

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 45 of 2019

STATE

V

SIMISEI QOLI

Counsel : Mr. T. Tuenuku for the State.
: Ms. G. Henao for the Accused.

Dates of Hearing : 28 and 29 September, 2020
Closing Speeches : 30 September, 2020
Date of Summing Up : 30 September, 2020
Date of Judgment : 01 October, 2020

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "T.V")

1. The Director of Public Prosecutions charged the accused by filing the following amended information:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) of the Crimes Act 2009.

Particulars of Offence

SIMISEI QOLI on the 23rd day of February, 2019 at Vatukoula, in the Western Division, unlawfully and indecently assaulted “T.V” by touching her vagina.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SIMISEI QOLI on the 25th day of February, 2019 at Vatukoula, in the Western Division, penetrated the vagina of “T.V”, an 8 year old girl with his finger.

2. The three assessors had returned with a unanimous opinion that the accused was guilty of one count of sexual assault and one count of rape as charged.
3. I adjourned overnight to consider my judgment I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called four witnesses and the defence called the accused.
5. The complainant informed the court that on 25th February, 2019 she was living with her grandmother at Veiquwawa Settlement, Vatukoula, the accused was their neighbour. The complainant was 8 years at the time it was late afternoon the complainant was at her home, the accused called her to come to his house.
6. After telling stories, the accused went into his house at this time he pulled the complainant’s hand according to the complainant this was painful he then closed the door.

7. The accused laid her on the bed, removed her panty laid on top of her and was pushing himself he then started poking her vagina with his hand. The complainant felt pain and also felt the poking inside her vagina. The accused told her not to tell anyone about what he had done to her he then gave her 50 cents. After she left the house of the accused her aunt Bui called her.
8. Aunt Bui asked her what was in her hand, she told her aunt that the accused had given her 50 cents. When further questioned by her aunt she told her aunt about what the accused had done to her. The complainant was taken to the Vatukoula Police Station and then to the hospital for medical attention.
9. Dr. Menisha Nand informed the court that in 2019 she was a Medical Officer at the Tavua Hospital. On 25th February, 2019 the witness had examined the complainant at about 11pm.
10. The specific medical findings were:
 - a) Examination of vaginal area showed hymen was not intact. The witness explained hymen is a membrane or a tissue which was about 2 to 3 cm from the vaginal opening. Hymen could be either torn or broken;
 - b) No other signs of force or injuries or bleeding were noted.

The possible causes of hymen not being intact could be by the penetration of penis, finger, vigorous activities such as horse riding, etc.
11. In her professional opinion she was unable to comment on the age of the injury and the patient's hymen was not intact.

12. The third witness Adi Litia Asivino Vulilatabua informed the court that she knows the accused from many years. The complainant calls the witness aunt Bui, on 25th February, 2019 in the evening she saw a light in the accused's house the door opened and the complainant came out when the witness saw this she called out to the complainant.
13. The witness asked the complainant what was in her hand, she was told it was 50 cents when she asked the complainant who gave her the money she was quiet and crying then she said the accused gave it to her.
14. The witness then went to the house of the accused and confronted him, when the witness said she will report the matter to the police the complainant started crying. At this time, the witness went to get the kindergarten teacher Ms. Aloesi. In the presence of the witness, Aloesi questioned the complainant who stated that the accused had put his hand and touched her vagina. The witness took the complainant to report the matter to the police.
15. The final prosecution witness Cpl. 3833 Jese Marovia had caution interviewed the accused on 26th February, 2019 at the Vatukoula Police Station in the ITaukei language at the request of the accused.
16. The witness did not force or threaten or make any false promises to the accused to give his answers. The witness also did not see any other police officer force or threaten the accused in any way.
17. The witness had explained to the accused his rights during the caution interview but he did not wish to exercise those rights. The witness had also made an English translation of the caution interview.

18. The witness also admitted that he overlooked to provide an English translation to the answers at Q.39 and Q.41 of the caution interview.

19. The English translation for answer to Q.39 and Q.41 are as follows:

Q.39 When she was lying on your bed, what did you do?

Ans: I pulled up her dress and undo her panty.

Q.41 I put to you that you inserted your finger inside her vagina. What can you say about it?

Ans: Yes I do inserted my finger.

20. The accused informed the court that he has been residing in Veiquwawa Settlement for a long time. On 23rd February, 2019 he had a headache so he took panadol and slept early and woke up the next day. He knows the complainant who is his neighbour living with her grandmother about 10 steps away from his house. The accused did not meet the complainant on this day.

21. On Monday 25th February at about 6.30pm the accused had met the complainant when he was smoking in the porch of his house. The complainant came to ask for food but there was none in his house. After a while she asked for 50 cents for her spending money, the accused went inside his house followed by the complainant. From under the mattress the accused took out 50 cents and gave it to the complainant who was beside him.

22. The complainant was wearing a very short dress he observed the elastic of her undergarment was loose although she was a little girl she behaved like an adult. The accused did not lie on top of the complainant but made her lie on his chest and he only touched her vagina. The accused denied that he had inserted his finger into the complainant's vagina.

