

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 54 of 2013

BETWEEN : STATE

AND : SAKARAIA BULIVAKARUA

Counsel : Mr Fotofili L and Ms M Chaudhary M for the State
Mr J Savou for the Accused

Date of Hearing : 10 December 2014

Date of Judgment : 16 December 2014

JUDGMENT

1. The accused Mr. Sakaraia Bulivakarua is charged with two counts of Sexual Assault contrary to section 210 (1) (a) of the Crimes Decree and two counts of Rape contrary to section 207(1) and 207 (2) (b) of the Crimes Decree.
2. The accused pleaded not guilty for these four counts, wherefore, this action was set down for hearing on 8th, 9th and 10th of December 2014. The prosecution called six witnesses including the complainant and tendered the copy of caution interview of the accused and the medical report of the victim as prosecution exhibits during the cause of this hearing. At the conclusion of prosecution case, one count of sexual assault and one count of rape were

dismissed pursuant to section 231 (1) of the Criminal Procedure Decree and acquit the accused accordingly.

3. The accused gave evidence on oaths for the defence. Subsequently the learned counsel for the defence and the prosecution made their respective closing submissions. I then delivered by summing up to the assessors.
4. The three assessors have returned with an unanimous guilty verdict against the accused for the offence of sexual assault and the offence of rape. The assessors' verdict was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing.
5. In respect of the count of sexual assault, the victim specifically stated in her evidence that the accused person came to her, while she was sleeping with her sister in the bed and touched her breast, stomach, bum and private part from his hand. She identified the accused person at that time. I am mindful of the fact that the victim stated in her evidence that the accused lowered the light, but the father of the victim stated that he found the lights were turned off. However, the father of the victim in his evidence stated that the lights from an adjacent building was coming through, which was sufficient for him to see the things inside the room. Accordingly, I do not find this contradictory nature of the evidence on the lighting condition of the room has lessened the credibility of the victim's recognition of the accused person. I further mindful of the fact, that the victim was an 8 year of child at the time of this alleged incident took place. She knew the accused person as he was living with her family in the same house. I accordingly accept her evidence of recognition of the accused person.
6. The accused in his evidence stated that he admitted to the father of the victim that he committed this crime as he was asked his father to admit anything if

someone made an allegation against him. I find it is indeed an un-reasonable explanation from a person of his age. Moreover, the accused has admitted in touching the victim's private part, breast and stomach in his caution interview. The court has already ruled that the accused was not forced and gave his answer in caution interview voluntarily. In view of these reasons, I do not accept the evidence of the accused person. In addition the accused person's evidence failed to create any reasonable doubt in respect of the count of sexual assault.


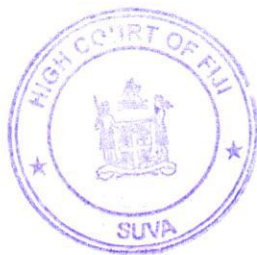
7. I heard the evidence of the victim and observed the manner she gave her evidence. It appears to me that she was able to properly understand the questions put to her and confidently answered to them though she appeared to be naïve. I accordingly accept her evidence that the accused came to her while she was sleeping in the bed with her sister. He then indecently and unlawfully touched her breast, stomach, bum and private parts from his hand. I accordingly find the accused person is guilty for the offence of sexual assault.
8. In respect of the count of rape, it appears that this alleged incident has taken place during the same cause of events as of the offence of sexual assault.
9. The victim did not specifically state that the accused penetrated her vagina with his finger. She only stated that the accused touched her private part from his hand. She said that the accused put his hand inside her clothes, but did not specify which part of her body he touched putting his hand through her clothes. Moreover, she stated in her evidence that she could not specifically say which part of the hand of accused touched her body.
10. Meanwhile, the doctor who conducted the medical examination of the victim gave her opinion upon her medical observation of the victim that her vaginal

orifice is open and it is consistent with penetration of vaginal orifice with a blunt object. There is no direct evidence of penetration of the vagina by the accused with his finger, though the medical findings and opinion confirm penetration of vaginal orifice with a blunt object.

11. Under such circumstances, it appears that the prosecution has established that the accused touched her private part with his hand and later, the doctor has found, based on her medical observation and findings that the vaginal orifice of the victim is open and it is consistent with penetration of vaginal orifice with a blunt object. Hence, it is required to determine that whether this circumstantial evidence allows me to safely form an inference that the accused has penetrated the vagina of the victim.
12. The learned counsel of the prosecution submitted in his submission that the age of the victim and her level of understanding of such incidents need to be considered in forming such a positive inference of the accused person's guilt. There is no evidence to generate any reasonable doubt that someone apart from the accused had touched her private part. The accused and PW1 stated during the course of their respective evidence that this alleged incident took place in May 2012. The medical report was conducted on 26th of August 2012. The victim is a small girl. The doctor in her evidence ruled out the possibility of self-penetration by a girl as of the victim's age.
13. Having considered these reasons set out above, it appears that the evidence presented by the prosecution allows me to form a positive inference that the accused has penetrated the vagina of the victim with his finger without any reasonable doubt. I accordingly find the accused is guilty for the offence of rape.

14. Having considered the summing up I delivered and the reasons I set out above, I do not find any cogent reason to disagree with the unanimous verdict of the assessors.

15. I accordingly find the accused is guilty for the offence of sexual assault contrary to section 210 (1) (a) of the Crimes Decree and for the offence of rape contrary to section 207(1) and 207 (2) (b) of the Crimes Decree. I convict the accused for these two counts accordingly



T Rajasinghe
Judge

At Suva
16 December 2014