

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 101 OF 2019

STATE

V

EMONI CAVUTU

Counsel : Ms. W. Elo for State
: Ms. L. Manulevu for Defence

Date of Summing-Up : 6 November 2020

Date of Judgment : 9 November 2020

(Name of the Complainant is suppressed. She is referred to as SS)

JUDGMENT

1. The accused was tried before three assessors. The Information on which he was tried is as follows:

COUNT ONE

Statement of Offence

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

Particulars of Offence

EMONI CAVUTU on the 20th day of February 2019 at Vatuwaqa, in the Central Division, unlawfully and indecently assaulted **SS** by touching her breast.

COUNT TWO

Statement of Offence

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

Particulars of Offence

EMONI CAVUTU on the 20th day of February 2019 at Vatuwaqa in the Central Division, **on an occasion other than that mentioned in Count 1** unlawfully and indecently assaulted **SS** by touching her breast.

COUNT THREE

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

Particulars of Offence

EMONI CAVUTU on the 21st day of February 2019 at Vatuwaqa in the Central Division unlawfully and indecently assaulted **SS** by touching her breast.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

EMONI CAVUTU on the 21st day of February 2019 at Vatuwaqa, in the Central Division, penetrated the vagina of **SS** with his finger, without her consent.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

EMONI CAVUTU between 1st day of February and the 28th day of February 2019, **on an occasion other than that mentioned in Count 1, Count 2 and Count 3** at Vatuwaqa in the Central Division, unlawfully and indecently assaulted **SS** by touching her breast.

2. The Prosecution called four witnesses at the ensuing trial. At the end of the Prosecution's case the Court decided that there is a *prima face* case for the accused to answer on each count. The accused elected to exercise his right to remain silent. After my Summing-Up, the assessors returned a mixed opinion. They unanimously found the accused guilty on counts 1 and 2 and not guilty on count 3. They, in their majority opinion, found the accused not guilty on counts 4 and guilty on count 5. Having directed myself on my own Summing-Up, I pronounce my judgment as follows:
3. The complainant is a child and was 14 years old at the time of the offending. She is from a broken family and had to leave her village because her step-mother did not like her. On her grandmother's invitation, she came to her uncle (the accused) and aunt's place in Vatuwaqa from where she had attended school. She is an asthmatic patient and was in a vulnerable position under the roof of the accused at the time of the alleged offences.
4. It appears that the assessors have basically accepted that the child complainant told the truth in Court. But their majority opinion of 'not guilty' on counts 3 and 4 appears to be based on the fact that the prosecution had failed to prove beyond reasonable doubt that all elements of the offence of Sexual Assault (on count 3) and Rape (on count 4) as charged have been satisfied.
5. In view of the mixed opinion expressed by the assessors, I thought it apposite to delve into all the issues raised at the trial in detail. The attack on complainant's credibility was mainly based on the complainant's subsequent conduct. The complainant had not complained to her aunt Mini Sikote (wife of the accused), cousin, doctor or teacher about the alleged incidents. She had complained to aunt Vatiseva a few days later. She had not screamed or raised alarm during or immediately after the alleged incidents, a typical conduct supposedly expected of a rape victim.

6. There are acceptable explanations as to why the complainant conducted herself the way she did. As I said before, the complainant, having been forced to leave her village, was in a vulnerable position and under the authority of the accused. Apart from that, the complainant said that she was scared that her uncle would do something to her. Her fear was based on the accused's hostile gestures, utterances and also her belief (based on what she had heard from her grandmother) that 'they' will seek apology, and will never report to the police. Under these circumstances, it is highly unlikely that she had the courage to complain against the accused. For the same reasons, the argument of the Defence that the complainant did not scream or raise alarm because these incidents never happened should also be dismissed.
7. The complainant was suffering from asthma and the so called therapeutic massage of the accused was no cure for it. Failing of which, the accused eventually volunteered to take the complainant to the hospital. The complainant had no option but to go to the doctor with the accused when her aunty insisted that she go with him. It is possible that the presence of the accused at the hospital prevented the complainant from complaining to the doctor about the sexual harassments.
8. Whilst attending school, the complainant had made several attempts to escape the 'grip' of the accused and go away. Her first 'escape attempt' failed when she realized that her bus card was empty. The second attempt failed because she did not find anyone at the bus stand to help her, thus forcing her to return to where she was. Her attempt was finally successful when she met Mereseini, her cousin, at the bus stand. After spending the weekend at Mereseini's place, she refused to go back to the house of her uncle. That was when she eventually opened up and relayed the incidents to Mereseini's mother, Vatiseva. Vatiseva in her evidence confirmed that she received the complaint from the complainant although there are some inconsistencies in terms of the details between the two versions. The complainant is recent in nature and concerned a sexual offence. The delay in complaint in my opinion did not affect complainant's credibility as it was made at the first available opportunity she found comfortable with. The complainant's conduct is consistent with her evidence that she was sexually assaulted and raped.
9. The Defence highlighted certain inconsistencies between complainant's evidence and her previous statement made to police. Those inconsistencies in my opinion are not material

enough to discredit the version of the complainant. They concern only peripheral matters. When considered her previous statement as a whole, one can safely conclude that she is telling the same story both in her statement and her testimony although there are some differences between the two so far as the sequence of events is concerned. The inability of this child witness to narrate the incidents in a sequence and their exact dates should not lead the court to conclude that she is a liar.

