

IN THE RESIDENT MAGISTRATES COURT
AT SUVA
CRIMINAL JURISDICTION

Lau Juvenile Case No. 44 of 2018

Extended Jurisdiction File No. 28 of 2018

The State

V

V C M (Juvenile)

For the State : Counsel Ms. Sharma (DPP)
For the Juvenile : Counsel Ms. Filipe/ Ms. Baleiwai (Legal Aid)
Date of the Judgment : 14th February 2019

JUDGMENT

1. The juvenile has been charged as follows,

1st Count

Indecent Assault: Contrary to section 212(1) of the Crimes Act 2009

Particulars of the offence

You (the juvenile) on the 27th day of January, 2018 at Lau, in the Eastern Division, unlawfully and indecently assaulted T L L (victim's name is suppressed), by touching her breast.

2nd Count

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

Particulars of the offence

You (the juvenile) on the 27th day of January, 2018 at Lau, in the Eastern Division, had carnal knowledge of T L L (victim's name is suppressed), by inserting your penis into the vagina of T L L, without her consent.

3rd Count

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

Particulars of the offence

You (the juvenile) on the 30th day of March, 2018 at Lau, in the Eastern Division, had carnal knowledge of T L L (victim's name is suppressed), by inserting your penis into the vagina of T L L, without her consent.

4th count

Sexual Assault: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of the offence

You (the juvenile) on the 07th day of April, 2018 at Lau, in the Eastern Division, unlawfully and indecently assaulted T L L (victim's name is suppressed), by sucking her breasts.

5th Count

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

Particulars of the offence

You (the juvenile) on the 07th day of April, 2018 at Lau, in the Eastern Division, had carnal knowledge of T L L (victim's name is suppressed), by inserting your penis into the vagina of T L L, without her consent.

2. The 2nd, 3rd and the 5th counts are indictable offences and the High Court has granted extended jurisdiction to hear this case to the Juvenile Court on 13/08/2018 in terms on Section 4(2) of the Criminal Procedure Act 2009.
3. The juvenile has pleaded not guilty to all 5 counts on 20/08/2018 and the case was taken up for hearing on 03/12/2018 and 04/12/2018.
4. The Prosecution alleges that the juvenile had carnal knowledge with the victim on 3 occasions, without her consent and as well as touched and sucked her breasts in two of such occasions.

5. While denying all the allegations, the position of the juvenile is that everything happened with the consent of the victim.
6. Only the prosecution filed closing submissions and the Defence submitted that they rely on the case record. On a careful examination of the evidence presented during the course of the hearing and considering the closing submissions, I will now proceed with the judgment.

The Prosecution Case

7. The Prosecution called 3 witness to prove charges against the juvenile as follows;
 - i. The Victim (PW1)
 - ii. Walsea Brian Malani – Medical Doctor (PW2)
 - iii. Cprl. 3329 Thimoci (PW3)
8. Victim gave evidence as PW1. She testified that by 27/12/2017, she was staying with her aunt at Cicia Island. Around 6pm on that day, when she was trying to sleep, the juvenile (victim referred him as Mika), who was living in the same house has come to her and squeezed her breast inside from her clothes. When she shouted, the aunt, who was in the kitchen at that time has asked her to be quiet and stop playing. After a while, when she was trying to sleep again, the juvenile has come back to her, tried to take off her pants and tried to have sex with her. He further has covered her mouth with a pillow but she has struggled. Others had been in the kitchen and the sitting room by that time.
9. Then the juvenile has removed her pants, parted her legs and inserted his private parts into her private parts. (The witness was not aware the names used for each one's private parts) She said he had sex with her. The witness further said that she tried to move away from the juvenile, but he pulled her down.

10. She further said that she didn't tell this incident to the aunt as she always takes his side. But she has told one Tupou and that person has ultimately conveyed that to the juvenile.
11. A similar incident has happened when nearly the school term started. The aunt has gone to hospital with uncle and one cousin and the other cousin has gone fishing on that day. While other children were sleeping around 6-7pm, the juvenile has closed the door and come to where she was sleeping. He has laid on top of her and she has struggled to move as she didn't want have sex with him but she couldn't move. The juvenile has moved her panty to one side and had sex with her.
12. She said then he missed a day and did it again. Around 12 o'clock in the night, the juvenile has come to her and laid beside her. She has asked him "what do you want?" and he has told her to be kept quiet. She has said not to do anything and he has responded by saying that "after this it will finish". Then he has started touching her legs and she has said 'no' and stood up. But the juvenile has laid her back and asked her to relax and be quiet. Then he has blocked her mouth in one hand and taken off her panty. He was already naked. Then he has had sex with her. He has touched and squeezed her breasts too.
13. The witness said that when this happened she pushed him, he moved away for a while and then came back.
14. The witness submitted that she wanted to say this to somebody but she didn't have anybody to tell as she was new to the school. After few weeks, she has told one Milika who was residing in the same village. Witness identified the juvenile in open court.

