

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 121 of 2015

STATE

v.

MOHAMMED SHARUK SHAMIM

Counsel: Mr. R. Kumar for State
Mr. M. Yunus for Accused

Date of Hearing: 29th February 2016, 1st and 2nd March 2016

Summing Up: 3rd March 2016

Judgment: 4th March 2016

JUDGMENT

[Name of the victim is suppressed. The victim will be referred to as [A.A.]

1. Accused is charged with the following offences.

FIRST COUNT
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

MOHAMMED SHARUK SHAMIM, between the 1st day of September 2014 and the 30th day of November 2014, at Manoca, Nausori, in the Central Division, penetrated the mouth of 'A.A.', a child under the age of 13 years, with his penis.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

MOHAMMED SHARUK SHAMIM, between the 1st day of September 2014 and the 30th day of November 2014, at Manoca, Nausori, in the Central Division, had carnal knowledge of 'A.A.', a child under the age of 13 years.

THIRD COUNT

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to section 213 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

MOHAMMED SHARUK SHAMIM, between the 1st day of September 2014 and the 30th day of November 2014, at Manoca, Nausori, in the Central Division, with intent to insult the modesty of 'A.A.', a child under the age of 13 years, exposed his naked penis to her, intending that his penis be seen by her.

2. After trial, three assessors unanimously opined that the accused is not guilty of all the 3 counts. I adjourned to consider my judgment. I direct

myself in accordance with my summing up and the evidence adduced at the trial.

3. Prosecution called 3 witnesses and Defence called 1 witness at the trial.
4. Complainant was a child of 10 years at the time of the alleged offence. Her evidence was that she was residing at Aunty Nisha's place during the period between September and November 2014. Accused is a son of Aunty Nisha.
5. Her evidence was that when Aunty Nisha was away in the West, the accused committed the sexual acts on her. One day during that period the accused had asked her to take his penis into her mouth and she had taken it inside her mouth. Another day the accused had put his private part inside her private part. She said that she shouted as it was painful. Then the accused stood up, wore his trousers and had gone outside. She said that there was blood on her private part and the trousers. She had not told anyone about the incidents and after some time she had told her stepmother when her father was away in Japan.
6. Complainant's stepmother Shafina in her evidence said that the complainant was complaining of stomach pain and also that her urine was burning. On questioning the complainant, she had told her what the accused did to her. This was in February 2015. Then she had told her husband who is the father of the child who was in Japan at that time. On his advice, she had waited for Naushad, her husband to come.

When her husband came, they have reported the matter to police. This evidence was confirmed by Naushad, the complainant's father.

7. Dr. Kelerayani had examined the complainant on 13/03/2015. She said that there were no bruises or injuries on the genitalia. She said that 'no signs of physical injury' did not mean any such assault did not occur due to the time lapse between the incident and the time of examination. However, she had not even examined the complainant's hymen. She said it would have been prudent, but she did not mention it in her report.
8. According to the charges (Counts 1 – 3), the offences were alleged to have been committed between September 2014 and November 2014. Complainant's father clearly said in cross examination that the complainant was staying at the accused's place and was taken back by him the day the accused's sister came back from overseas and also that the complainant never returned to the accused's place thereafter.
9. Accused's sister Shabana Naz said in her evidence that she came from overseas on 26/02/2014 and that she never went back. She said that after 26/02/2014 the complainant was never at her mother's place (accused's house). This evidence was not challenged by the prosecution. She had brought her passport to court to confirm her date of arrival to Fiji and to show that she never went back. It was the complainant's father's evidence as well, that the complainant child never went to the accused's house after the accused's sister came from overseas. Therefore it is clear in evidence that the complainant was not staying in the accused's house

after 26/02/2014. Therefore, if at all any such incident happened it has to be before 26/02/2014. However, there is no clear evidence as to when the complainant was residing at accused's house before 26/02/2014.

10. However, the information says that the incidents happened between September and November 2014. Complainant also clearly said that the incidents happened during that period.
11. It was the position taken by the defence that the alleged incidents never happened and it was a made up story to take revenge from the accused by the complainant's father Naushad. It was also suggested that the complainant was never at the accused's house during the period between September and November 2014.
12. Complainant's evidence was that the incidents took place at the accused's house at the time she was residing there. There is evidence to say that she had been residing there at some point in time, but it is not clear when it was. The evidence also revealed that the complainant was not residing in accused's house between the periods mentioned in the indictment. She had not been residing there after February 2014, which means nowhere close to the dates mentioned in the indictment. Therefore it cannot be taken as a slight difference on the date or a mistake on the date as the complainant confirmed in her evidence that it happened during the period between September and November 2014. It is not a mere mistake of the date, but a substantial variation from the dates specified in the indictment.

13. Assessors were also directed on this issue to decide whether the accused committed the offences and if they found that he has committed, but on a different date, to see whether the accused was prejudiced in his defence. Although the complainant says that it happened between September and November 2014, the evidence revealed that complainant had not been at accused's house on any date close to the period mentioned in the indictment.
14. Therefore I find that the assessors were entitled to come to the conclusion that the prosecution has failed to prove the charges beyond reasonable doubt.
15. Hence, I accept the unanimous opinions of the assessors that the accused is not guilty of all 3 counts in the indictment and acquit the accused on all 3 counts accordingly.



A handwritten signature in black ink, appearing to read "Priyantha Fernando".

Priyantha Fernando
Judge

At Suva

4th March 2016

Solicitors

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