10. I observed complainant's demeanor. She was straightforward and not evasive. The demeanor of the complainant is consistent with her honesty and her evidence that she was sexually assaulted and raped.
11. The Defence argues that it was not possible for the accused to commit these offences in the setting in which they are alleged to have been committed. The complainant does not deny that there were nearly 15 occupants in that house. However, the first incident had taken place outside the house near the bathroom. The neighboring house closest to the bathroom according to her was empty and only the complainant and the accused had been there at that time. The second incident also took place outside when her cousin, after giving her baby to the complainant, had gone inside the house. When the accused started massaging the complainant, her aunt had gone to light the firewood. The children had gone to school. No one else was present at the time when the accused had allegedly touched the breasts of the complainant under the guise of massaging her. The alleged penetration took place in the same transaction when the complainant had fallen asleep. It is not impossible for the accused to commit these offences in those settings.
12. The complainant was 14 years old at the time of the alleged incidents. There is no evidence that the complainant had a motive to make up these serious allegations against her uncle. Having considered the evidence led and, observed her demeanor, it was open for the assessors to conclude that the complainant was telling the truth in Court.
13. The Defence alleges that the police officers fabricated the answers in the caution interview. The police witnesses deny this allegation. According to the Defence, the police officers had not only fabricated answers in respect of the alleged offences but also those relating to the livelihood of the accused. Why would the police officers, even if they had an ulterior motive, want to fabricate the answers relating to his livelihood? There is no basis for this

allegation. I am satisfied that the accused was asked those questions by the interviewer and the answers recorded thereto have been given by the accused. Having considered all evidence led in trial I am satisfied that the accused told the truth to the police at the interview.

14. I now turn to the elements of each count. The first alleged assault relating to count 1 took place when the complainant came out of the bathroom from a shower. She could feel that somebody was spying on her during the shower. When she finished her shower, she heard a person knocking on the door. When she opened the door, she saw the accused in front of the door. He obstructed her movements and did not allow her to go out. When she tried to escape, he squeezed her breast with both of his hands. She was wearing just a towel at that time. She was angry. She could not believe that her uncle would do that to her. The accused in his caution interview at Q 34 and Q 35 admits that he touched complainant's breasts playfully. I am satisfied that squeezing of complainant's breast by her uncle constitutes the elements of Sexual Assault. I agree with the unanimous opinion of assessors and find the accused guilty on count 1.
15. The assault relating to count 2 allegedly took place when the complainant was giving the baby to the accused. Accused had asked her if he could carry the baby. Then she gave him the baby. Whilst she was giving the baby to the accused, his hands touched her breast on top of her t-shirt. He was laughing at her. There is no evidence beyond reasonable doubt that the touching was an intentional act on the part of the accused. I am not satisfied that the offence of Sexual Assault is made out. I reject the opinion of the assessors and find the accused not guilty on count 2.
16. The assault relating to count 3 took place when the accused was massaging the complainant who was suffering from an asthma attack. Her aunt wanted the complainant to be taken to hospital but accused said 'no' and wanted her to be massaged. Then he started massaging the complainant's body starting from her back. She had taken off her t-shirt and was wearing only the bra at that time. He then started touching the front part of her body, chest and her breasts and squeezed her breasts. She was scared and angry. The circumstances under which the touching took place constitute the offence of Sexual Assault. The accused in his caution interview admitted at Q. 38 that he touched her breasts. I reject the opinion of assessors and find the accused guilty on count 3.

17. The count 4 concerns a digital rape allegation which took place in the same transaction. While massaging, the accused told the complainant to lie down sideways. Then he massaged her legs. She felt weak and fell asleep. She woke up when she realized that her vagina was paining. She saw the accused sitting besides laughing at her. He was inserting his finger inside her vagina. She was scared. She could not believe that her uncle would do this nasty thing to her. Under cross examination, the complainant admitted that she did not see the accused inserting his finger into her vagina. But she clearly said that she felt her vagina being inserted causing her the pain in her vagina. The accused was seated beside her at that time. She did not see but felt the offence being committed. It is open for the assessors to draw the inference that it was the accused that was penetrating her vagina with his finger.
18. There is no dispute that the accused was engaged in massaging the complainant at that particular time. She had not objected to the massaging for a therapeutic purpose. She had not consented to the nature of the act of the accused- a penetration of her vagina. The complainant had fallen asleep at that time and was not in a position to give consent to this particular act. In the circumstances, the accused should have known that the complainant was not consenting to a penetration. The accused at Q 39 admitted that he, while massaging, inserted his finger into complainant's vagina. The Prosecution proved that the accused penetrated complainant's vagina with his finger, without her consent. I reject the majority opinion of the assessors and find the accused guilty on count 4.
19. The 5th count concerns an incident allegedly occurred upon complainant's arrival from the hospital. She wore warm clothes and lied down. When she woke up in the midnight, she saw the accused standing beside her, touching her breasts. He inserted his hands underneath her clothes to touch her breasts. She recognized the uncle from the dim light coming from the light in the middle of the house. She was ashamed and crying. I am satisfied that the offence of Sexual Assault is made out. I accept the majority opinion of the assessors and find the accused guilty on count 5.

Summary

20. The accused is found guilty of counts 1, 3, 4 and 5 and convicted accordingly. The accused is acquitted of count 2.

21. That is the judgment of this Court.



Aruna Aluthge

Judge

At Suva

9 November 2020

Solicitors: Office of Director of Public Prosecution for State
Legal Aid Commission for Defence