15. In cross examination she refused that she gave her consent to the juvenile to do these acts, removed clothes by herself or put the pillow on her mouth by herself so that others won't hear. She further said that she struggled to escape but the juvenile was too strong.

16. PW2 is a medical doctor who worked at Cicia Island Medical Centre at the material time. He has examined the victim (PW1) on 14/04/2018. He marked the Medical Examination Report as PEx 1. He has observed that her hymen opening is larger than for a girl of her age. In his opinion, this is due to having sexual intercourse. He has not observed any injuries or bruises on her body or any trauma or bruising around her vagina. He further said that it is quite unlikely that any injuries would have healed within one week, but there is a slight possibility as well.

17. PW3 is the interviewing officer of the juvenile. He marked the caution interview of the juvenile as PEx2. It has been prepared in English language. He said that the juvenile was given his rights and he was in good state. A Social Welfare Officer has been present during the interview. He further submitted that no any force, inducement, promise or intimidation was done on the juvenile, at the recording of the interview. He re-produced certain question and answers where the juvenile has admitted the offence.

18. In cross examination, he refused the suggestion by the Defence that the confessionary answers given by juvenile were made up by him. He said that those are direct answers given by the juvenile. He admitted that the questions were asked and answers were given in i- Taukei language but recorded in English. He said that the juvenile gave his consent for that arrangement at the beginning of the caution interview and signed it. He further said, when he typed the answers in the computer, the juvenile was reading them at the same time.

The Defence Case

19. Only the juvenile gave evidence on behalf of the Defence. He admitted that he had sex with PW1 on 27/01/2018. However he said that when he was trying to sleep, the victim was spoiling him calling out his name. Then he has gone up to her and asked what she wanted. Then she has removed her clothes and pulled him to her. Then he has had sex with her. He further said that he had sex with her in two occasions and she did not struggle or tried to push him away in any of such occasions. He said that he did not cover her mouth with pillow or removed her clothes.
20. In cross examination the juvenile said that he answered at the caution interview in i-Taukei language and some of the answers recorded, were not given by him. He admitted that he can read English but said he didn't read the caution interview after it was recorded. He further said that he gave answers on his own free will.
21. He refused that he touched victim's breasts and did anything by using force.

The Law

22. The juvenile has been charged with one count of Indecent Assault, three counts of Rape and one count of Sexual Assault.
23. The Offence of Rape is defined in section 207(1) as '*any person who rapes another person commits an indictable offence*'. The constitution of the offence is stipulated in subsection 2 and 2(a) says, *a person rapes another person when the person has carnal knowledge with or of the other person without other person's consent.*

24. The offence of **Indecent Assault** is defined in section 212 (1) of the Crimes Act as
“A person commits a summary offence if he or she unlawfully and indecently assault any other person.”
25. The offence of Sexual Assault is defined in section 210 of the Crimes Act. The section 210 (1) (a) says, *any person commits an indictable offence (which is triable summarily) if he or she, unlawfully and indecently assault another person.*
26. Sexual Assault/ Indecent Assault is defined in Black’s Law Dictionary (10th edition) as *‘offensive sexual contact with another person exclusive of Rape’*. In Archbold (2011), under chapter 20-16, in Sexual Offences Act 2003, s 77, sexual assault is defined as *‘the Defendant intentionally touching another person (the complainant), where the touching is sexual.’*
27. Accordingly, the prosecution has to prove following elements beyond reasonable doubt in order to find the juvenile guilty for charged offences.

