

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 381 of 2018

STATE

vs.

DAVID ALI

Counsel: Ms. K. Semisi with Ms. B. Khantaria for the State
Ms. L. Vaurasi with Ms. S. Nayacalevu for Accused

Date of Hearing: 11th, 12th, 15th, 17th, 29th, 30th April 2019, 01st, 02nd, 03rd May 2019

Date of Closing Submission: 06th March 2019

Date of Summing Up: 07th May 2019

Date of Judgment: 08th May 2019

JUDGMENT

1. The name of the complainant is suppressed. Hereinafter she will be referred to as **AB**.
2. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act. The particulars of the offence are that:

COUNT 1

Statement of Offence

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

Particulars of Offence

DAVID ALI between the 1st day of August, 2018 and the 31st day of August, 2018 at Suva in the Central Division, penetrated the vulva of **AB**, a child under the age of 13 years, with his finger.

3. The hearing commence on 11th April 2019 and concluded on 03rd of May 2019. The prosecution adduced the evidence of four witnesses, including the complainant. The accused gave evidence and also called two witnesses for the defence. Having concluded the presenting of evidence, the learned counsel for the prosecution and the defence made their respective closing addresses. Subsequent to that, I delivered my summing up.
4. The three assessors unanimously found in their opinion that the accused not guilty to the offence of Rape as charged. Furthermore, the assessors unanimously found in their opinions that the accused not guilty to the alternative count of Sexual Assault.
5. Having carefully considered the evidence presented by the prosecution and the defence, the respective closing addresses of the prosecution and the defence, the summing up and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
6. The prosecution alleges that the accused had removed the clothes of the complainant and then inserted his fingers into the vulva of the complainant at the left side corner of the kindergarten room of the Kids First school. The accused denies the allegation and said that he never inserted or touch the vulva of the complainant as alleged.
7. The complainant in her evidence said that David removed her clothes and touched her backside and private parts. However, during the cross examination, she said that David did not touch her back and private parts. She further said that David is a tall person.
8. The complainant made dock identification in the court, identifying the accused as David from the school. However, the Investigation Officer in her evidence said that the

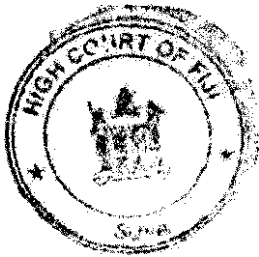
complainant made no identification of the accused during the investigation either in the form of identification parade or photo identification. Under such circumstances, it is required to carefully scrutinize the evidence of dock identification.

9. According to the mother of the complainant, Monisha, she was not sure about the name that the complainant was referring to in relation to this allegation in the night of 4th of September 2018. She has heard it as Diven and Daven. Monisha had inquired from Mary, the pre-school teacher, whether there is someone by the name of Daven or Diven in the school. It was Mary, who had informed Monisha that they do not have anyone by any of those names, but has David. Then Monisha said "That is the guy" and asked the complainant "Is it David? ". The complainant had then said yes that is David. Moreover the complainant in her evidence said that her mother told her the name of David. Moreover, she had been shown photos of David by her mother and father from their phone. According to the evidence of Monisha, the complainant had not told her that it was a big boy like daddy in the night of 4th of September 2018. Monisha had thought that it was a small boy until she went to the school on the 5th of September 2018. Furthermore, you could take into consideration the school attendance sheet for the period between 20th of August 2018 to 31st of August 2018. According to the said documents, there are two students by the name of David and one student by the name of Darren in the school.
10. According to the staff attendance sheet, the accused had not signed in for work on the 28th, 29th, 30th, 31st of August 2018. He had only signed in for the work from 20th to 24th and 27th of August 2018. According to the evidence of the doctor, the bruises were fresh and within the two weeks period. She said that normally bruises fed away after two weeks. If the court taken into consideration the said opinion of the doctor, the bruises could have caused between 27th of August 2018 and 5th of September 2018.
11. In view of these reasons, there is a reasonable doubt whether the complainant had referred the accused as the person who removed her clothes and touched her private parts or someone else by the name of David, Daven or Diven in relation to this alleged incident.

12. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that it was the accused who committed this offence as charged. Therefore, I do not find any cogent reason to disagree with the unanimous opinion of not guilty given by the three assessors.

13. In conclusion, I find that the prosecution has failed to prove beyond reasonable doubt that the accused Mr. David Ali guilty to the offence as charged. Therefore, I find the accused not guilty to the offence of Rape, contrary to Section 207 (1) and (2) (b) (3) of the Crimes Act and acquit him from the same accordingly.

14. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
08th May 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Shekinah Law for the Accused.