

IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

Criminal Case No.: HAC 78 of 2018

BETWEEN : STATE

AND : SEKOPE TUIVEIKAU

Counsel : Ms A. Vavadakau for the State
Ms K. Boseiwaqa for the Accused

Dates of Hearing : 03 February 2020

Date of Ruling : 04 February 2020

RULING

1. The Accused is charged with two representative counts of digital rape. It is alleged that between 20 April 2018 and 7 October 2018 the Accused penetrated the vagina and anus of the complainant with his finger. The Accused pleaded not guilty to the charges. He is presumed to be innocent. The burden is on the prosecution to prove these charges.
2. The trial commenced on 3 February 2020. The prosecution led evidence from three witnesses. The first prosecution witness was a medical doctor who examined the complainant on 8 October 2018. He found vaginal and anal lacerations on the complainant but he could not ascertain the age of the injuries. He said the injuries were likely to be caused by blunt force penetration of vagina and anus and not by scratching or due to constipation.

3. The second witness was a vernacular school teacher of the complainant. She was tendered for cross-examination only. Her evidence is that on 8 October 2018 following a fits seizure she questioned the complainant about her condition and after prodding the complainant revealed to her that her grandfather had touched her private parts. This complaint evidence which was hearsay and inadmissible unfortunately was led by the defence counsel. Since the complainant did not give evidence of any such complaint made to her teacher, I disregard this evidence from consideration.
4. The third witness was the complainant. She was born on 26 March 2011. Her date of birth is an agreed fact. Her relationship with the Accused is also an agreed fact. He is her maternal grandfather and she was residing with him and his wife in Naqai, Labasa at the time of the allegations. She was seven years old at the time. Her evidence was received in court using special measures such as closed court, use of screen and in the presence of a support person.
5. The complainant gave evidence that her grandfather had done bad things to her and that she did not want to reveal those bad things to the court. The prosecution was permitted to examine the witness at length for her to disclose the nature of the bad things that her grandfather did to her but she stood her ground and said she was not willing to talk about it. The prosecution closed its case.
6. The defence moved the Court for a no case to answer.
7. Section of 231 (1) of the Criminal Procedure Act states:

When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.

8. The test for a no case to answer application in the High Court is settled. The test is whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences (*Sisa Kalisoqo v R* Criminal Appeal No. 52 of 1984, *State v Mosese Tuisawau* Cr. App. 14/90, *State v Woo Chin Chae* [2000] HAC 023/99S).

9. Section 207 (2) of the Crimes Act defines rape as follows:

A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

(3) for this section, a child under the age of 13 years is incapable of giving consent.

10. The allegations are that the Accused penetrated the vagina and anus of the complainant with his finger. Since the complainant is a child under the age of 13 years, she is incapable of giving consent. The only element that the prosecution must prove is that the Accused penetrated the complainant's vagina and anus with his finger. Slightest penetration will do.

11. There is some medical evidence of vaginal and anal penetration. The question is whether there is some direct or circumstantial evidence that the Accused is the perpetrator. I have considered the entire evidence of the complainant. There is no direct proof that the Accused penetrated the complainant's vagina and anus with his finger. The only evidence that incriminates the Accused is that he had done some bad things to the complainant.

Bad things can mean many things especially when the child witness has said that her grandfather used to hit her and make her sleep outside. Without details of what the child witness is referring to as the bad things an inference cannot be drawn that the Accused penetrated the complainant's vagina and anus with his finger.

12. There is no direct or circumstantial evidence to link the Accused to the alleged offences.
13. The application for a no case to answer is allowed and a finding of not guilty is recorded in respect of both charges.
14. The assessors are discharged.




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Hon. Mr Justice Daniel Goundar

Solicitors:

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