

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 57 of 2016

STATE

V

PITA COLASAWIRI

Counsel	:	Ms. Amelia Vavadakua for the State Ms. Talei Kean for the Accused
Dates of Trial	:	16-18 October 2017
Summing Up	:	20 October 2017
Judgment	:	20 October 2017

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

JUDGMENT

[1] The accused Pita Colasawiri is charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, unlawfully and indecently assaulted T.T.

SECOND 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

PITA COLASAWIRI, on the 15th of October 2016, at Banikea Village, Lekutu, in Bua, in the Northern Division, penetrated the vagina of T.T., a child under the age of 13 years, with his tongue.

- [2] The accused pleaded not guilty to the two charges and the ensuing trial was held over 3 days. The accused is the complainant's maternal grandfather.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a majority decision, the three Assessors found the accused guilty of the two counts of Sexual Assault and Rape brought against him. The third Assessor found the accused not guilty on the first count and also the second. However, in respect of the second count he found the accused guilty of the lesser charge of Sexual Assault.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the provisions of Section 210 (1) (a) of the Crimes Act No. 44 of 2009 (Crimes Act), and also the provisions of Section 207 (1) and (2) (b) and (3) of the Crimes Act.
- [6] The Assessors were directed that in order for the prosecution to prove the first count of Sexual Assault, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 15 October 2016);
 - (iii) at Banikea Village, Lekutu, in Bua, in the Northern Division;
 - (iv) unlawfully and indecently assaulted T.T., the complainant.

- [7] The Assessors were further directed that in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 15 October 2016);
 - (iii) at Banikea Village, Lekutu, in Bua, in the Northern Division;
 - (iv) penetrated the complainant's vagina, with his tongue.
- [8] The above individual elements were further elaborated upon in my summing up.
- [9] The Assessors were also directed that, in relation to the second count, if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, on 15 October 2016, penetrated the complainant's vagina with his tongue, has satisfied beyond any reasonable doubt that the accused, on 15 October 2016, unlawfully and indecently assaulted the complainant by licking of the complainant's vagina; as an alternative, they were then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count two.
- [10] The complainant, a medical officer and one police witness gave evidence for the prosecution.
- [11] The complainant testified that in the year 2016, she was staying at Banikea, Kavula. She was staying with her maternal grandparent^s and was attending Banikea, Kavula, Infant School. The accused was her grandfather. She refers to the accused as Bu Pita and her grandmother as Bu Peti. Her younger sister, Loraina, and another man named Bu Bobo were also residing in the same house.
- [12] She testified that on the day of the alleged incident when they were at home, Bu Pita wanted to go and pull out some cassava. So she had gone with him. She was climbing on an orange tree, while Bu Pita was cutting some leaves.
- [13] The accused had then told her to lie down. He had warned her not to shout. He was touching her vagina with his hand (she referred to the vagina as bukuqu in Itaukei). Then the accused had licked her vagina with his tongue. When the accused was licking the vagina it had been paining. The accused was doing so (licking her vagina) for a long time.
- [14] The complainant had been wearing a red dress at the time. She was wearing a panty and vest inside. She testified that Bu Pita had undressed her. He had taken out the dress and thrown it away and pulled out her panty. The witness said that she had felt frightened.

- [15] The complainant stated that after the incident she wore her dress again and also wore her panty. She had felt pain in her body. When asked which part of her body was paining, she said her vagina.
- [16] The complainant testified that she remembers the date this incident happened as the 15 October 2016. She had not gone to school on the said day and the next day was a Sunday.
- [17] The Medical Officer, Dr. Mala Darshani testified that in 2015-2016, she had been serving as a Medical Officer at the Seaqaqa Medical Centre. She recalls conducting a medical examination on the complainant, on 23 October 2016, at 3.54 in the afternoon. The Medical Examination Report of the complainant has been tendered as Prosecution Exhibit **P1**.
- [18] As to the specific medical findings the doctor testified as follows (Column D12 of the medical report):
- Heads, eyes, ears, nose and throat (HEENT)-Bruise noted below right eye.
 - Chest, trunk, abdomen, extremities (arms and legs)- No bruise noted.
 - Vaginal examination- Hymen cannot be visualized. No foul smelling discharge. Small abrasion noted on right side of the vaginal opening. No active bleeding.
- [19] The Medical Officer stated that in this case the complainant's hymen was perforated or broken at the time she conducted the examination.
- [20] The prosecution also led the evidence of Detective Corporal 3191, Neori Tavakaturuga, the Crimes Officer at the Nabouwalu Police Station. He had supervised the investigation into this case and had also attended the crime scene. He had assigned PC 3334 Dradra as the investigating officer in this case.
- [21] He testified that on the 24 October 2016, he had visited the crime scene. He stated that the complainant had guided him from the house right to the scene of the incident with no hesitation. The crime scene was about 1 kilometre away from the place she had been residing. At the crime scene he had drawn a rough sketch plan of the scene. The said rough sketch plan has been tendered as Prosecution Exhibit **P3**.
- [22] The complainant had stated in her evidence that, when she had gone with one Bu Sereima to the river to have a bath, the day following the incident (which was a Sunday), the witness had told the story (about what the accused did to her) to the said Bu Sereima. However, it is clear that the formal police complaint in respect of this

incident had only been recorded, at the Seaqaqa Police Station, on 23 October 2016. Bu Sereima was not called as a witness by the prosecution.

- [23] The police witness testified that the complaint into this incident had been first made at the Lekutu Community Post. He had been informed through a call from the Post Officer of the Lekutu Community Post that they had received a report of a rape/incident from Banikea Village. He was informed that the report was reported on that same day (23 October 2016, which was a Sunday). The Lekutu Community Post is part of the area of operation of the Nabouwalu Police Station.
- [24] The witness further testified that the Banikea village is not accessible to phone networks. If they want to report a matter they have to travel all the way to Lekutu, which is roughly about 10 kilometres away. There is no public transport from the village. Therefore they have to walk down to Lekutu. It will take about 2 hours to get to Lekutu.
- [25] This Court is satisfied that the reason for the delay in making of the formal complaint to the police has been reasonably explained.
- [26] I am conscious of the fact that medical evidence is only corroborative in nature. In this case, in respect of the second count, the complainant did not specifically testify to the effect that the accused's tongue had gone into or penetrated her vagina. However, she has stated that when the accused was licking her vagina it had been paining her and also the accused had been doing so (licking her vagina) for a long period of time.
- [27] The complainant has testified that after the incident when she was wearing her clothes she had felt pain in her body. When asked which part of her body was paining, she specifically referred to her vagina.
- [28] In terms of the law, the slightest penetration is sufficient to satisfy this element of penetration.
- [29] The Assessors have found the evidence of prosecution as truthful and reliable, as they have by a majority decision found the accused guilty of the count of Sexual Assault and Rape.
- [30] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the majority opinion of the Assessors.

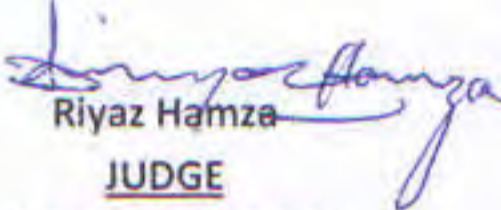
[31] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences with which the accused is charged.

[32] In the circumstances, I find the accused Pita Colasawiri guilty as follows:

First Count-Sexual Assault- Guilty.

Second Count-Rape- Guilty.

[33] Accordingly, I convict the accused on both counts.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LABASA

Dated this 20th Day of October 2017

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