

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 145 of 2017

STATE

V

ALFRED AJAY PALANI

Counsel : Ms. L. Latu for the State.
: Ms. A. Bilivalu for the Accused.

Dates of Hearing : 27, 28 and 29 July, 2020
Closing Speeches : 30 July, 2020
Date of Summing Up : 31 July, 2020
Date of Judgment : 04 August, 2020

JUDGMENT

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

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

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ALFRED AJAY PALANI, on the 31st day of March, 2015, at Toko, Tavua in the Western Division, had carnal knowledge of “AL” without the said “AL’s” consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act 2009.

Particulars of Offence

ALFRED AJAY PALANI between the 1st day of December, 2014 and the 24th day of December, 2014 at Toko, Tavua in the Western Division, unlawfully and indecently touched the breasts of “AL” on top of her clothes, without the said “AL’s” consent.

2. The three assessors had returned with a unanimous opinion that the accused was guilty of both the counts.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced in court.
4. The prosecution called five witnesses whereas the defence called the accused to give evidence and did not call any other witnesses.
5. In 2015 the complainant was 14 years of age and a class 8 student. The complainant informed the court of two occasions she was sexually abused by the accused. The first incident happened in late 2014 when the complainant was in class 7. The complainant had gone to wash clothes with the accused at Toko river.
6. After the complainant finished washing and bathing in the river the accused touched her breasts from on top of her clothes. The complainant did not consent to the accused to touch her breasts. When the complainant came home she informed her grandmother about this incident which was not reported to the police.

7. The second incident was on the 31st of March, 2015 in the afternoon when the complainant was in the house with the accused. The accused had sent the brother of the complainant to the shop to buy some panadol and had told the complainant to have her shower.
8. When the complainant came out of the bathroom she was wearing a long towel the accused gave her a small towel to change. The complainant was scared of the accused so she changed into a small towel. The accused was also wearing a towel when the complainant went into her room to look for her clothes the accused came from behind and held her tightly and dragged her to his bedroom.
9. The accused made the complainant lie down on his bed and then told her *“if you tell anyone I would kill you”* after this the accused started kissing the complainant’s neck then her breast and then her vagina. He then forcefully tried to insert his penis into her vagina for about 5 minutes, the complainant was frightened and scared. After sometime the accused was able to penetrate her vagina with his penis, the complainant felt the accused penis in her vagina. The accused then told the complainant *“if you tell anyone or if you report this, I will kill you”*.
10. The complainant did not consent to have sexual intercourse with the accused. After wearing her clothes the complainant went and told her uncle Dalituicama who was living next door about what the accused had done to her. Next morning the complainant went to school and also told her school teacher Alena Vodivodi.
11. Viliame Dalituicama the uncle of the complainant informed the court that the accused was his younger brother. The accused lived next door with his mother, the complainant and her brother Edward.
12. On 31st March, 2015 at about 7pm the witness was at home when the complainant came crying into his house. When he first asked her what

happened she did not respond. On the second occasion the complainant told the witness that the accused had touched her. After sometime the mother of the witness came and he told his mother what the complainant had told him.

13. Alena Vodivodi told the court that on 1st April, 2015 at 8.30am the witness was told by a student that the complainant who was a class 8 student wanted to see her in respect of a problem.
14. The witness met the complainant and both went to her office. When the witness asked the complainant about her problem the complainant cried for a while and then told the witness that her uncle Ajay had raped her the previous evening that is on 31st March.
15. The complainant continued to cry when she was relating her problem. The head teacher was informed and the matter was reported to the police.
16. Edward Palani the younger brother of the complainant informed the court that on 31st March he was playing with a cousin when the accused called him to go to the shop and buy panadol. The witness went with his cousin Dela to the shop.
17. After 20 to 30 minutes the witness left the shop for home, on the way he saw his grandmother and aunty getting off the bus so everyone came home together. At home the witness saw the complainant crying.
18. The final witness Dr. Jimi Taria narrated to the court the medical findings of Dr. Virisila Sema who had examined the complainant. Dr. Sema had mentioned that her examination was inconclusive meant it was difficult for her to draw any conclusion on what had happened to the patient although there was sign of trauma to the outer lower part of the vagina.

