

IN THE HIGH COURT OF FIJI AT LABASA

**CASE NO: HAC 47 of 2017
[CRIMINAL JURISDICTION]**

STATE

V

AVNEEL SHANEEL SHANDIL

Counsel : Ms. A. Vavadakua for State
Mr. V. Tuicolo for Accused

Hearing on : 19 - 20 March 2018

Ruling on : 21 March 2018

RULING

1. The above named accused ("the accused") is charged with the following offence;

[REPRESENTATIVE COUNT]

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

Particulars of Offence

AVNEEL S. SHANDIL, around the 4th day of August 2017 and the 5th day of August 2017, in Labasa, in the Northern Division, penetrated the vagina of **SHRITI SHIKHA MAHARAJ**, a child under the age of 13 years, with his penis.

2. The accused is in fact charged with two others in the same Information and the three of them have been charged with three separate counts relating to three separate incidents.
3. The case is fixed for trial for one week from 19/06/18 before another judge. Having pleaded not guilty to the above count initially, on 16/03/18 the accused had indicated to court that he wishes to change his plea. Accordingly his plea was taken on 19th March 2018 and the accused pleaded guilty to the above charge. He informed this court that he was not influenced by anyone to plead guilty and it is done on his freewill.
4. Thereafter the following summary of facts were read out to the accused;

SUMMARY OF FACTS

1. *The accused in this matter is Avneel S. Shandil (DOB 01/02/93), a 25 year old cane cutter of Kelikoso, Wainikoro, Labasa, Northern Division.*
2. *The child victim in this matter is Shriti Shikha Maharaj (DOB 08/05/06), an 11 year old student of Namara, Labasa, Northern Division (attached: Birth Certificate of Shriti Shikha Maharaj).*

Count 3

3. *In the afternoon of 03 August 2017 the accused and his family had visited the child victim's house at Namara, Labasa with a proposal for the accused to marry the child victim. The child victim's mother had initially refused the proposal however later agreed with the proposal and then the accused, together with his family, the child victim and her mother went to the accused's house at Kelikoro, Wainikoro, Labasa and stayed there.*
4. *On 04 August 2017 the child victim and her mother had stayed at the accused's house. During the night of 04 August 2017 the child victim had slept together with the accused on his bed. While sleeping together, the accused had kissed the child victim's cheek and mouth, after which he had removed all her clothes and his own trousers. The accused then kissed the child victim again and sucked her breast before getting atop her. The accused then spread the child victim's legs apart and penetrated his penis into her vagina. The accused pushed his penis in and out of the child victim's vagina until he had ejaculated*

outside her vagina. After this both the child victim and the accused fell asleep together.

5. *On 05 August 2017 the child victim had remained at the accused's house with her mother. During the night of 05 August 2017 the child victim had again slept together with the accused on his bed. While sleeping together, the accused had kissed the child victim's cheek and mouth, after which he had removed all her clothes and his own clothes. The accused then kissed the child victim again and sucked her breast before getting atop her. The accused then spread the child victim's legs apart and penetrated his penis into her vagina. The accused pushed his penis in and out of the child victim's vagina until he had ejaculated outside her vagina. After this both the child victim and the accused fell asleep together.*
 6. *The child victim was medically examined at Labasa Hospital on 08 August 2017. The medical findings showed that the child victim's hymen was torn (fissure) (attached: Medical report of Shriti Shikha Maharaj).*
 7. *The accused was arrested and interviewed under caution on 09 August 2017 at the Labasa Police Station. The accused admitted to having had sexual intercourse with the child victim at the material times (Q & A 123 - 124) but that it was consensual. The accused admitted to having asked the child victim to marry him and stated that the child victim had agreed. The accused had stated that when he asked the child victim her age, she had told him she would tell her age later (Q & A 54 - 11) (attached: Record of interview of Avneel S. Shandil).*
5. When the said summary of facts were explained to the accused in Hindi the accused said that he is disputing certain facts and he also said that the complainant's mother told him that the complainant was 20 years old and she is the one who made the proposal for the accused to marry the complainant. He also said that when he asked the age from the complainant, the complainant told him that she will tell him later.
 6. Though the accused accepts the fact that he had sexual intercourse with the complainant, it was evident that the accused is not convinced that he committed an offence especially because of what he was told by the complainant's mother and the surrounding circumstances. It should also be noted that the complainant's mother was there in the same house when the

complainant was with the accused in the same room and then had sexual intercourse with the complainant. Moreover the accused was supposed to marry the complainant.

