

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 49 OF 2016

STATE

-v-

SIMELI BARAVILALA

Counsel : Mr. A. Singh for State  
Ms. K. Vulimainadave for Accused

Date of Summing Up : 11<sup>th</sup> October, 2017

Date of Judgment : 12<sup>th</sup> October, 2017

*(Name of the Complainant is suppressed. She is referred to as R)*

JUDGMENT

1. The Accused was charged with the following count and tried before three assessors.

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (b) of the Crimes Decree 44 of 2009.

*Particulars of Offence*

SIMELI BARAVILALA between the 01st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division penetrated the vagina of R with his finger.

2. Assessors unanimously found the Accused guilty of Rape as charged.
3. I direct myself in accordance with my own summing up and review evidence led in the trial.

4. Having concurred with the unanimous opinion of Assessors, I pronounce my judgment as follows.
5. There is no dispute as to the identity of the Accused. It is agreed that Accused is Complainant's cousin. Accused does not deny that he touched or fondled Complainant's vagina on more than one occasion during the period mentioned in the Information.
6. Prosecution is burdened to prove that the Accused penetrated the vagina of the Complainant with his finger, without her consent.
7. Prosecution based their case on the evidence of the Complainant and her mother Seini.
8. Complainant was 13 years old at the time of offence. She said that Accused inserted his hand into her vagina and he was pushing it in and out for 3-4 minutes. She said she did not consent to what Accused was doing to her. In the month of November 2015, this incident had happened 4 or 5 times during night time. She also said that Accused always repeated what he was doing.
10. In a night in January 2016, Complainant's mother, Seini, had seen Accused's right hand in Complainant's panty. That is how this offence came to light. Accused admitted this incident in his evidence. Complainant, when questioned by her mother soon after this incident, said 'nothing was happening'. According to Seini's evidence, Complainant was fast asleep at that time and she had to smack the bum several times to wake her daughter up. If Complainant was really fast asleep, she would not have known what was happening.
11. There is no evidence that Complainant had screamed, raised alarm or that she had complained to her mother about any of the incidents happened in November 2015. She opened up only when her mother questioned her when one of the incidents was witnessed in January 2016.
12. Complainant gave reasons why she did not complain to her mother at the first available opportunity. She said she was scared that her mother will do something to her. She was also scared of the Accused who was living under the same roof with her.
13. Seini said her daughter is a very shy and timid girl. She spoke to her mother only when her mother asked something from her. Doctor's initial impression

was that she was shy. I observed Complainant's demeanor and manner of giving evidence. She appeared somewhat timid. During the time of offence, she was a 13 year-old minor. Under these circumstances, I find Complainant's conduct in not raising alarm against the Accused's assaults not improbable.

14. There are minor discrepancies between Complainant's evidence and her mother's evidence. They do not make Complainant's evidence less reliable.
15. Complainant in her previous statements to her mother and doctor had not specifically stated that she was digitally penetrated by the Accused. She had only used the word 'touching'. Given her tender age and immaturity, the lack of detailed description of the assault in her previous statements does not make her evidence less reliable.
16. Doctor Kelera, in her medical opinion, states that sexual assault had been of non-penetrative in nature. Doctor explained the dual basis on which her opinion was formed. She had considered the history related to her by the patient and her own finding that Complainant's hymen was still intact.
17. Doctor had not been given a history of a digital penetration by the Complainant. She found Complainant's hymen still intact. Under these circumstances, Doctor had formed her opinion as to non-penetration on the basis that a penis had not entered Complainant's vagina.
18. Doctor did not rule out the possibility of penetrating a vagina with a finger or fingers without damaging the hymen which is located a bit inside of the vaginal opening or orifice.
19. Doctor's evidence did not damage the credibility of the version of the Prosecution.
20. Accused's evidence that he did not penetrate is not credible. He admitted everything what the Complainant said about other types of sexual assaults except the fact of penetration. He admitted violating Complainant's body without her consent. He admitted fondling Complainant's vagina in order to give her a 'sense of pleasure'. He admitted touching Complainant in the same way for more than two nights.
21. Accused said he could not hold his desire and that is why he approached her. Even if his evidence that Complainant was seen masturbating was believed,

there is no evidence that he had obtained her consent before embarking upon his 'exercise'.

22. Evidence Accused gave is self -serving and unreliable. It did not create any doubt in the version of the Prosecution case.
23. Prosecution proved the charge beyond reasonable doubt. I agree with the unanimous opinion of assessors.
24. I find the Accused guilty of Rape as charged. Accused is convicted accordingly.
25. That is the Judgment of this Court.



A handwritten signature in black ink, appearing to read 'Aruna Aluthge'.

Aruna Aluthge

Judge

AT LAUTOKA

12<sup>th</sup> October, 2017

Solicitor: Office of the Director of Public Prosecution for State  
Office of the Legal Aid Commission for Accused