23. Next morning the accused heard that Bui had reported the matter to the police so he went to the police station. Police Officer Jese was writing his answers he was forcing the accused to admit to the allegations. The accused was thinking not to sign the interview since he knew if he signs he will be admitting to the allegations. The accused was forced to sign and he was also told by Jese to admit to the allegations and that he will get a lenient sentence if not then he has to tell the court that he was not admitting to the allegations. There were other police officers present but he did not complain to them since he did not know what to say.
24. After considering the evidence adduced by the prosecution and the defence it is obvious to me that the first count of sexual assault is unsustainable reason being the complainant did not raise any allegation against the accused in respect of 23rd February, 2019. A review of the evidence shows that the complainant was narrating her evidence based on what had happened to her on 25th February, 2019.
25. The narration by aunt Bui that the complainant had told her the accused had touched her vagina was not clarified by the prosecution as to which incident the complainant was talking about. Furthermore, in his caution interview and his evidence the accused also denied the complainant had come to his house on the 23rd.
26. In respect of the second count I accept the evidence of the complainant as truthful and reliable she was able to recall what the accused had done to her on the 25th. She was also able to withstand cross examination and was not discredited.
27. Immediately after the incident the complainant was able to tell her aunt about what the accused had done to her. It is understandable that an 8 year old child cannot be expected to narrate every detail of her unexpected

sexual encounter to the first person she saw. The fact that the complainant was able to tell her aunt that the accused had touched her vagina was in my view crucial and important information to alert her aunt that the complainant had undergone an unexpected situation which required urgent attention.

28. I have no doubt in my mind that the complainant told the truth in court. I also accept the evidence of Adi Litia as credible and truthful, she appeared to me as a person of strong character who wasted no time in confronting the accused and in taking the complainant to the police station. This witness was referred to an inconsistency and/or omission between her police statement and her evidence in court. The discrepancy was not significant to adversely affect the credibility of this witness.
29. The examining doctor had also arrived at her opinion after carrying out a vaginal examination of the complainant which was that the hymen was not intact. I have also kept in mind that the slightest of penetration of the vagina is sufficient to satisfy the act of penetration. The interviewing officer also gave a coherent account of what he had done when he had interviewed the accused. I also accept his evidence as reliable and truthful.
30. At the outset there is no dispute that the interviewing officer Jese and the accused are known to each other. The accused was cautious during the interview he knew if he signs he will be admitting to the allegations. I reject the assertion of the accused that he was forced to sign his caution interview and that he relied on the promise of Jese that if he admits the allegations he would get a lenient sentence.
31. I accept the accused told Jese the truth during the caution interview he had all the opportunity to make any complaints if any against Jese with the other police officers who were present in the police station but he did not is quite unusual if there was indeed any impropriety by Jese. From the

demeanour of the accused he appeared to be a person who cannot be forced to do anything against his will.

32. I accept that the accused had given his answers voluntarily in his caution interview and which was the truth.
33. The accused on the other hand did not tell the truth about what had happened in the evening of the 25th, he was very careful in his evidence. He admitted in his evidence that when he saw the complainant in his house he could not think straight and was overcome by his lust.
34. I reject the evidence of the accused that he did not penetrate the vagina of the complainant with his finger as unworthy of belief. I accept what the complainant told the court that the accused had penetrated her vagina and she had felt it.
35. The defence has not been able to create a reasonable doubt in the prosecution case in respect of count two.
36. In respect of count one this court is not satisfied beyond reasonable doubt that the accused on 23rd February, 2019 had unlawfully and indecently assaulted the complainant by touching her vagina.
37. This court is however, satisfied beyond reasonable doubt that on 25th February, 2019 the accused had penetrated the vagina of the complainant an 8 year old girl with his finger.
38. For the above reasons, I overturn the unanimous opinion of the assessors that the accused is guilty of one count of sexual assault. However, I accept the unanimous opinion of the assessors that the accused is guilty of one count of rape as charged.

39. In view of the above, I find the accused not guilty of one count of sexual assault as charged as such he is acquitted of this count. In respect of the second count of rape the accused is found guilty and he is convicted as charged.
40. For completeness, on 6th January, 2020 the accused in the presence of this counsel had pleaded guilty to one count of sexual assault as per the following information:

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) of the Crimes Act 2009.

Particulars of Offence

SIMISEI QOLI on the 25th day of February, 2019 at Vatukoula, in the Western Division, unlawfully and indecently assaulted “T.V” by touching her vagina.

41. On 5th March, 2020 the accused understood the summary of facts read to him by the State Counsel as follows:
1. *On the 25th February, 2019 the complainant namely T.V (hereinafter referred to as the “complainant”), 8 years, Class 3 student of Vatukoula Primary School was residing with her grandmother at Veiquwawa Settlement, Vatukoula.*
 2. *The accused, Mr Simisei Qoli (hereinafter referred to as the “accused”), 76 years, Unemployed of Veiquwawa Settlement, Vatukoula is the neighbour of the complainant’s grandmother.*
 3. *On the abovementioned date (i.e 25th February, 2019) at about 7pm the complainant went to the accused house. Once the complainant was inside the house the accused told the complainant to lay on the bed.*

4. *The complainant lay on the bed and the accused lifted the complainant's dress and pulled down the complainant's panty to her knees and then he touched the complainant's vagina using his hand.*
5. *After the accused had touched the complainant's vagina, the accused told the complainant to dress up and he gave \$0.50c to the complainant and tell her not to tell anybody about the incident.*
6. *The complainant related the incident to one Asivino Vunilatabua (hereinafter referred to as "PW2") on the same night and she took the complainant to Vatukoula Police Station and reported the matter to the Police.*
7. *The accused was arrested, cautioned interviewed and charged for a count of Sexual Assault.*

42. On this day the court was satisfied that the accused had entered an unequivocal plea of guilty hence he was found guilty and convicted accordingly for one count of sexual assault as charged.

43. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka

1 October, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.