

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 083 of 2010

STATE

V

SBN

Counsel : Ms. S. Puamau for State
Ms. M. Tarai for Accused

Dates of Hearing : 04th April – 07th April 2016

Date of Summing Up: 07th April 2016

Date of Judgment : 08th April 2016

(The names of the accused and of the complainant are suppressed. Accordingly, the accused will be referred to as SBN and the complainant as SM)

JUDGMENT

1. The accused is charged for the following offence;

Statement of offence

Rape: Contrary to Section 207 (1)(2)(c) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

SBN on the 05th day of April 2010, at Lami, in the Central Division, penetrated the mouth of **SM** with his penis without her consent.

2. The assessors have returned with a unanimous opinion that the accused is guilty of rape as charged.

3. I direct myself in accordance with the summing up delivered to the assessors on 07th April 2016 and the evidence adduced during the trial.
4. To find the accused guilty of rape contrary to section 207(1)(2)(c) of the Crimes Decree 2009, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused
 - b) penetrated the mouth of SM with his penis
 - c) without the consent of SM or,
that SM was below the age of 13 years at the time of the incident
5. Section 207(3) of the Crimes Decree 2009 provides that '*a child under the age of thirteen years is incapable of giving consent*'. It is an admitted fact in this case that SM was under the age of 13 years at the date of the alleged incident. In view of the said admission, the third element above is established. Therefore, only the first two elements are in dispute.
6. I carefully observed the demeanour of SM when she gave evidence. She was not evasive. Her answers during her examination in chief, cross examination and reexamination appeared frank and genuine. I am mindful of the fact that she was 3 years old when this alleged incident took place and that she was 9 years old now.
7. I believe her when she said that, on 05/04/2010, the accused called her inside his house and pressed his penis into her mouth and that accused's penis went inside her mouth. I also believe her when she said that she told her sister, AQ when AQ told her to have lunch soon after the alleged incident, that she suckled from the accused.
8. I also believe the evidence of SM's sister, AQ who said that when she told SM to eat after bringing her from the accused's house on 05/04/2010, SM told her that 'A.. I have already suckled' and when AQ asked SM again SM said that she had already suckled the accused's private part. Therefore, I hold that SM did make a complaint without delay and what SM said to AQ contains sufficient information regarding the charge against the accused. Therefore, I consider that SM's credibility is further strengthened due this recent complaint evidence.

9. Defence pointed out that there were inconsistencies in the evidence of SM and further, there were inconsistencies between her evidence and the evidence of her sister, AQ. Now I turn to examine the inconsistencies highlighted by the defence.

10. During cross examination, SM was asked a series of questions to which she kept on answering 'yes'. In the process she admitted that the accused came home when she was playing on his porch with other children and he chased all of them away including her and that was the only time she saw the accused on the day in question. She also admitted that her sister AQ smacked her with the spoon relentlessly which made her cry.

11. It is pertinent to note that though she said 'yes' to the questions which suggested that she was chased away by the accused and she did not see the accused after that, SM very clearly and firmly denied the suggestion that the accused did not make her suck his penis on the day in question. Further, she clearly said "No" when it was suggested to her that she started telling what AQ told her to say because AQ hit her so much that day.

12. SM's answer to the last 3 questions posed to her during cross examination were as follows;

Q: I suggest to you that on that day, Tai Bili did not make you *tu tu* on his *polo*?

A: Not true.

Q: I put to you that you did not *tu tu* on Ta Bili's *polo*? Is that true or not?

A: Not true.

Q: I suggest to you that you did not *tu tu* on Ta Bili's *polo*, because as soon as Ta Bili chased you, you went to your house?

A: Yes.

13. Even after she had clearly said "not true" when it was put to her that she did not suckle accused's penis, she answered "yes" to the next (final) question which is a compound question that again includes the suggestion that she did not suckle accused's penis. It is not clear to which question she answered "yes" and it is highly likely that she answered the last question of that compound question. It appeared to me that SM did have a strong recollection of the accused chasing her and her friends from his house. Though the prosecution did not object to this question, considering her age and considering her clear answer to the previous two questions, I am of the view that her answer "yes" to this final

question in cross examination cannot be considered as her admitting that she did not suckle accused's penis.

14. It is pertinent to note that this matter was further clarified during reexamination when SM clearly said that the accused chased the other children but called her inside his house and then put his penis into her mouth.
15. I note that there was in fact an inconsistency between the evidence of SM and the evidence of AQ regarding smacking SM with the spoon. However, the evidence given by both witnesses concerning the complaint made by SM to AQ was consistent. The aforementioned inconsistency is not material and relevant in determining the elements of the offence. Especially in light of the fact that SM has clearly denied any connection between the allegation made against the accused and AQ hitting her with the spoon, it is not necessary to make a finding regarding the manner in which AQ hit SM on the day in question.
16. Pointing out that SM admitted in cross examination that her mother and her sister (AQ) told her to tell in court that the accused made her suck his penis; defence says that there is a reasonable doubt regarding this case. Considering SM's clear evidence with regard to what the accused did to her and the fact that SM never said that her mother or sister told her to fabricate evidence against the accused as pointed out by the counsel for the prosecution, I cannot agree with the defence that the aforementioned admission gives rise to a reasonable doubt concerning the guilt of the accused.
17. After holding a *voir dire* on the admissibility of the cautioned interview tendered as PE01 (PE02 - English translation), I found that the said cautioned interview statement was made voluntarily. Considering the evidence of the police officers, the evidence of the accused and the cautioned interview itself, I find that the accused made the admissions recorded in PE01. Considering all evidence led in the trial, I find that the admissions accused made to the effect that he removed his pants and told SM to suck his penis and that SM sucked his penis are true.
18. I observed the demeanour and deportment of the accused when he gave evidence. In my judgment the accused was not a credible witness.

19. In light of the above, I find that the prosecution has proved beyond reasonable doubt that the accused penetrated the mouth of SM with his penis on 05/04/2010.

20. I am therefore convinced that the unanimous opinion of the assessors in finding the accused guilty for the offence of rape was not perverse and it was open for them to reach that conclusion.

21. In the circumstances, I concur with the unanimous opinion of the assessors.

22. I find the accused guilty of the offence of rape as charged and convict him accordingly.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.