

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 205 of 2013

STATE

VS

SOHEB NASIR ALI

Dates of Trial : 4 and 5 February 2019
Summing Up : 6 February 2019
Judgment : 7 February 2019

Ms. P Lata with Mr. Alvin Singh for the State

Mr. Anil Singh with Miss Koroitamudu for the Accused

JUDGMENT

- 1.] The accused faced a charge under an amended information which read:

Statement of Offence

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

- 2.] *Particulars of Offence*

SOHEB NASIR ALI between the 1st day of October 2013 and 31st day of October 2013 at Nadi in the Western Division, penetrated the vagina of **CRYSTAL DIVASHNI GRACE**, aged 12 years and 11 months with his penis.

- 3.] An earlier information had stipulated the date of the offence to be 1st October 2013 and this amended information enlarged the date of offence to be within the month of October 2013.
- 4.] Counsel for the Defence had no objection to this amendment but after the close of the Prosecution Case made an application to have proceedings declared a nullity on the basis that the amended information was not put to the accused for plea. The Court disallowed this application.
- 5.] Pursuant to section 214(9) of the Criminal Procedure Act 2009 the Court ordered the amendment be made in accordance with the uncertainty as to the date of the offence. Such amendment was made, the Court finding that the amendment of the time frame did not embarrass or prejudice the accused in his defence, he already having entered a plea of not guilty to the charge on the earlier information.
- 6.] After a two day trial before 3 assessors, they returned with a majority opinion of guilty to the offence.
- 7.] The thrust of the prosecution case came from the complainant, Crystal who was 12 years and 11 months at the time of the offence. She gave evidence of having met the accused, then aged 20, at a youth club that they both attended weekly. They appeared to have struck up a casual friendship although they each denied in their respective evidence that they were close.
- 8.] Crystal said that on the 8th October, she was home alone when he came to her house wanting to use some computer device. She admitted him and after giving him refreshments he followed her into her bedroom and forced himself upon her penetrating her with his penis. She said that he forcibly held her hands, covered her mouth and undressed her before removing his own trousers.
- 9.] This relationship (if it was indeed such) came to the notice of the girl's mother on the 23rd October 2013 when the mother came home from work early and found them both dressed but under a blanket on

Crystal's bed. The mother, quite understandably, was furious that her 12 year old was in such a compromising position with the boy and she proceeded to beat them and berate them. As a result of this discovery the mother reported a case of trespass to the Police. The Police enquiries led to a medical examination of the girl from which the mother learned that the girl was not a virgin. The daughter then relayed the rape complaint as detailed above to the mother and the boy was charged accordingly. He was interviewed under caution by the Police.

- 10.] The mother gave evidence, as did the Investigating Officer. This Police witness produced the girl's birth certificate proving that she was under 13 at the time and he told the Court that he had interviewed the boy under caution. As a "follow up" to that evidence the Court enquired as to the response of the boy in the interview to which the officer said that he confessed.
- 11.] The inculpatory interview under caution was not led by the Prosecution.
- 12.] That was the end of the prosecution case and the defence made a no case submission which did not succeed, there being strong evidence that an under age girl had been penetrated.
- 13.] The Court explained to the accused his rights in defence, where upon he elected to give evidence.
- 14.] The accused agreed the evidence that he had met the girl at the youth club and that they had become casual friends. He agreed that he went to her house when she was alone and had played computer games (he didn't say when). He also admitted that he had returned to visit on October 23 and was on the bed with Crystal when Mum came home and started "belting" him. When asked in chief by his Counsel whether he had told the Police he had raped or had sex with Crystal, he told the Court that he had told the Police no rape and no sex.

15.] This unfortunate question by counsel of course opened the Record of interview in rebuttal and it was put to the accused. The answer to Question 54 clearly shows him to have answered: "we had sex on the bed" which belied his answer to counsel in chief, and called his credibility into question.

16.] The accused called no witnesses in his defence.

17.] Analysis

Obviously, the only issue in this case was whether there was an act of intercourse between the two actors in the month of October 2013.

18.] At least 80% of the cross-examination and submissions of the defence were irrelevant to this issue, with so much time being wasted on whether the act was said to have occurred on the 1st or 8th October 2013, whether oral evidence was inconsistent with statements made out of Court and who got beaten by the mother, for example.

19.] The situation with the interview under caution was unfortunate in two respects. The State and the Defence had agreed before trial that the inculpatory interview would not be used at trial. The Court has no idea as to why the State would make this great concession to the Defence but in any event they had and quite fairly the prosecutrix did not attempt to allude to it.

20.] Unfortunately the Court was not made aware of this concession and was not constrained to have asked the Police witness who told the Court that he had interviewed the accused what the outcome of the interview was.

21.] This might have been overlooked and "lost" if the Defence Counsel had not "opened" the interview in his examination of the accused in chief. This allowed the prosecution to use the interview to rebut a lie told by the accused. However, as can be seen in the summing up, the assessors were directed not to use this to find guilt.

- 22.] The Court is sure beyond reasonable doubt that there was an act of sexual intercourse in October 2013 but has doubts as to how this came about. There are a lot of unanswered questions as to the circumstances of the two being together both on the 8th and the 23rd. It could well be that the girl was a precocious willing party who cried rape when Mum found out about her having lost her virginity ; but that is speculation on the part of the Court, something I admonished defence counsel for and warned the assessors against. I am firmly of the belief that sex did occur, that it was Soheb and the Birth Certificate tells me that she was under 13 at the time.
- 23.] I accept the majority opinions of the assessors and find the accused Soheb guilty. He is convicted of the count and remanded in custody pending sentence.



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Paul K. Madigan
Judge

7th February, 2019
At High Court Lautoka