

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

CRIMINAL CASE NO: HAC. 15 OF 2015

STATE

V

TOMASI BULAGO

Counsel : Mr. M. Vosawale and Ms. L. Bogitini for State
Ms. C. Choy for the Accused

Dates of Hearing : 01st June – 03rd June 2016

Date of Summing Up: 06th June 2016

Date of Judgment : 07th June 2016

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as TK)

JUDGMENT

1. The accused is charged for the following offences;

COUNT ONE
(Representative Count)
Statement of offence

Rape: Contrary to Section 207 (1) & (2)(b) & (3) of the Crimes Decree 2009.

Particulars of offence

TOMASI BULAGO between the 1st day of February 2010 to the 27th day of August 2010 at Nasinu, in the Central Division, penetrated the vagina of TK, a child under the age of 13 years with his finger.

COUNT TWO
(Representative Count)
Statement of offence

Rape: Contrary to Section 207 (1) & (2)(c) & (3) of the Crimes Decree of 2009.

Particulars of offence (b)

TOMASI BULAGO between the 1st day of January 2011 and the 27th day of August 2011 at Nasinu, in the Central Division penetrated the mouth of TK, a child under the age of 13 years with his penis.

COUNT THREE
(Representative Count)
Statement of offence

Rape: Contrary to Section 207 (1) & (2)(a) & (3) of the Crimes Decree of 2009.

Particulars of offence (b)

TOMASI BULAGO between the 1st day of January 2011 and the 27th day of August 2011 at Nasinu, in the Central Division had carnal knowledge of TK, a child under the age of 13 years.

COUNT FOUR
(Representative Count)
Statement of offence

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

Particulars of offence (b)

TOMASI BULAGO between the 1st day of January 2012 and the 31st day of December 2012 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.

COUNT FIVE
(Representative Count)
Statement of offence

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

Particulars of offence (b)

TOMASI BULAGO between the 1st day of January 2013 and the 31st day of December 2013 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.

COUNT SIX
(Representative Count)
Statement of offence

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

Particulars of offence (b)

TOMASI BULAGO between the 1st day of January 2014 and the 31st day of October 2014 at Nasinu, in the Central Division had carnal knowledge of TK, without her consent.

COUNT SEVEN
(Representative Count)
Statement of offence

Sexual Assault: Contrary to Section 210 (1)(a) of the Crimes Decree of 2009.

Particulars of offence (b)

TOMASI BULAGO between the 1st day of February 2010 and the 31st day of December 2013 at Nasinu, in the Central Division unlawfully and indecently assaulted TK by touching her breasts.

2. The assessors returned with the following opinion;
 - 1st count (Rape) – guilty (unanimous)
 - 3rd count (Rape) – not guilty (unanimous)
 - 4th count (Rape) – not guilty (unanimous)
Defilement – not guilty (unanimous)
 - 5th count (Rape) – not guilty (unanimous)
Defilement – 1st & 2nd assessors - not guilty; 3rd assessor - guilty
 - 6th count (Rape) – 1st & 2nd assessors - not guilty; 3rd assessor - guilty
 - 7th count (Sexual Assault) – 1st & 2nd assessors - guilty; 3rd assessor - not guilty
3. I direct myself in accordance with the summing up delivered to the assessors on 06th June 2016 and the evidence adduced during the trial.
4. The prosecution's case involves alleged incidents from 2010 to 2014. According to the prosecution the accused penetrated the complainant's vagina with his fingers on multiple occasions between 01st February 2010 and 27th August 2010. The complainant was 12 years old during the above period. The first incident took place when the complainant's mother was admitted in hospital for one week. Thereafter, between 01st January 2011 and 27th August 2011 the accused penetrated the complainant's mouth with his penis. During the same period, between 01st January 2011 and 27th August 2011 the accused penetrated the complainant's vagina with his penis. According to the prosecution, since then, the accused had penetrated complainant's vagina with his penis on several occasions in the same year, then in 2012, in 2013 and in 2014, without her consent. It is also alleged that

the accused sexually assaulted the complainant by touching her breasts on several occasions during 01st February 2010 and 31st December 2013.

5. The prosecution had decided to charge the accused with 7 representative counts (i.e. digital rape in 2010, oral rape in 2011, penile rape in 2011, penile rape in 2012, penile rape in 2013, penile rape in 2014 and sexual assault between 2010 and 2013) as reproduced above.
6. During the time material to the first three counts, the complainant was below the age of 13 years. During the time material to the fourth and fifth counts, the complainant was above the age of 13 years but below the age of 16 years. The time of offence of the sixth count is from 01st January 2014 to 31st October 2014 and the complainant became 16 years old on 27th August 2014.
7. All assessors have found the accused guilty of the first count where it is alleged that the accused penetrated the vagina of the complainant who was at that time below the age of 13 years, with his finger between 1st February 2010 and 27th August 2010.
8. In view of the admitted facts, it was established that, during the time material to the first, second and the third counts, the complainant was under the age of 13 years. Section 207(3) of the Crimes Decree 2009 provides that '*a child under the age of thirteen years is incapable of giving consent*'. Therefore, the elements concerning consent were not relevant to these three counts.
9. Giving evidence on the alleged first incident relevant to the first count which had taken place during night time, the complainant said that the light was off and she recognized the accused by his voice. According to her evidence, accused initially told her to massage his stomach and then his penis. Then he told her to lie down beside him. After the accused penetrated her vagina with his finger, he told the complainant not to tell anyone because no one would believe her. He also told her that he will beat her and send her to a faraway place. According to this evidence I find that there had been sufficient time for the complainant to identify the accused. Moreover, the complainant also said that the accused did that to her on several occasions between 1st February 2010 and 27th August 2010. In this case there was no dispute on the identity of the accused. This was not a case of

