

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 59 of 2018

STATE

V

SITIVENI TUINASERAU

Counsel : Ms. L. Latu for the State.
: Ms. V. Diroiroi for the Accused.

Dates of Hearing : 11 and 12 February, 2019
Closing Speeches : 14 February, 2019
Date of Summing Up : 14 February, 2019
Date of Judgment : 15 February, 2019

JUDGMENT

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

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

ONE COUNT

Statement of Offence

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

Particulars of Offence

SITIVENI TUINASERAU, between the 1st day of March, 2018 and the 15th day of March, 2018 at Maururu, Ba, in the Western Division penetrated the vagina of **AB**, a child under the age of 13 years, with his finger.

2. The three assessors returned with a unanimous opinion that the accused was guilty of the offence of rape as charged.
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 three witnesses and the accused gave evidence for the defence.
5. The complainant "AB" informed the court that her uncle Siti (the accused) took her to the guava patch where he had poked her "pipi" meaning her vagina with his little finger. As a result of this intrusion blood came out of her vagina. The accused wiped the blood with some mango leaves when the complainant started to cry, the accused then gave her some guavas. The complainant pointed to her private part when asked to show her "pipi".
6. The complainant further said that the accused then told her not to tell her mum about what he had done. She was lying down when the accused poked her "pipi". The accused poked her "pipi" whilst she was wearing her underwear. When going home after picking guavas her "pipi" was sore but despite this she played with her friends.
7. The complainant told her mummy Lanieta about what the accused had done to her. The complainant maintained that the accused had poked her "pipi".

8. Lanieta Likuwau the mother of the complainant recalled in March, 2018 she was at home with her mother in law and her children. At around 11.30am Sereana the sister of the witness and her 6 year old son Semesa came to her house.
9. After a while Sereana and her son left, a little later the witness also went to her sister's house. At the house of Sereana the witness was inside while Semesa and the complainant were playing outside. At around 1pm the accused came and shared some jokes with the witness and her sister. The accused is the brother in law of the witness.
10. After the accused left, the witness did not hear the complainant's voice so she asked Semesa about the whereabouts of the complainant. The witness was told that the accused had called the complainant to go and pick some guavas.
11. About half an hour later the witness saw the complainant playing with Semesa and another little boy. The witness called the complainant who came and gave two guavas to the witness saying that uncle Sitiveni had given the guavas.
12. After giving the guavas the complainant said "*mummy uncle Sitiveni did*" then stopped. When the witness asked the complainant what had happened, the complainant repeated the same sentence three times and did not say anything else.
13. Thereafter the witness took the complainant to the church for Palm Sunday rehearsals. After the rehearsals finished at about 5pm both reached home. At home the witness told the complainant to take off her clothes and have her shower. At this time the complainant started to cry. The witness took the complainant to the bathroom took off her panty and then saw blood on the undergarment of the complainant.

14. When the witness asked the complainant the reason for the blood on her undergarment the complainant kept crying. The complainant then bent down and pointed to her back, the witness saw blood. The complainant said that uncle Siti had poked her vagina at the guava patch. At this time the witness felt bad and started crying she then called her husband and showed him the undergarment. After this the witness went and informed Joeli the elder brother of the accused. The accused was called and when confronted by the witness denied the allegation saying that the complainant was lying and that he had not taken the complainant to the guava patch.
15. The next morning that is 15th March, the witness took the complainant to the hospital and then to Ba Police Station. In the hospital the complainant was kept overnight.
16. The final witness was Dr. Renita Maharaj. Dr. Maharaj obtained her MBBS degree from the Fiji School of Medicine in the year 2010. Thereafter she completed post graduate Diploma in Public Health. This is her 9th year of practice and over the years she has worked at the Lautoka, Tavua and Ba Hospitals.
17. On 15th March, 2018 the doctor had examined the complainant at the Ba Mission Hospital. According to the doctor the patient at the time of the medical examination was brought by her mother.
18. The Specific Medical Findings of the doctor was explained as follows:
 - (a) Swollen Inflamed Introitus
Introitus is the opening of the vagina upon inspection of the vagina the doctor observed that the entrance was swollen it looked a bit red and upon touch it was very painful to the patient.
 - (b) Hymen not intact admits pus swab easily

Hymen is a very fragile membrane that partially covers the vagina, when the doctor examined the complainant she could not see any hymen normally for a 4 year old the little finger should go in but because the patient was in pain the doctor used a pus swab stick which is a bit bigger than the little finger to see if the hymen was intact or not. The pus swab stick went in easily and freely.

