

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 172 of 2019

STATE

V

THOMAS PEARSON

Counsel : Ms. Swastika Sharma with Ms. Nimisha Shankar for the State
Mr. Nemani Tuifagalele for the Accused

Dates of Trial : 26-28 May 2020

Summing Up : 29 May 2020

Judgment : 1 June 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "APLT".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecution (DPP), the accused, Thomas Pearson, was charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

THOMAS PEARSON, between the 1st day of January 2019 and the 3rd day of May 2019, at Nasinu, in the Central Division, penetrated the vagina of APLT, a child under 13 years of age, with his finger.

COUNT TWO

Statement of Offence

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

Particulars of Offence

THOMAS PEARSON, between the 1st day of January 2019 and the 3rd day of May 2019, at Nasinu, in the Central Division, penetrated the anus of APLT, a child under 13 years of age, with his finger.

- [2] The accused pleaded not guilty to the two charges and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the Assessors found the accused not guilty of the two charges of Rape. Furthermore, by their unanimous decision the Assessors found the accused not guilty of the lesser or the alternative charge of Sexual Assault, in respect of all two counts.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the unanimous opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the First Count of Rape, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) During the specified time period (in this case between 1 January 2019 and 3 May 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Penetrated the complainant's vagina, with his finger; and
 - (v) At the time the complainant was a child under the age of 13 years.

- [7] Similarly, the assessors were directed that in order for the prosecution to prove the Second Count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) During the specified time period (in this case between 1 January 2019 and 3 May 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Penetrated the complainant's anus, with his finger; and
 - (v) At the time the complainant was a child under the age of 13 years.
- [8] Each of the above individual elements were further elaborated upon in my summing up in respect of the two counts.
- [9] The Assessors were further directed that in relation to the first count of Rape, if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, penetrated the complainant's vagina with his finger, has satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, unlawfully and indecently assaulted the complainant by touching the area around the complainant's external genitalia without penetrating (touching her externally); as an alternative, they are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count one.
- [10] Similarly, the Assessors were directed that in relation to the second count of Rape, if they find that the prosecution although failing to establish beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, penetrated the complainant's anus with his finger, has satisfied beyond any reasonable doubt that the accused, between 1 January 2019 and 3 May 2019, unlawfully and indecently assaulted the complainant by touching of the complainant's anus without penetrating; as an alternative, they are then allowed to look at the lesser offence of Sexual Assault, though the accused is not formally charged in the information for that offence in count two.
- [11] In support of their case, the prosecution called the complainant (APLT), her guardian, Frances Verma, and Medical Officers, Dr. Mikaele Lutumailagi and Dr. Brian Guevara. The prosecution also tendered the following documents as prosecution exhibits:
- Prosecution Exhibit **PE1**- Birth Certificate of the complainant.
 - Prosecution Exhibit **PE2**- Medical Examination Report of the complainant.
- [12] The accused testified on his own behalf. He also called two other witnesses in support of his case: His wife, Trevina Marama Tuivunilagi, and his wife's younger sister, Martina Tora Tuivunilagi.

[13] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Amended Admitted Facts*” without placing necessary evidence to prove them:

1. APLT is the complainant in this matter.
2. The complainant resides at House 5 Kings Road, Centre Point.
3. The accused is Thomas Pearson.
4. The accused resides at Lot 5, Ambala Road, Centre Point.
5. The complainant resides with her guardian namely Frances Verma.
6. The complainant’s biological mother is Trevina Marama Tuivunilagi.
7. The accused is the complainant’s biological mother’s husband.
8. The accused is the complainant’s step-father.
9. The complainant and the accused live next to each other’s house.

[14] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Amended Admitted Facts*” without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

[15] I have summarized the evidence of all witnesses during the course of my summing up. The complainant was 5 and a half years old at the time of the alleged incident, and was 7 years old when she testified in Court (Her date of birth being 13 May 2013).

