

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 281 of 2016

STATE

v.

GV

Counsel: Ms. K. Semisi for State
Ms. V. Filipe for Accused

Hearing: 21st, 22nd, 23rd and 25th August 2017

Summing Up: 28th August 2017

Judgment: 29th August 2017

JUDGMENT

1. The Accused is charged with one count of Rape contrary to Section 207 (1) (2) (b) and (3) of the Crimes Decree. As an alternative to the main count, the accused is further charged with one count of Sexual Assault, contrary to Section 210 (1) (a) and (2) of the Crimes Act. The particulars of the offences are that:

FIRST COUNT

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

GV on the 10th day of July 2016 at Nasinu in the Central Division penetrated the vagina of **AV**, an eleven year old girl, with his tongue.

SECOND COUNT

ALTERNATIVE COUNT

Statement of Offence

SEXUL ASSAULT: Contrary to Section 210 (1) (a) and (2) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

GV on the 10th day of July 2016 at Nasinu in the Central Division unlawfully and indecently assaulted **AV**, an eleven year old girl, by licking her vagina.

2. The hearing commenced on the 21st of August 2017 and concluded on the 25th of August 2017. The Prosecution adduced the evidence of three witnesses including the victim. The accused then gave evidence and called one witness for his defence. Subsequently, the learned counsel for the Prosecution and the Defence made their respective closing addresses. I then delivered my summing up.
3. The two assessors in their respective opinions found the accused is guilty for the offence of Rape. However, one assessor in his opinion found the accused is not guilty for the offence of Rape, but found the accused is guilty for the alternative offence of "Attempt to Commit Rape".
4. Having carefully considered the evidence adduced by the parties, the respective closing addresses of the counsel, the summing up and the opinions of the three assessors, I now proceed to pronounce my judgment as follows.

5. The Prosecution alleges that the accused came to the bathroom while the victim was washing her uniform in it. He then pulled her shorts down and licked her vagina. While licking the vagina, he penetrated into the vagina of the victim with his tongue.
6. The accused denies the allegation that he penetrated the vagina of the victim with his tongue, though he admitted that he licked the vagina of the victim.
7. Accordingly the main issue in this matter is whether the accused penetrated the vagina of the victim with his tongue.
8. In order to prove the case, the Prosecution mainly relied on the evidence of the victim and her mother. The victim in her evidence said that the accused licked the place where menstruation blood is coming out. The Doctor, who was called to give evidence for the defence, in her evidence, said that menstruation blood comes out from the vaginal opening. The vaginal opening is covered by *labia minora* and *labia majora*. The Doctor further said that it is required to open the *labia majora* in order to approach the vaginal opening. According to the evidence given by the doctor I find that the accused has to open the *labia majora* in order to lick the vaginal opening with his tongue. According to the evidence given by the victim, she felt pain, coming from inside the vagina when he licked her vagina.
9. The Defence suggested that the evidence given by the victim in court is not inconsistent with the statement made to the Police on three main grounds, they are:
 - i) The victim has not stated in her statement that she felt pain,
 - ii) The victim has mentioned in her statement that her mother only spoke to the accused and not to her when she came to the bathroom when this alleged incident took place,
 - iii) The victim used the word "*piam*" in the statement when she referred the place where the accused licked.

10. The accused in his evidence admitted that the mother of the victim spoke to her when she came to the bathroom. He then heard that the victim was telling her mother that the accused licked her vagina. The accused in his caution interview has made an admission that he licked the "clito" of the vagina. Moreover, the accused during the cross examination admitted that he licked the vagina of the victim. The mother of the victim said that the meaning of the words of *piam* and *kim* in Rabi Language is "my vagina".
11. I find that the victim has not mentioned anything about the pain that she felt in the statement made to the Police. However, I consider the fact that she was eleven years old at that time. Hence, it is possible that she could not recall or repeat everything as exactly as it happened in every time.
12. In view of these reasons, I find that the above inconstancies suggested by the learned counsel for the defence has not adversely affected the reliability and credibility of the evidence given by the victim.
13. I observed the way and the manner the victim gave her evidence. She is a twelve years old child. However, she was straight and accurate in giving her answers. She was not evasive. In view of these reasons, I find the evidence given by the victim is reliable and credible. I accordingly accept the evidence of the victim as truthful and credible beyond reasonable doubt.
14. I now take my attention to the caution interview of the accused.
15. The prosecution presented in evidence the record of the caution interview of the accused. The prosecution contends that the accused in fact made an admission that he licked the vagina of the victim. In question 45 of the caution interview the accused has admitted that he licked the clito of the vagina. The Prosecution further presented evidence to establish that those admissions of the accused have been recorded in the caution interview accurately and truly. The prosecution says the accused was treated well and he gave those answers in the caution interview freely and voluntarily. The Interviewing Officer in his evidence said

that he recorded those answers in the caution interview as exactly as the way that the accused gave his answers.

16. Meanwhile the accused claims that the answer he gave pertaining to question 45 was introduced to him by the Interviewing Officer. The Interviewing Officer suggested the accused the word "clito". He then accepted it. The accused did not allege that he was mistreated. He said that he understood the questions posed to him by the Interviewing Officer and then answered to them accordingly. During the cross examination, the accused said he gave the answer pertaining to question 45.
17. Accordingly, the Prosecution alleges that the accused has made an admission in the caution interview that he licked the vagina of the victim. Apparently, he has not made any admission in the caution interview that he penetrated the vagina of the victim with his tongue.
18. During the cross examination, the accused admitted that he licked the vagina of the victim for about five seconds. Hence, I find the evidence given by the accused himself concurred with the answers as recorded in the caution interview of the accused. Therefore, I can safely accept the contents in the caution interview as true and credible evidence.
19. The Defence then adduced the evidence of Doctor Ongbit, saying that it is required to open the *labia majora* in order to access the vaginal opening. Doctor Ongbit is an expert witness. In view of her evidence, the accused had to open the *labia majora* with his tongue in order to access the vaginal opening of the victim. I am mindful of the fact, that slightest penetration is sufficient to constitute the element of penetration. Hence, I am satisfied that the evidence adduced in the hearing has established that the accused penetrated the vagina of the victim with his tongue beyond reasonable doubt.
20. Accordingly, I find that the evidence given by the accused by merely denying that he did not penetrate the vagina of the victim with his tongue cannot be accepted as true and

credible evidence. Moreover, I find the evidence of mere denial has not created any doubt in the prosecution's case.

21. In view of the reasons discussed above, I do not find any cogent reasons to disagree with the majority opinion of guilt given by the two assessors in respect of the offence of Rape.
22. In conclusion I find that the Prosecution has successfully proven beyond reasonable doubt that the accused is guilty for this offence of Rape. I accordingly hold the accused is guilty for the offence of Rape, contrary to Section 207(1) (2) (b) and (3) of the Crime Act and convict him for the same.



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva

29th August 2017

Solicitors

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