

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

High Court Criminal Case No. HAC 174 of 2015

BETWEEN : STATE

AND : ALTHAEUS WILSON TOMASI

Counsel : Mr Niudamu for the State
Ms Vulimanadave for the Accused

Dates of Hearing : 22 July 2019

Closing Speeches : 23 July 2019

Date of Summing up: 23 July 2019

Date of Judgement : 24 July 2019

(The complainant's name is suppressed and will be referred to as HS)

JUDGMENT

1. The Accused is indicted for one representative count of rape. The statement of offence and the particulars of offence are as follows;

Representative count

Statement of Offence

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

Particulars of Offence

Althaeus Wilson Tomasi between the 1st day of October 2014 and 30th day of November 2014 at Lautoka in the Western Division penetrated the vagina of HS aged 10 years with his penis.

2. The Accused pleaded not guilty on 12 February 2016. The trial commenced on 22 July 2019. Only the complainant was called by the prosecution to prove the case against the Accused. After the prosecution case was closed the court decided that there is evidence that the Accused committed the offence and the Accused has a case to answer.
3. The Accused was explained his rights pursuant to Section 231(2) of the Criminal Procedure Act. The Accused chose to remain silent and no witnesses were called for the defence.
4. Subsequently I have summed up the case to the assessors. After a short deliberation, the assessors unanimously found the Accused not guilty.
5. The assessors were given directions on the elements of rape that need to be proved by the prosecution. They were directed on the degree of proof, the issue of penetration, consent, corroboration, representative counts, how to assess credibility of a witness and other general considerations. However, it appears that the assessors have misconceived the directions, or they have failed to properly analyse the evidence based on the directions given.
6. Having directed myself in accordance with the summing up, I will now review the evidence adduced in this case to pronounce my judgement.
7. The complainant gave evidence in respect of three incidents allegedly occurred between October to November 2014. According to the agreed facts the complainant was below the age of 13 at the time of the alleged offences. The Accused is the step father of the complainant.

8. The complainant gave evidence that in 2014 she was residing at Vomo Street with her mother, stepfather and two younger brothers. She said that her stepfather is Althaeus Tomasi. She gave evidence in respect of three incidents alleged to have taken place between October and November in 2014.
9. The complainant testified that the first incident took place on a Saturday when her mother was not at home. She said that her step father, who is the Accused was at home. The Accused had called her to his room and had closed the door. He had told her to lie next to him. Then the Accused had removed her pants and underwear with his toes. She further said that the Accused was not wearing anything, and he inserted his penis into her vagina. The complainant had shouted as it was painful. She said then he took the penis out and inserted it again two more times into her vagina.
10. According to the complainant the second incident had taken place on the following Saturday. She said that the Accused told her to come and lie next to him. The Accused had covered them with a blanket and had removed her pants. The complainant said that the Accused then inserted his penis into her vagina. She further said that the Accused was not wearing anything, and he was lying on top of her.
11. The complainant gave evidence that the third incident also happened in the same month and it was a Saturday too. She said that the Accused called her into his room and asked her to lie down next to him. The Accused had removed her underwear and had inserted his penis into her vagina. However, she said that the Accused did not insert his penis fully and then he started rubbing his penis on her vagina.
12. She said that she did not complain about the incidents to her mother as she was afraid that her mother will be angry with her. The complainant testified that in 2015 her grandmother, Celina Penjueli started living with them when they moved into a new house. The complainant said that she finally informed her

grandmother about the incidents and after a few months the Police came and took her to the house of another grandmother named Kijiana.

13. The complainant was cross examined at length by the defence counsel. Under cross examination the complainant said that after the second or the third incident the Accused told her not to tell about the incidents to anybody. When it was suggested to her that no such incidents took place, the complainant denied the suggestion and reiterated that she is telling the truth about what has happened to her. Although she was cross examined extensively the defence could not challenge her credibility.
14. The Accused is charged for one representative count of rape in respect of three incidents allegedly committed between 01 October 2014 and 30 November 2014. Section 70(3) of the Criminal Procedure Act provides for representative counts in sexual offences as follows;

“When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred. In such a case the charge must specify in the statement of offence that the count is a representative count”.

15. As per the evidence of the complainant the Accused has inserted his penis into her vagina in three occasions. The prosecution led evidence on penetration in respect of all three incidents. The defence could not challenge the evidence of the complainant regarding penetration. I am satisfied that the prosecution proved the element of penetration beyond reasonable doubt.
16. Section 207(3) of the Crimes Act stipulates that for the offence of rape a child under the age of 13 years is incapable of giving consent as far as the offence of rape is concerned. Therefore, it is very clear that in this case there is no issue of

consent as the complainant had been below 13 years at the time of the alleged offences.

17. I have observed the demeanour of the complainant and I am satisfied that she is a reliable witness who testified with clarity. The complainant was well composed and confident when she gave evidence. She gave evidence in a very consistent and a convincing manner. Although she was cross examined at length by the counsel for the Accused, her credibility and consistency were not shaken. The defence could not create any doubt in the prosecution case. I accept the evidence given by the complainant as truthful and reliable evidence.

18. Section 129 of the Criminal Procedure Act 2009 provides;

“Where any person is tried for an offence of a sexual nature, no corroboration of the complainant’s evidence shall be necessary for that person to be convicted; and in any such case the Judge or Magistrate shall not be required to give any warning to the assessors relating to the absence of corroboration.”

19. Although the prosecution presented the evidence of the complainant only, I am satisfied that her evidence is sufficient and reliable to act upon.

20. It is my considered opinion that the prosecution proved the elements of rape beyond reasonable doubt in respect of each incident relating to the representative count.

21. In the circumstances I am not inclined to concur with the unanimous opinion of the assessors. I reject the opinions of the assessors as I am of the view that their opinions are not founded on the directions given to them.

22. I decide that the prosecution has proved beyond reasonable doubt that between 01 October 2014 and 30 November 2014 the Accused penetrated the vagina of

the complainant with his penis in three occasions. I find the Accused guilty of the representative count of rape.

23. Accordingly, I convict the Accused.



A handwritten signature in blue ink, consisting of several overlapping loops and lines.

Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission