

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 400 of 2016

[CRIMINAL JURISDICTION]

STATE

V

INIA RAYALO

Counsel : Ms. S. Serukai for State
Mr. L. Qetaki and Ms. E. Radrole for Accused
Dates of Hearing : 25th - 27th April 2017
Date of Summing up: 28th April 2017
Date of Judgment : 01st May 2017

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

JUDGMENT

1. The accused is charged with the following offence;

Statement of Offence

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

Particulars of Offence

INIA RAYALO on the 20th of October 2016, at Vunuku Village, Rewa in the Central Division, penetrated the vagina of TN with his finger.

2. The assessors have returned with the unanimous opinion that the accused is not guilty of the above offence but guilty of the lesser offence of sexual assault.

3. I direct myself in accordance with the summing up delivered to the assessors on 28th April 2017 and the evidence adduced during the trial.
4. The complainant, her mother and the doctor who medically examined the complainant gave evidence on behalf of the prosecution. The accused chose to remain silent.
5. Before the trial, the prosecution informed the court that the complainant is four years old and she is scared to come inside the courtroom. Accordingly an application was made by the prosecution to allow the complainant to give evidence from a location outside the courtroom. Being satisfied that the necessary facilities and the equipment are available to transmit the evidence via secure audio visual electronic means to the courtroom, a direction was given allowing the complainant to give evidence from a special room as provided under section 296(1)(b) of the Criminal Procedure Act 2009.
6. I was satisfied that the complainant is possessed of sufficient intelligence to justify the reception of her evidence and to understand the duty of speaking the truth considering her answers to the preliminary questions.
7. The complainant was a credible witness though there were certain inconsistencies in her evidence. In my view, those inconsistencies surfaced mainly as a result of the way the complainant was cross-examined and they were in relation to peripheral matters. The complainant was clear and firm when she said that 'Inia' removed her undergarments and touched her genital area. The defence also highlighted that this matter was reported to the police about 3 days after the alleged incident. The four year old complainant is not responsible for this delay and considering her evidence I am of the view that this delay in reporting the matter to the police does not affect the her credibility.

8. I accept the complainant's evidence that 'Inia' touched her genital area after removing her undergarments. The issue is whether there was penetration. The only evidence which came out of the complainant on penetration was that she said "*inside my pussy*" when she was asked whether Inia touched inside or outside the 'pussy'. In my view, this evidence of the complainant is not sufficient to prove beyond reasonable doubt that there was penetration.
9. According to the second prosecution witness, the incident took place on 22/10/16. The complainant was medically examined on 25/10/16 by the third witness for the prosecution and she had observed a bruise on the inner lip between *labia minora* and the vaginal opening. No evidence was adduced regarding the age of this injury.
10. Considering all the evidence presented by the prosecution, I am not satisfied that the prosecution has proved beyond reasonable doubt that there was penetration.
11. The defence challenged the evidence on identification of the accused. The complainant said in her evidence that "Inia" she referred to is Grandfather Semi's son. The evidence in this case was that the complainant ran to the second prosecution witness soon after the encounter with the offender and when the second prosecution witness immediately went inside the kitchen where the alleged incident had taken place, she saw the accused. I accept the evidence of the second prosecution witness with regard to the identification of the accused. According to her, she had the opportunity to clearly see the accused and she had also questioned the accused. She said the accused had something white in his left eye and it is a special reason for her to identify the accused. She also said that the accused is Semi's son. The defence did not challenge the second prosecution witness' evidence on identification. According to the questions put to the complainant during cross-examination, the defence did not challenge the evidence on the presence of the accused at the place the alleged incident took place.

12. Therefore, considering all the evidence, I am satisfied beyond reasonable doubt that "Inia" the complainant referred to in her evidence was the accused in this case. The prosecution has established the identity of the accused beyond reasonable doubt.

13. In this case there was a variance between the particulars of the offence and the evidence with respect to the date of offence. According to the particulars of the offence, the prosecution alleges that the incident took place on 20/10/16 and according to the evidence of the second prosecution witness the incident took place on 22/10/16 which was a Saturday. On the face of it this variance appears to be a result of carelessness on the part of the prosecution. However, it was clear from the questions put to the prosecution witnesses during cross-examination and from the closing submission that the defence was not prejudiced due this discrepancy.

14. I consider it appropriate to comment on the use of the word 'vagina' in the particulars of the offence. According to the particulars of the offence, the prosecution alleges that the accused committed the offence of rape by penetrating the vagina of the complainant with his finger. The third prosecution witness said in her evidence that the bruise was found on the inner lip between the vaginal opening and *labia minora*. Her evidence seems to suggest that the injury was noted before the vaginal opening and therefore not inside the vagina. The prosecution need to be mindful of the possible distinction between the general meaning given to the word 'vagina' and its medical meaning to avoid unnecessary complications in a trial. It is pertinent to note that section 207(2)(b) of the Crimes Act refers to 'vulva' apart from the word 'vagina'. However, this issue does not affect this case as I have concluded that the evidence is not sufficient to prove beyond reasonable doubt that there was penetration on the day of the alleged incident.

15. All in all I find that the prosecution has failed to prove that the accused committed the offence of rape under section 207(1) read with section 207(2)(b) of the Crimes Act.
16. However, I find that the complainant's evidence proves the elements of the offence of sexual assault beyond reasonable doubt. Removing the complainant's undergarments and touching her genital area constitutes an unlawful assault and a right minded person would conclude that assault indecent and also sexual given the nature of the force used and circumstances under which the said force was used. Accordingly, I find that the elements of the offence of sexual assault under section 210(1) are proved beyond reasonable doubt.
17. Therefore, I agree with the unanimous opinion of the assessors that the accused is not guilty of the offence of rape under section 207(1) of the Crimes Act but he is guilty of the offence of sexual assault under section 210(1) of the Crimes Act.
18. In the circumstances, I convict the accused for the offence of sexual assault under section 210(1) of the Crimes Act.



Vincent S. Perera

JUDGE

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