what was being done to her. The accused had penetrated her vagina on three occasions she did not tell anyone until she went to her grandmother's house to stay.
14. Sometimes in April, 2014 she went to live with her father at his village since she was not her normal self her father dropped her back to her grandmother's house. When she was at her father's village, she had told her uncle some things about what the accused was doing to her, but not the whole story when her father came to know he was furious.
15. One day at her grandmother's house the complainant's father told everything to her grandmother in the presence of her mother whilst the accused was inside the room. At that time no one believed her they said she was lying. It took the complainant two years to report the matter to the police because none of her family members believed her.
16. Since the complainant loved to write she wrote about what the accused had done to her and had saved the document on a laptop. The complainant's grandmother read what was written by her when she was using the laptop. This prompted her grandmother to ask the complainant about what she had

written, at this moment she told her grandmother everything the accused had done to her.

17. As a result of what the accused had done to her, she attempted suicide 13 times since no one at home believed her and that she could not stop her grandmother from allowing her mother and the accused from coming into the house. The complainant got sick and was mentally ill, on one occasion the complainant ended up at the Hub Center for treatment. The complainant did not consent to what the accused had done to her.
18. The final prosecution witness Atelaite Ravu the grandmother of the complainant informed the court that sometimes in 2013 the complainant had gone to stay with her mother. In 2014 the complainant came back to live with the witness when the complainant was living with her, she noticed the complainant wanted to tell her something but couldn't say so.
19. On many occasions she asked the complainant if anything had happened to her, she didn't reply, but was in tears until one night she saw a document in the laptop which the complainant had typed. When she asked the complainant about the contents of the document she told her everything that had happened to her. After listening to the complainant the witness took the complainant to the police station the next morning.
20. The witness stated the complainant told her the accused would touch her breasts, kiss her, poke his tongue on her vagina, suck her vagina, had sex with her. The complainant did not tell anyone because she was told by the accused not to. When the complainant was telling her this she was crying.
21. The accused informed the court in 2013 he was in a defacto relationship with Salote Tukavesi and they lived at the Lololo Settlement, Lautoka. As a result of an argument between the complainant and her grandmother whereby the complainant was beaten by her grandmother, the complainant

came to live with the accused and his family. The accused treated the complainant like his eldest daughter together with his five children. The complainant came in September 2013 and stayed with him and his family till 2014. The accused observed that something was wrong with the complainant and that she was possessed.

22. During the Fiji Day long weekend that is 10th October 2013 there was a fundraising organized at the Lololo Primary School. The accused and the whole family, including the complainant attended the fundraising at the school. It was night time when the fundraising finished, Salote the complainant's mother at around 10pm took all the children including the complainant home.
23. After dropping the children home, Salote came back with a bottle of rum. The accused and the others present started drinking at around midnight. The drinking finished at 5am the next day, the accused and his wife Salote arrived home during the early hours of the morning. After being awakened by his father the accused was shocked to see the complainant crying.
24. The following week on the 27th of October the accused rushed the complainant to the hospital where the complainant was admitted for an appendicitis operation. The complainant had asked him not to inform her grandparents about her admission to the hospital since she was beaten up by her grandmother.
25. After the complainant was discharged she was taken to her grandparents' house, in the evening the whole family had a prayer meeting the accused on behalf of his family sought forgiveness in regards to the complainant's medical condition.
26. The accused denied committing the offences as alleged he says his house was a small one bedroom house, the accused and his wife slept in the bedroom, whereas the complainant slept on the bed in the sitting room with

his five children. He further stated if there was anything done as alleged the whole family would have known the alleged incidents happened in 2013 and 2014 and yet the matter was reported in 2015.