mistaken identity. The position taken by the accused (in relation to all the counts) was that the complainant was lying.

10. According to the accused, he was at Denarau when this first incident was said to have taken place. The assessors have unanimously rejected the accused's *alibi* and they have accepted the complainant's evidence that the accused penetrated her vagina with his finger during the period between 1st February 2010 and 27th August 2010.
11. I find that the unanimous opinion of the assessors that the accused is guilty of the first count is not perverse and it was open for them to come to that conclusion. Thus, I agree with the unanimous opinion of the assessors that the accused is guilty of the first count.
12. At the conclusion of the prosecution case, I found the accused not guilty of the second count pursuant to section 231(1) of the Criminal Procedure Decree as there was no evidence that the accused committed the offence as charged on the second count. Accordingly, in my summing up, the assessors were informed that their opinion was not required in respect of the second count.
13. I am unable to rule out the possibility of the assessors forming an adverse inference against the complainant due to the reason that she did not come up to proof with regard to the second count. Since the time of offence of the second count and that of the third count is the same, such an inference is capable of leading them to disbelieve the complainant on the third count. It was the complainant's evidence that after the accused penetrated her vagina with his penis for the first time in the year 2011 he told her to suck his penis and she did not do it. The court and the assessors noted the unsuccessful attempts made by the prosecutor in questioning the complainant about accused penetrating her mouth with his penis and the complainant's firm response that she did not suck the accused's penis. It is not for this court to question the basis of bringing the second count against the accused or whether there was sufficient evidence in the first place to charge the accused with the second count. That was a matter entirely within the discretion and the good judgment of the prosecution.
14. That said, I accept the evidence of the complainant when she said that the accused penetrated her vagina with his penis that particular day between 1st January 2011 and 27th August 2011, on which she was alone at her house. Accordingly, I am satisfied that the elements of the third count have been proved beyond reasonable doubt. Therefore, I am

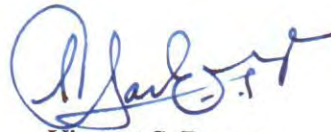
unable to agree with the unanimous opinion of the assessors that the accused is not guilty of the third count.

15. In my view, the evidence the complainant gave, with regard to the fourth, fifth and sixth counts was vague. May be she was in fact confused due to the numerous unpleasant events she experienced over a period of four years. I recall her evidence where she said that her memory was 'jumbled up' when she gave her statement to the police. The court observed that the prosecutor who led the evidence of the complainant could not offer much assistance and she herself was confused at times regarding the events. However, the fact remains that the evidence the complainant gave with regard to the alleged incidents in 2012, 2013 and 2014 was not convincing. By saying that I am not implying that the complainant was an incredible witness. I find the state of mind of the complainant after what she had experienced and the manner in which the prosecution decided to present its case, as the reasons for the evidence that was led regarding the aforementioned incidents, to be unconvincing. As I have directed the assessors, sympathy or prejudice has no role to play in deciding whether an accused is guilty or not guilty of a particular offence. That decision should be based on whether or not there is evidence to prove the elements of the offence beyond reasonable doubt.
16. Therefore, I am inclined to agree with the unanimous opinion of the assessors that the accused is not guilty of the fourth count and the fifth count; and the majority decision of the assessors that the accused is not guilty of the sixth count. Further, I also agree with the unanimous opinion of the assessors that the accused is not guilty of the lesser offence of defilement as an alternative to the fourth count, and the majority opinion of the assessors that the accused is not guilty of the lesser offence of defilement as an alternative to the fifth count.
17. Two assessors have found the accused guilty of the seventh count where it was alleged that the accused sexually assaulted the complainant by touching her breasts between 1st February 2010 and 31st December 2013.
18. Complainant clearly said in her evidence that the accused touched her breast on the night he inserted his finger inside her vagina for the first time. This was during the period between 1st February 2010 and 27th August 2010. That touching of the complainant's breasts was unlawful, indecent and sexual in nature. Therefore, I agree with the majority decision of the assessors that the accused is guilty of the seventh count of sexual assault.

19. In the circumstances, I find the accused not guilty of the second, fourth, fifth and sixth counts and acquit him accordingly.

20. I find the accused guilty of the first, third and seventh counts 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.