

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION

Crim. Case No: HAC 109 of 2015

STATE

v.

NEMANI MOCEISAVU

**Counsel:** Ms. S. Serukai for State  
Ms. M. Tarai for Accused

**Hearing:** 17<sup>th</sup> and 18<sup>th</sup> October 2016

**Summing Up:** 19<sup>th</sup> October 2016

**Judgment:** 21<sup>st</sup> October 2016

JUDGMENT

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

1. The accused was charged with 1 count of Rape and 5 counts of Sexual Assault.

**FIRST COUNT**

**(Representative)**

*Statement of Offence*

**RAPE:** Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

NEMANI MOCEISAVU, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, penetrated the anus of 'J.R.', a child under the age of 13 years, with his finger.

**SECOND COUNT**  
**(Representative)**  
*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**NEMANI MOCEISAVU**, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, unlawfully and indecently assaulted 'J.R.', by kissing her lips.

**THIRD COUNT**  
**(Representative)**  
*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**NEMANI MOCEISAVU**, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, unlawfully and indecently assaulted 'J.R.', by kissing her breasts.

**FOURTH COUNT**  
**(Representative)**  
*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**NEMANI MOCEISAVU**, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, unlawfully and indecently assaulted 'J.R.', by kissing her vagina.

**FIFTH COUNT**  
**(Representative)**  
*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**NEMANI MOCEISAVU**, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, unlawfully and indecently assaulted 'J.R.', by fondling her vagina.

**SIXTH COUNT**  
**(Representative)**  
*Statement of Offence*

**SEXUAL ASSAULT:** Contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**NEMANI MOCEISAVU**, between the 1<sup>st</sup> day of September 2014 and the 31<sup>st</sup> day of October 2014, at Verata, Tailevu, in the Central Division, unlawfully and indecently assaulted 'J.R.', by rubbing his penis on her anus.

2. At the end of the prosecution case on an application made by the defence the court found that there was no case to answer in respect of counts 4, 5 and 6. Hence, the case continued against the accused in respect of counts 1, 2 and 3 with 3 assessors.
3. After trial the majority opinion of the assessors was that the accused is guilty of Rape in respect of count no. 1 and they unanimously opined that the accused is guilty of sexual assault in respect of counts 2 and 3.

4. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at the trial.
5. The prosecution called 3 witnesses, the complainant, complainant's mother and the doctor who examined the complainant to give evidence.
6. Defence called the accused and the police investigating officer who recorded the complainant's statement to give evidence for defence.
7. It is an admitted fact that the complainant was 7 years old at the time of the alleged offences were committed. Therefore she was incapable of giving consent to the sexual acts alleged.
8. Complainant and the accused had been living in the same settlement. Complainant in her evidence said that the accused on one occasion, when she was coming from Joji's home, pushed her to the grass, pulled her dress and panty up, kissed her lips, kissed her breasts and then inserted his finger into her anus after she was turned upside down.
9. Again on another occasion when she was alone at home the accused had come and taken her to the bedroom. He had made her lay on the bed and done the same thing to her.
10. She said that she had not told this to anyone as she was scared. Later one day when her mother had noticed something below her anus and when she asked her she had told the mother what happened.

11. In his evidence the accused said that he did not even know about the victim child although he knew her father. Denying the allegations he said that he did not know about the allegations.
12. I bear in mind that the complainant was 7 years old at the time of the alleged offences and 9 years old when she testified in court.
13. Complainant has not told anyone including her parents about what the accused did to her. She said that she was scared. She told her mother only when her mother questioned her. As a 7 year old child she may have had the guilty feeling about what happened to her. She even may have been embarrassed of what happened to her. Her understanding about these matters can be severely limited for number of reasons such as the age and maturity. Therefore I find that the delay in complaining can be justified.
14. However, the evidence revealed that she never complained about the accused inserting his finger into her anus. She admitted in court in cross examination that she did not mention that to police. She said that she did not tell that in her statement but told her mother.
15. However, her mother's version on that was different. Complainant's mother said that she told her that the accused poked his finger into her vagina, in i-taukei language she had used the word 'Front'.
16. Also the investigating officer clearly said that the complainant never told her about penetrating her anus.

17. Although the complainant denied having said to police about penetrating the vagina, on showing the statement she admitted telling that to police. This inconsistency goes to the root of the elements of Rape. The only element in dispute on the charge of Rape is penetrating the finger into her anus. The complainant clearly said that she did not use the word vagina. Also there is no evidence in court that the accused penetrated the vagina of the complainant with his finger.
18. Although she said that the accused penetrated her anus with his finger in her evidence I find that evidence is unreliable when consider the inconsistencies, mentioned above.
19. The complainant said that her mother told her to tell that her anus was penetrated, however, she said that it was the truth. Complainant also said that she told the same story to the State counsel.
20. Although she later admitted on showing her the statement that she told the police that the accused inserted his finger into her vagina, no evidence was led to that effect in court. In court she repeatedly said that he inserted the finger into her anus.
21. On the above, I find that the evidence on penetrating the anus is unreliable.
22. I find that the prosecution failed to prove the element of penetrating the anus with the accused's finger beyond reasonable doubt.

23. Therefore I disagree with the majority opinion of the assessors that the accused is guilty of Rape in respect of count no. 1. Hence, I find the accused not guilty of Rape in respect of count No. 1. Accordingly I acquit him of Rape in respect of count no. 1.
24. Now I will turn to evidence in respect of counts 2 and 3. The complainant was consistent that the accused on both occasions kissed her lips and breasts. Accused denied the allegations saying that he did not know about the allegations and also that he even did not know the complainant. He admitted that he only knew complainant's father but not the complainant. It is also an admitted fact that the accused and the complainant are from the same settlement. It is highly improbable that the accused did not know the complainant. The assessors rejected that version of the accused which they are entitled to.
25. Complainant also has informed her mother about those acts committed by the accused. I find that kissing of her lips and her breasts were unlawful and indecent in the context. Any right thinking person would consider these acts indecent under these circumstances. I have no reason to disbelieve her evidence that the accused committed those acts on her and assessors were entitled to come to the conclusion that the accused committed those acts.
26. I have said before that the evidence of the complainant was unreliable in respect of count no. 1 for the given reasons. Court is entitled to accept part of a witness's evidence and reject another part on reliability for good reasons.

27. Hence, for the given reasons I accept the evidence of the complainant in relation to counts 2 and 3 and agree with the unanimous opinion of the assessors that the accused is guilty in respect of counts 2 and 3 and convict him accordingly.

28. This is the judgment of Court.



  
Priyantha Fernando  
**JUDGE**

**At Suva**

21<sup>st</sup> October 2016

**Solicitors**

Office of the Director of Prosecution for State  
Office of the Legal Aid Commission for Accused