19. On the other hand, the accused denied committing the offences as alleged. The complainant did not tell the truth in court she made up a story against him. The incident at the Toko river did not happen because it is a public place where other children were also around so it was not possible for the accused to touch the breasts of the complainant.
20. As for the allegation of rape it is again another made up story the complainant did not like the accused who was strict on her. When she went to her uncle Dalituicama's house she did not say anything about being raped because nothing had happened.
21. The complainant made up a story overnight to tell her teacher the next day both the incidents did not happen the complainant could have screamed, yelled and shouted but she did not. The house of her uncle Dalituicama was only 10 steps away so a shout or a scream or a yell would have alerted her uncle who was at his home at the time.
22. The accused denied the allegations saying it was a lie and he did not do it.
23. 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 relate what the accused had done to her in late 2014 and March, 2015. The complainant gave a coherent account of both the incidents. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. The fact that the complainant did not shout or yell does not mean that the incident as narrated by the complainant did not happen I accept that the complainant was afraid of the accused who had threatened her.
24. The complainant was able to withstand cross examination and was not discredited in respect of the allegations raised by her.
25. The complainant had gone to her uncle's house immediately after the second incident and had informed him about what the accused had done to

her although she did not say anything in specific detail. The fact that the complainant told Dalituicama the accused had touched her and not that she had been raped by her uncle does not create any doubt on the complainant's credibility or honesty to tell the truth.

26. It is not expected of a 14 year old child to talk to her uncle who was elder than her father about what his younger brother had done. The fact that the complainant gave relevant information about what the accused had done to her was in my view acceptable in the circumstances of the complainant. The distressed condition namely that she was crying does show that the complainant was affected by what the accused had done.
27. The complainant on the following day gave an account of what the accused had done to her when she informed her teacher that she had been raped by the accused.
28. The complainant had promptly informed her uncle and her teacher gives credence to the fact that the complainant had told the truth about what the accused had done to her.
29. In respect of the allegation of indecent assault I accept that the complainant had told her grandmother promptly about what the accused had done to her but nothing was done.
30. During cross examination the complainant was referred to some inconsistencies between her evidence in court and her police statement. In my judgment the inconsistencies did not go to the root of the matter and shake the basic version of her evidence. Considering the age of the complainant at the time of the alleged incidents, the time lapse which is about 5 years ago inconsistencies, omissions and discrepancies are bound to arise. I would have been surprised if the complainant had given evidence in accordance with her police statement.

31. In any event the inconsistencies were insignificant to adversely affect the credibility of the complainant. 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 which I accept:

“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...”

32. Although the examining doctor did not make any conclusive findings in regards to penetration it does not affect the complainant’s version.
33. I do not believe the accused he did not tell the truth in court. I reject the denials of the accused as untenable on the totality of the evidence he was putting up a picture of a good uncle who treated the complainant as his daughter as not worthy of belief.
34. The accused was not forthright he deliberately withheld vital information which was obvious in his cross examination.
35. The defence has not been able to create a reasonable doubt in the prosecution case.
36. This court is satisfied beyond reasonable doubt that the accused on 31st March, 2015 had penetrated the vagina of the complainant with his penis without her consent.
37. 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.

38. Finally, this court is also satisfied beyond reasonable doubt that between the 1st day of December, 2014 and the 24th day of December, 2014 the accused had unlawfully and indecently assaulted the complainant by touching her breasts.
39. I agree with the unanimous opinion of the assessors that the accused is guilty of one count of rape and one count of indecent assault.
40. In view of the above, I find the accused guilty as charged and I convict him accordingly.
41. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

04 August, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.