[16] The complainant testified that her biological mother Trevina, whom she also refers to as Tee or mummy Tee, had sent her to go and bring a diaper from the next door (meaning the house in which Tee and her husband Thomas were staying in). She explained that at the time Tee was cooking roti upstairs in the main house. The complainant had gone next door to get the diaper. She had told Tom, the accused, to get the diaper, because the diaper was up a shelf. The accused had said no.

[17] The complainant said at this point, while she was standing, the accused had put his hand in her pants and poked her butt and touched her ‘muna’. When asked as to which part of his hand the accused used, the witness showed the index finger of her right hand. She said the accused had touched her butt and her muna from inside of her underwear. She said she had felt pain in her butt and her muna.

- [18] The complainant testified that on the same day she had told her mother Trevina that the accused had poked her butt and poked her muna.
- [19] Frances Verma, the guardian of the complainant and with whom the complainant has been living with since she was 4 days old, said that on 3 May 2019, the complainant was upstairs playing with the other kids (her cousins). Around 12 noon, she had called the complainant downstairs to have her shower. The complainant had come downstairs, had her shower, and then the witness had taken her to the room to dry her. When she tried to dry her private part, the complainant had complained to her. She had said: "That her muna, muna was sore."
- [20] Frances had then asked the complainant, if there was something wrong or if someone had touched her inappropriately. She had asked if someone had touched her muna, muna or if someone had touched her bum, bum. The complainant had said that Tom had poked her muna, muna and her bum bum. The complainant had kept repeating the same thing.
- [21] The witness testified that the complainant refers to her private part or her vagina as muna muna and she refers to her bottom as bum bum.
- [22] The accused testified in Court and totally denies the two charges against him. He totally denies that he penetrated the complainant's vagina with his finger or that he penetrated the complainant's anus with his finger. He submitted that he would never do such a thing. He also said that he has been framed by Frances and her husband, Taniela Lomani as he and his wife Trevina had complained to the police, on the morning of 3 May 2019, about Taniela selling drugs in their front porch, whilst his kids were playing there. He said: "They are trying to frame me for an incident I did not do".
- [23] Trevina Marama, the biological mother of the complainant testified that she had a confrontation with Frances and Taniela, around 8.00 in the morning on 3 May 2019, about Taniela selling drugs in their compound. When the confrontation took place, Taniela had been furious and her aunt Frances had said that she will take care of it. Later, around 10.00 a.m., she and her husband Thomas had gone and made a verbal complaint against Taniela at the Valelevu Police Station.
- [24] The witness said that the allegations made against Thomas is not true and that such a thing never happened.
- [25] On hearing of the allegations Trevina said she had asked the complainant, in the presence of her sister Martina, if the accused had really done what she had alleged. The complainant had said no and when asked why she had said Tom's name she stated: "Then she told that mummy and daddy tell me to say it because uncle Tom was a bad man."
- [26] Martina Tuivunilagi, the younger sister of Trevina, testified and confirmed that the above conversation took place.

[27] The prosecution objected to evidence of this conversation, which took place between the complainant and Trevina, in the presence of Martina, being led as no suggestion was put to the complainant or Frances when they were testifying in Court. I concede that no such suggestion was put by the defence to the complainant or Frances regarding this conversation when they were testifying in Court. Thus, this portion of the evidence should be taken into account with that infirmity in mind.

[28] However, considering all the above evidence in its totality, I am of the opinion, that more than a reasonable doubt has been created by the defence in this case.

[29] In my view, the Assessors' unanimous opinion in finding the accused not guilty of the charges of Rape and also of the lesser or alternative charges of Sexual Assault, is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.

[30] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charges of Rape or the lesser or alternative charges of Sexual Assault, against the accused, beyond reasonable doubt.

[31] In the circumstances, I find the accused not guilty of the two charges of Rape and accordingly acquit him of the two charges.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 01st Day of June 2020

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Tuifagalele Legal, Barristers & Solicitors, Suva.**