27. The final prosecution witness was the wife of the accused Salote Tukavesi she informed the court that the complainant was her daughter she basically confirmed what the accused had told the court that after the fundraising she left with the complainant and the children. At about 9.30pm she took a bottle of rum and went back to the school where the fundraising had taken place.
28. After midnight the grog finished and the accused drank liquor and at about 4.45am when they reached home it was day break. According to the witness she did not see anything suspicious or peculiar happening at school or at home.
29. After carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. She was able to recall and express herself about what the accused had done to her in 2013 and 2014. After watching the demeanour of the complainant I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. The complainant gave a coherent and explicit account of what the accused had done to her over a period of time on several occasions.
30. The complainant was subjected to vigorous and lengthy cross examination by defence counsel, which she was able to withstand. The complainant was also not discredited in respect of the allegations raised by her.
31. The complainant at the time of the alleged incidents was helpless and vulnerable since she had nowhere to go and no one to rely on. The complainant's grandmother and other family members did not believe her when she brought to their attention what the accused had done to her this

added to her miseries hence the delay in reporting the matter to the police cannot be taken against the complainant since the circumstances were beyond her control.

32. This court also accepts that the complainant's grandmother told the truth in court when she narrated what the complainant had told her. This witness was also able to withstand vigorous and lengthy cross examination.
33. During cross examination both the prosecution witnesses were referred to some inconsistencies and omissions between their evidence in court and their police statements. In my judgment the inconsistencies and omissions did not go to the root of the matter and shake the basic version of their evidence. Considering the age of the complainant at the time of the alleged incidents, the time lapse which is about 5 to 6 years inconsistencies, omissions and discrepancies are bound to arise. I would have been surprised if both witnesses had given evidence word to word in accordance with their police statements.
34. The inconsistencies and omissions were insignificant which did not adversely affect the credibility of both the prosecution witnesses. The Supreme Court of India in a judgment arising from a conviction for rape in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280* made the following pertinent observations:

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when all the important “probabilities factor” echoes in favour of the version narrated by the witnesses...”

35. On the other hand, this court does not believe the accused told the truth this was obvious to me during cross examination the evidence of the accused was untenable and implausible his demeanour was not consistent with his honesty. The accused was also not forthright giving me the

impression that he was determined not to say anything that may compromise his stance.

36. Moreover, the accused was shifting the focus of the trial away from the charges by bringing to the forefront issues that were not put to the complainant during cross examination. This court rejects the evidence of the accused that he did not sexually assault and rape the complainant as unbelievable and untruthful.
37. The wife of the accused, Salote Tukavesi also did not tell the truth in court it was obvious to me that this witness was rehearsing whatever she had memorized. For instance, this witness was able to remember dates without any second thoughts and was basically replicating what the accused had told the court, however, she did not assist the defence in regards to both the alleged offences since she had no idea about what was happening around her at that time. This witness did not observe anything suspicious either at the fundraising or at home.
38. The defence has not been able to create a reasonable doubt in the prosecution case.
39. This court is satisfied beyond reasonable doubt that the accused between the 1st of January, 2013 and 31st of December, 2013 unlawfully and indecently assaulted the complainant "AT" on more than one occasion.
40. This court is also satisfied that the accused between the 1st of January, 2014 and 30th of April, 2014 penetrated the vagina of "AT" with his penis without the consent of the said "AT" on more than one occasion.
41. This court also accepts that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

42. In view of the above, this court accepts the majority opinion of the assessors that the accused is guilty of count one being representative count of sexual assault. In respect of count two this court accepts the unanimous opinion of the assessors that the accused was guilty of count two being representative count of rape.
43. For the above reasons, I find the accused guilty of one representative count of sexual assault and one representative count of rape as charged and I convict him accordingly.
44. This is the judgment of the court.



Sunil Sharma
Judge



The seal is circular with a blue border. The text 'HIGH COURT OF FIJI' is written around the top inner edge, and 'LAUTOKA' is written around the bottom inner edge. In the center, there is a smaller circular emblem featuring a figure and a star.

At Lautoka
25 July, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.
Messrs. Vananalagi and Associates, for the Accused.