

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 274 of 2019

STATE

vs.

AVYASH MANI GOUNDEN

Counsel: Ms. S. Swastika for the State
Mr. M. Yunus for Accused

Date of Hearing: 17th, 18th, 19th and 20th February 2020

Date of Closing Submission: 20th February 2020

Date of Summing Up: 24th February 2020

Date of Judgment: 02nd March 2020

JUDGMENT

1. The prosecution has charged the accused with one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act, and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

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

Particulars of Offence

AVYASH MANI GOUNDEN, on the 14th day of July, 2019 at Waituri, Nausori, in the Eastern Division, penetrated the vulva of ASHLYN ASHLINI PRASAD, a child under the age of 13 years, with his tongue.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

AVYASH MANI GOUNDEN on the 14th day of July 2019 at Waituri, Nausori, in the Eastern Division, unlawfully and indecently assaulted ASHLYN ASHLINI PRASAD, a child under the age of 13 years, by touching her vagina.

2. The hearing commenced on 17 February 2020 and concluded on 20 February 2020. The prosecution adduced the evidence of four witnesses, including the complainant. The accused and one witness gave evidence for the defence.
3. The learned counsel for the prosecution and the defence then made their respective closing addresses. Subsequently, I delivered the summing up. The three assessors in their unanimous opinions found the accused guilty of both counts.
4. Taken into consideration the evidence presented during the hearing, the closing addresses of the counsel, the summing up, and the opinions of the assessors, I now proceed to pronounce the judgment as follows.
5. The prosecution alleges the accused had gone to the bedroom when the complainant and his little son were in it. He then removed the pajama of the complainant and penetrated the

vulva of the complainant with his tongue. Moreover, the accused had touched the vagina of the complainant.

6. The defence denies the allegation. The accused claimed that he only went to the bedroom because of the little boy's cry. He went with his wife and then pampered the boy for a while.
7. Prematilaka JA in Volau v State [2017] FJCA 51; AAU0011.2013 (26 May 2017) has explained the meaning of vulva, where his Lordship said that:

"It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina."

8. The complainant was an eight years old girl at the time. She said the accused sucked her "tutu" with his mouth, and it went deep inside. She then pointed out the place that she referred to as "tutu" by using a toy bear.
9. Prematilaka JA in Volau v State (supra) has further discussed the difficulties of a child witness in explaining any alleged penetration with technical terms. His Lordship found that:

"Now the question is whether in the light of inconclusive medical evidence that the Appellant may or may not have penetrated the vagina, the count set out in the Information could be sustained. It is a fact that the particulars of the offence

state that the Appellant had penetrated the vagina with his finger. The complainant stated in evidence that he 'porked' her vagina which, being a slang word, could possibly mean any kind of intrusive violation of her sexual organ. It is naive to believe that a 14 year old would be aware of the medical distinction between the vulva and the vagina and therefore she could not have said with precision as to how far his finger went inside; whether his finger only went as far as the hymen or whether it went further into the vagina. However, this medical distinction is immaterial in terms of section 207(b) of the Crimes Act 2009 as far as the offence of Rape is concerned."

10. The complainant precisely said the accused licked her "tutu" and it went a little deep. I find that evidence is sufficient to establish the penetration of vulva with the mouth or the tongue. The particulars of the offence said the accused had penetrated the vulva of the complainant with his tongue. I do not find the word of the tongue or the mouth is materially important in this matter. The evidence of the complainant establishes that the accused had penetrated her vulva with his mouth or tongue.
11. I do not find the inconsistencies between the evidence given by Ms. Devi, and her statement to the police is materially important to the main issues in this dispute.
12. Gates CJ in **Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)** has discussed the scope of the evidence of recent complaint.

"The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.


The complaint need not disclose all of the ingredients of the offense. However, it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting

the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph."

13. Hence, the complainant does not need to disclose all the ingredients of offence to her teacher and the mother. The evidence of the class teacher and the mother of the complainant disclosed that the complainant had told them the accused had licked her genitals and touched it. I find evidence of recent complaints strength the consistency of the account given by the complainant.
14. The accused said he only went to the room when the little boy started to cry. He had gone there with his wife. According to the father of the complainant, the accused went and stayed in the room for about ten to fifteen minutes. His wife was cooking at that time.
15. Ms. Arpana Chand, the daughter of the accused said she started to watch a movie on the phone when the little boy stopped playing with it. She was observing the complainant, who was watching a cartoon on the mobile phone just next to her. I observed the evasiveness and the demeanour of Ms. Arpana Chand when the learned Counsel asked her about the nature of the cartoon the complainant was watching.
16. I observed the manner and the way the complainant gave evidence. She was straight, forthright, and coherence. During the cross-examination, the complainant maintained the same position that she explained in her evidence in chief. There are no adverse inaccuracies, errors, and mistakes in her evidence. Neither I find any intentional lies nor intentional attempts to deceive in her evidence. As a result, I find the evidence of the complainant is reliable, credible, probable, and truthful. Hence, the defence failed to establish or create a reasonable doubt about the case of the prosecution.
17. Accordingly, I find the prosecution has proven beyond a reasonable doubt the accused has committed these crimes, as explained under counts one and two in the Information. Hence, I do not find any cogent reasons to disagree with the unanimous opinion of guilty given by the three assessors.

18. In conclusion, I find the accused guilty of one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act, and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. I convicted him for the same accordingly.




R.D.R.T. Rajasinghe
Judge

At Suva
02nd March 2020

Solicitors
Office of the Director of Public Prosecutions for the State.
YLAW for the Accused.