

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 39 of 2017

STATE

V

PONIRITE KOLI

Counsel : Ms. Lavenia Bogitini with Mr. Zenith Zunaid for the State
Ms. Vani Filipe with Mr. Vilisoni Tuicolo for the Accused

Dates of Trial : 6-9 November 2017

Summing Up : 13 November 2017

Judgment : 16 November 2017

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

JUDGMENT

[1] The accused Ponirite Koli is charged with the following offence:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Particulars of Offence

PONIRITI KOLI, on the 20th of December 2016, at Suva, in the Central Division, penetrated the mouth of **PBN**, a child under the age of 13 years, with his penis.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days. The accused is the complainant's maternal granduncle.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the charge of Rape brought against him.
- [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 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 20 December 2016);
 - (iii) at Suva, in the Central Division;
 - (iv) penetrated the mouth of PBN with his penis; and
 - (v) at the time PBN was a child under 13 years of age.
- [7] The above individual elements were further elaborated upon in my summing up.
- [8] The Assessors were directed that the issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with

necessary mental capacity to give consent. The complainant in this case was 6 years of age at the time of the alleged incident, and therefore, he had no mental capacity to consent.

[9] The complainant PBN, his aunt, Mereti Ranadi, and his mother, Alena Vonokula gave evidence for the prosecution.

[10] The complainant, inter alia, testified as follows:

- (i) *He refers to the accused as Taitai Vo or grandfather Vo.*
- (ii) *On the day of the alleged incident his mother had been cooking in the kitchen. She had sent him to go and fetch water from the tap outside the house. The accused had been bathing at the time. The accused had told him to go and leave the water and to come back to him.*
- (iii) *The accused had then asked the witness to suck his 'polo'. The witness had said no. The accused had then pushed the complainant's mouth to suck his polo. The witness demonstrated how the accused had pushed his mouth to suck his polo.*
- (iv) *When asked how the accused's polo looked like the witness testified that it was long.*
- (v) *The witness further testified as follows:*
 - Q: *Did his polo go into your mouth?*
 - A: *Yes*
 - Q: *You said his polo went into your mouth? Did you see him putting it inside your mouth?*
 - A: *Yes*
 - Q: *How did it feel inside your mouth?*
 - A: *It was dirty*
 - Q: *How long was it inside your mouth?*
 - A: *Just for a little while*
- (vi) *When asked as to what the accused was wearing at the time, the witness testified that he was wearing an underwear. The accused had pulled down his underwear and put his polo into the complainant's mouth.*
- (vii) *When asked as to how far down the accused had pulled down his underwear, the witness stated right down.*
- (viii) *Apart from being long the witness testified that the accused's polo looked dirty.*

- (ix) *The witness explained further that the polo he is referring to is the part with which males urinate with.*
- (x) *The witness also testified that when the accused's polo was in his mouth it was hard.*
- (xi) *When asked to demonstrate as to how the accused was pushing his polo into the witness's mouth, the witness put his hand on the back of his head and demonstrated how it happened.*
- (xii) *When witness was asked to demonstrate and show as to how the accused's polo was going into his mouth, the witness demonstrated with his hands as to how it happened (one hand to depict the polo and the other hand to depict the mouth).*

[11] In her testimony Mereti Ranadi stated as follows:

- (i) *She refers to the accused as Ta levu Vo (or uncle Vo). He is also known as Voniriti Koli and Ponirite Koli.*
- (ii) *On 20 December 2016, she had been attending to her household chores, after that she had gone to do her washing. This was around 4.00 p.m. The washing area is outside the house.*
- (iii) *From the washing area, she could clearly see, Alena's house and the place where Alena's tap is situated outside the house.*
- (iv) *Uncle Vo had come and asked for a piece of soap. She had told him that soap only costs \$1. After that the accused went to have his bath at the back tap (Alena's back tap).*
- (v) *The witness demonstrated, that the tap in Alena's house is 8 metres from where she was washing.*
- (vi) *The witness testified that when she looked towards Alena's tap area she saw the accused putting on his underwear. The underwear reached half way on his thighs. When she looked, she saw PBN was standing in front of the accused holding onto the front of his pants. The witness demonstrated how this happened. She testified that she had a clear view and nothing was obstructing her view.*
- (vii) *She then saw PBN looking up to Ta levu Vo, the accused. The accused had then pulled PBN's head towards his polo. She had seen PBN moved down and opened his mouth. PBN was bowing down and opening his mouth.*
- (viii) *When asked as to what she meant by polo, the witness said the male genital.*

- (ix) *When asked, as to what PBN opened his mouth to, the witness said, he was moving down to Ta levu's polo.*
- (x) *She had then run to Alena and told Alena to call her son and ask him what uncle Vo did to him. Alena had been at home at the time.*

[12] The complainant's mother Alena Vonokula testified that:

- (i) *On the 20 December 2016, she had told, PBN to go and fetch water from the tap. She had given him a small bucket of biscuit to fetch the water. The accused went to have his bath at the tap at the same time. The tap is located at the back of the house.*
- (ii) *Her immediate neighbour is Mereti, her cousin. The two houses are situated nearby. She described that her house was at a slightly higher elevation than Mereti's house.*
- (iii) *She too described that from where the tap is located at the back of her house to the place where Mereti washes clothes, the distance is 8 metres.*
- (iv) *She testified that PBN had come, kept the water and went back. Thereafter, Mereti came and told her to call PBN and to ask him what the accused did to him. This was about 30 minutes after PBN had left.*
- (v) *The witness had then called out to PBN. When he came, she had asked him what the accused had said to him. PBN had informed that the accused had told him to suck his polo.*

[13] The defence totally denied that the incident took place. The defence position, is that the complainant would do or say anything his mother or his aunty Mereti would want him to say. The defence also state that Mereti could not have seen the incident from her washing area as her vision would have been obstructed by cassava, dalo and banana trees and also by the tarpaulin which is placed around the bathing area. The defence also takes up the position that when the complainant made his statement to the Police he only referred to "soresore" and never referred to the term "polo".

[14] However, the Assessors have found the evidence of prosecution as truthful and reliable, as they have by a unanimous decision found the accused guilty of the count of Rape. Therefore, it is clear that they have rejected the version put forward by the accused.

[15] 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 unanimous opinion of the Assessors.

[16] 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 offence with which the accused is charged.

[17] In the circumstances, I find the accused Ponirite Koli guilty of the charge of Rape.

[18] Accordingly, I convict the accused for the count of Rape as charged.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA

Dated this 16th Day of November 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.

Solicitor for the Accused : Office of the Legal Aid Commission, Suva.