

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 302 OF 2018S

STATE

Vs

USAIA MALO

Counsels : Ms. U. Tamanikaiyaroi for State

Mr. E. Radio for Accused

Hearing : 24, 25 and 26 February, 2020.

Summing Up: 27 February, 2020.

Judgment : 28 February 2020.

JUDGMENT

1. The three assessors had returned yesterday afternoon with a unanimous opinion that the accused was guilty of rape in count no. 1, not guilty of rape in count no.2, and guilty of the alternative lesser offence of the “defilement of a young person between 13 and 16 years old”, contrary to section 215(1) of the Crimes Act 2009.

2. The information were as follows:

"COUNT ONE

Statement of Offence

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

Particulars of Offence

USAIA MALO on the 30th of June, 2018, at Lau in the Southern Division, penetrated the vagina of AF, with his finger, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

USAIA MALO on the 30th of June, 2018, at Lau in the Southern Division, penetrated the vagina of AF, with his penis, without her consent."

3. I have reviewed the evidence called in the trial and I had directed myself in accordance with the Summing Up I delivered to the assessors yesterday. The assessors' opinion were not perverse. It was open to them to reach such conclusion on the evidence.
4. Obviously, the three assessors accepted the prosecution's version of events on count no. 1 (rape), but did not accept their version of events on count no. 2 (rape). However, they were unanimous in finding the accused guilty of defiling the complainant, at the material time. The "defilement" charge was the alternative lesser offence to count no. 2.
5. The three assessors' opinion would appear to show that they accepted the complainant's evidence that the accused penetrated her vagina with his finger (count no. 1) and penis (count no. 2), at the material time. So, the first element of the

offence of rape (count no. 1 and 2), as outlined in paragraph 9 (i) and 9 (ii) of my summing up, were satisfied by the prosecution beyond a reasonable doubt. The assessors accepted the same. I agree with the assessors' view on the above.

6. The difficulty came when considering the issue of whether or not the complainant consented to the accused penetrating her vagina with his finger (count no. 1) and penis (count no. 2). This concerned the second element of the offence of rape, as outlined in paragraph 9 (iii) of my summing up. On this issue, the assessors appear to differ and appeared inconsistent. On count no. 1, they appear to accept the position that the complainant did not consent to the accused penetrating her vagina with his finger. On count no. 2, they were either of the view that the complainant consented to the accused penetrating her vagina with his penis, at the material time, or were not sure of the accused's guilt on this issue.
7. The two alleged incidents in count no. 1 and 2 occurred simultaneously. So, if the assessors were of the view that the complainant consented to the accused penetrating her vagina with his penis (count no. 2) or were not sure of the same, then, in my view, it would be illogical if they didn't reach the same view on consent for count no. 1. In my view, the complainant's behavior on the night of 30 June 2018, prior to the alleged incident, during the alleged incident and after the alleged incident, threw the issue of consent into a lot of reasonable doubt. For a start she did not shout that loud to raise the alarm with the many children, who were playing and singing nearby. There were homes nearby. In a village setting, houses are near to each other, and if she shouted that loud, in my view, the villagers would be forewarned.
8. Secondly, she didn't complain to Litia, who arrived at the scene a few minutes later. If you were really raped, you would at least tell the first person who arrived at the

crime scene. Later, she did not report the matter to her relatives. She waited a week to report the matter to her grandmother. In her own evidence, she said she didn't tell her grandmother the whole story. She didn't report the matter to the Village Headman. She didn't report it to the police. She waited for them when they arrived. Looking at all the evidence presented in court, I am not sure on whether or not she did not consent to the accused penetrating her vagina with his finger (count no. 1) and penis (count no. 2). In my view, there was a lot of reasonable doubt on whether or not she did not consent to the accused penetrating her vagina with his finger (count no. 1) and penis (count no. 2). The law required the prosecution to remove that reasonable doubt. They were unable to do so. The law required that the benefit of that doubt must go to the accused.

9. Given the above, I agree with the assessors' opinion on count no. 2, but not on count no. 1. I find the accused not guilty as charged on count no. 1 and 2. I acquit the accused of the rape charges in count no. 1 and 2.

10. I agree with the assessors' opinion on the alternative lesser offence of "defiling a girl aged between 13 and 16 years old". I accept that the accused inserted his penis into the complainant's vagina, at the material time. In the "Agreed Facts", the accused admitted she was 14 years old at the time. It is unlawful for a male to have sexual intercourse with a girl who is under 16 years old at the time. I find the accused guilty of defiling the complainant, at the material time. I convict him of the same accordingly.



Solicitor for the State
Solicitor for the Accused

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Office of the Director of Public Prosecution, Suva.
Legal Aid Commission, Suva.



Salesi Temo
JUDGE