

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 74 of 2013

BETWEEN:

THE STATE

AND:

HENRY FISHER

Counsel : Ms P. Low for State
Ms M. Tarai for Accused

Date of Hearing : 30 June – 2 July 2014

Date of Judgment: 2 July 2014

JUDGMENT

- [1] The Accused, Henry Fisher is charged with two counts of rape against a 10 year-old complainant. The first count alleges digital penetration of the complainant's vagina using fingers. The second count alleges penile penetration of the complainant's vagina.
- [2] The trial commenced on 30 June 2014. The evidence was concluded on 1 July 2014. The prosecution called four witnesses. The defence called one witness. The Accused elected to remain silent.
- [3] After the summing up was delivered, the three assessors deliberated for thirty minutes. When the court reconvened to receive the assessors' opinions, the assessors expressed unanimous opinion of guilty on both counts against the Accused.

- [4] I direct myself in accordance with my directions contained in my summing up to the assessors. Like in any criminal trial, the prosecution carries the burden of proof to establish guilt beyond reasonable doubt. There is no onus on the Accused to prove anything. This Court draws no adverse inference against the Accused for not giving evidence.
- [5] On count one, the prosecution must prove beyond reasonable doubt that the Accused penetrated the complainant's vagina using his fingers. On count two, the prosecution must prove beyond reasonable doubt that the Accused penetrated the complainant's vagina using his penis. Lack of consent is not an issue because it is not in dispute that at the time of the alleged incidents the complainant was ten years old and was incapable of giving a valid consent under the law.
- [6] On count one, the prosecution's case depended entirely upon whether the complainant told the truth when she said the Accused inserted his fingers inside her vagina and her identification of the Accused is reliable and not mistaken. The identification of the Accused was made at night time and in dark.
- [7] On count two, the prosecution's case is depended upon acceptance of the complainant as a truthful witness when she said the Accused inserted his penis inside her vagina. This alleged incident occurred during the day time and therefore identification is not an issue.
- [8] The defence's case is that the sexual allegations were fabricated by the complainant after village rumours and that she admitted to her aunty Susana that the allegations were not true.
- [9] When the complainant gave evidence she struck me as an ordinary child. She had a quiet demeanour and she was not able to answer a number of questions under cross-examination because she broke down

into tears. The inconsistencies in her evidence related to the description she gave regarding the nature of the sexual acts. She told the village headman Rokobuli about the digital penetration and not the penile penetration. She reluctantly accepted the proposition put to her by the defence that she admitted to her aunty Susana that the sexual allegations against the Accused were not true. In assessing these inconsistencies, I bear in mind that the complainant is a child. I do not expect her to give a detailed account of the events that occurred more than three years ago. The complainant may have said to her aunty Susana that the allegations were not true but I do not accept she made that statement freely and voluntarily. The complainant said she did not complain about the sexual acts to her aunty Susana because she feared her aunty would not believe her. The complainant knew the consequences of complaining against the Accused would adversely affect her aunt's family. I find that the complainant became reluctant to pursue her complaint against the Accused because of fear that she would not be believed. I find the inconsistencies do not affect her credibility on the material issue of penetration of her vagina by the Accused as alleged in the charges.

- [10] On count 1, the complainant's identification of the Accused without any light and by using only the physical built, however, is unreliable form of identification. The complainant said the Accused spoke to her after the alleged event and told her not to tell anyone. This evidence is crucial although the complainant accepted that she told the police the Accused warned her the following morning when she woke up and not immediately after the alleged incident. Whether the warning was made immediately after the alleged event or the following morning is not significant. What is significant is that the Accused warned the complainant not tell anyone about the alleged incident that is subject of count 1. In this regard I accept the complainant's evidence that she was warned by the Accused not to tell anyone about the alleged incident that is subject of count 1. I further accept the complainant's evidence

that the Accused penetrated her vagina using his fingers and her identification of the Accused is reliable and not mistaken.

[11] On count 2, I accept the complainant told the truth when she said the Accused penetrated her vagina using his penis. Although the medical evidence is not conclusive as to the age of the tear that is consistent with sexual intercourse found on the complainant's vagina, I accept the medical evidence as confirming the complainant's version that penetration took place sometimes before June 2011.

[12] I feel sure of the Accused's guilt on both counts, and therefore I find him guilty as charged. The Accused is convicted of rape on both counts.



Daniel Goundar
JUDGE



At Labasa
2 July 2014

Solicitors:

Office of the Director of Public Prosecutions for State
Office of the Director of Legal Aid Commission for Accused