- (c) No active bleeding or laceration was noted.
19. The professional opinion of the doctor was that the hymen was not intact, indicative of abuse.
 20. The accused informed the court that the complainant called him uncle. On 9th March, 2018 the accused recalled telling stories to Lanieta and Sereana at Sereana's house. The complainant was outside the house relieving herself. It was around 1pm to 2pm he left the house. The complainant saw the accused and wanted to go with him to the guava patch since she was crying the accused took her with him. At the guava patch he made the complainant sit on the flip flops while he went to pick guavas. It took him about half an hour to pick guavas he gave the complainant her share of the guavas and told her they have to go home since her parents might be looking for her.
 21. The accused denied the allegation made against him, when they went back to the village Semesa was playing, the complainant cried and wanted to play with Semesa they played hide and seek game.
 22. Furthermore, the accused stated that Lanieta had told him about the allegation in the presence of the complainant but when he asked the complainant she did not respond but was only looking at her mother. Further the accused stated he told Lanieta this was not the first time he had

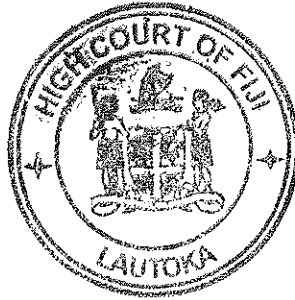
taken the complainant to pick guavas and each time he had safely returned her.

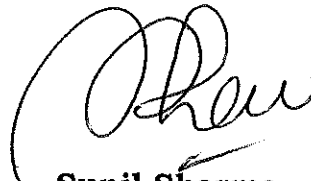
23. The accused whilst denying the allegation stated that he had a good relationship with the complainant and her family and he could not understand why the complainant made such an allegation against him.
24. Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of all the prosecution witnesses as truthful and reliable. The complainant who is now 5 years of age was able to recall what the accused had done to her last year when she was 4 years. The complainant gave a clear account of events of what the accused had done to her. I have no doubt in my mind that the complainant told the truth in court. Furthermore, she was also not shaken or discredited during cross examination she gave straight forward answers and was not evasive.
25. The complainant had promptly tried to tell her mother about what the accused had done to her when she came from the guava patch. Furthermore, the same afternoon during shower time the complainant told her mother the complete story about what the accused had done to her.
26. In my view this was an opportunity for the complainant to talk to her mother freely and with ease after her mother saw blood on her underwear. A child of 4 years cannot be expected to narrate an unexpected sexual encounter fully at first contact to anyone including someone known to her considering the mental and intellectual development of such a tender aged child.
27. Similarly, the mother of the complainant was also a reliable witness she also gave a coherent account of what the complainant had told her on the day of the alleged incident. Her demeanour was also consistent with her honesty. Even though there was an inconsistency between the police statement and

her evidence in court regarding the date of the alleged incident in my considered view this discrepancy was not significant and it did not adversely affect the credibility of this witness.

28. The doctor who had examined the complainant gave a clear account of her observations and the medical findings. She was also able to describe in detail the injuries seen on the complainant and the probable causes.
29. I accept the professional opinion of the doctor which was based on her physical examination of the complainant. The doctor's evidence was worthy of belief, reliable and credible.
30. On the other hand the accused who had a good relationship with the complainant and her family by virtue of being her paternal uncle did not tell the complete truth in court. He was cautious while giving evidence he chose his words carefully so as not to implicate himself his demeanour was not consistent with his honesty. He did not tell the truth when he denied poking the vagina of the complainant with his finger.
31. There was no suggestion by the accused of any motivation by the complainant and her mother in implicating him. The evidence adduced in court speaks of close family ties and good relationship enjoyed by the accused and the complainant's family. I reject the denial of the accused as unreliable and unworthy of belief.
32. The defence has not been able to create a reasonable doubt in the prosecution case.
33. For the above reasons, I agree with the unanimous opinion of the assessors that the accused is guilty of the offence of rape. On the evidence before the court it was open to the assessors to reach such a conclusion.

34. I am satisfied beyond reasonable doubt that the accused between the 1st day of March, 2018 and 15th day of March, 2018 had penetrated the vagina of the complainant a child under the age of 13 years with his finger.
35. In view of the above, I find the accused guilty as charged for one count of rape and I convict him accordingly.
36. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

15th February, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.