Rape

- i. The identity of the juvenile
- ii. The juvenile penetrated the vagina of PW1 in 3 occasions as mentioned in the charge.
- iii. He did so, without PW1’s consent

Sexual Assault/ Indecent Assault

- i. The identity of the juvenile
- ii. He touched PW1’s breasts on 27/01/2018, without her consent
- iii. He sucked PW1’s breasts on 07/04/2018, without her consent

Analysis

Caution Interview

28. Before analysing the evidence of the prosecution, it is proper to decide whether the caution interview of the juvenile is admissible in evidence.
29. The Defence took the view that the confessional parts of the interview are fabricated by the interviewing officer and the Defence didn't move for a *voir dire* inquiry and took up the objection at the trial proper.
30. The position of the Defence is that the questions were asked and answers were given by the juvenile in i-Taukei language but they have been recorded in English language whereby the interviewing officer has recorded fabricated answers.
31. In Q1, the juvenile has said that he wish the interview to be recorded in English language. In Q4, he has said that he does not have any difficulty of reading and understanding English language. Then he has signed the caution interview to that effect and the Social Welfare Officer who was present during the interview also has signed.
32. Though the juvenile said in evidence that some of the answers were not given by him, he admitted that he can read English language. Though he said that he did not read it after recording, he has signed the caution interview to that effect.
33. PW3 submitted in evidence that any force, intimidation or promise were not made on the juvenile during the interview. The Defence has not challenged this position. The Defence has failed to attack the credibility of this witness (PW3) in cross examination hence the court consider him as a truthful and a reliable witness.

34. When analysed the above evidence relating to the caution interview, it is the opinion of the court that the prosecution has proved that the caution interview is not a fabricated one and the juvenile has given his answers voluntarily. The Defence has failed to create any doubt on either it is fabricated or involuntary. The juvenile has not even tried to call the Social Welfare Officer who was present at the time of recording the interview to give evidence to create such doubt.
35. Accordingly, I conclude that the prosecution has proved beyond reasonable doubt that the caution interview is not a fabricated one as well as it has been recorded voluntary. Therefore I decide that the confessional parts of the caution interview of the juvenile are admissible in evidence.

Other Evidence

36. It is agreed by both parties that the juvenile and the victim are known to each other hence the identity of the juvenile is not in dispute. The birth certificate of the victim has not been marked by the prosecution. The victim stated in her evidence that she is 17 years old at the time of giving evidence in 2018, which was not disputed by the Defence. Accordingly, it could be concluded that it is proved that the victim was 17 years old at the time of the incident which took place in 2018.
37. PW1, the victim has testified that the juvenile had sexual intercourse with her three times as mentioned in the charge. Apart from that he has touched and squeezed her breasts. She has struggled to escape from the juvenile in all these occasions and tried to push him away, but she had failed as the juvenile was very strong.

38. According to the medical evidence, it is proved that she has had sexual intercourse but no evidence of any trauma. However, it is common knowledge that even a non-consensual sexual intercourse can take place without causing any injuries.
39. The Defence has failed to attack the credibility of any of the prosecution witnesses and there are no contradictions among them. Therefore, the court can rely on their evidence to be truthful.
40. I have decided before that the confessional parts of the caution interview of the juvenile are admissible in evidence. I will quote certain relevant questions and answers given by the juvenile at the caution interview.

Q30 - *What can you say about the allegation made against you by T L L (the victim) that you on 27/01/2018 forcefully have sexual intercourse with her without her consent*

A - *Yes. I had sex with her but never forced her.*

Q41 - *Did she pushed or kicked you?*

A - *No*

Q42 - *What you did with your erected penis?*

A - *I pushed my penis inside her vagina*

Q43 - *What was her reaction when you pushed your penis into her vagina?*

A - ***She pushed me away but I pushed my penis inside***

Q59 - *Did you put your penis inside her?*

A - *Yes*

Q60 - *Did she push you away?*

A - ***Yes. But I forced my penis inside her***

41. When it is analysed the answers given by juvenile at the caution interview, it is clear that he has admitted that the victim was trying to push him away when he was trying to have sex with her. But still he has inserted his penis into her vagina. This position is completely contradicted with the evidence given by him in court saying that she consented for sexual intercourse.

42. Therefore, the court cannot consider that the juvenile is a genuine witness and based on said contradictions, I completely reject his evidence as they are unreliable.

Conclusion

43. On a careful consideration of all the evidence produced during the trial, it is the opinion of this court that the prosecution has proved all 5 charges against the juvenile beyond reasonable doubt. The juvenile failed to create any reasonable doubt on the prosecution case.

44. Therefore, I find the juvenile guilty for all five counts mentioned in the charge.

45. As this court has exercised the vested jurisdiction by the High Court, parties may appeal within 30 days to the Court of Appeal, with the leave of the Court.

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Geethani Wijesinghe

Resident Magistrate

At Suva

14th February 2019