7. Section 34 of the Crimes Act 2009 reads thus;

(1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if —

(a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and

(b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.

(2) In determining whether a person was under a mistaken belief about facts, or was ignorant of the facts, the court may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

8. The offence of rape under section 207 is not a strict liability offence and it has a fault element which is either the knowledge, or the belief of the absence of consent of the complainant or the recklessness as to whether or not the complainant was consenting.

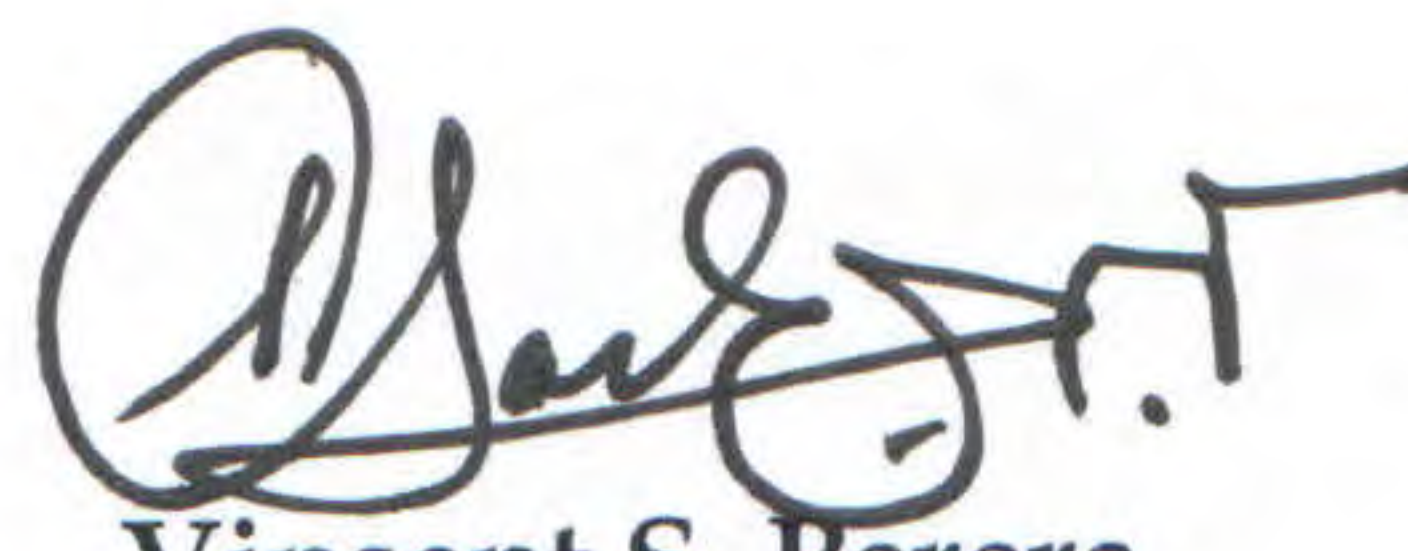
9. Section 207(3) provides that a child who is under the age of 13 years is incapable of giving consent. No person can claim that he or she was ignorant of the law. Therefore, an accused charged for the offence of rape of a person under the age of 13 years under section 207 cannot take up the position that he did not know that a person under the age of 13 years is incapable of giving evidence. There is no doubt on this point.

10. However, the question is if an accused who is charged with the offence of rape of a complainant under the age of 13 years who admits having sexual intercourse but says that he was under the mistaken belief that the relevant complainant was not below the age of 13 years at the time he had sexual intercourse with the complainant, would that amount to a defence which is

available for the accused to raise in view of the provisions of the Crimes Act 2009?

11. In my view, it is not proper to make a determination on that issue at this juncture where the main issue before me is whether the plea of guilty entered by the accused should be accepted or not. This issue should be examined if and when an accused properly raises such defence and that could be done only at a trial.
12. I wish to stress the fact that I have not reached the conclusion that mistake of fact is a defence available to the accused in this case and I reiterate that the determination as to whether that defence is available for the accused at law or not should be made if and when such defence is properly raised at the trial before the trial judge.
13. I also noted that according to the medical report of the complainant tendered as part of the summary of facts the complainant had informed the doctor that she had had non-penetrative sex with the accused. On the face of it this is an inconsistent statement made by the complainant.
14. All in all I am inclined to hold the view that the plea of guilty entered by the accused in this case on 19/03/18 is equivocal. Therefore, I would reject the said plea of guilty. His plea of not guilty entered on 24/11/17 shall remain.




Vinsent S. Perera
JUDGE

Solicitors:

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