

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 196 of 2019

STATE

V

MALELI NAIBE

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|---------------------------|---|---|
| Counsel | : | Mr. A. Kumar and Ms. L. Latu for the State. Ms. A. Bilivalu for the Accused. |
| Dates of Hearing | : | 25 and 26 January, 2021 |
| Closing Speeches | : | 27 January, 2021 |
| Date of Summing Up | : | 27 January, 2021 |
| Date of Judgment | : | 28 January, 2021 |

JUDGMENT

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

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

Statement of Offence

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

Particulars of Offence

MALELI NAIBE on the 26th day of October, 2019 at Ba, in the Western Division, inserted one of his fingers, into the vagina of “S.T”, without her consent.

2. In the summing up on the basis of the evidence before the court a direction was given to the assessors to also consider the lesser offence of sexual assault in case they opined that the accused was not guilty of the offence of rape.
3. The three assessors had returned with a unanimous opinion that the accused was not guilty of the offence of rape as charged but unanimously guilty of the lesser offence of sexual assault.
4. I adjourned overnight to consider my judgment I direct myself in accordance with my summing up and the evidence adduced in trial.
5. The prosecution called five witnesses whereas the accused exercised his right to remain silent and did not call any witness.
6. The complainant informed the court that in the year 2019 she was 16 years of age and a Form 5 student residing in Suva. On Friday 25th October, 2019 the complainant went home at Rarawai, Ba to spend her weekend. This was the first time she had seen the accused who was staying with her family. At about 11pm the complainant and her family went to sleep.
7. At around 4 am when the complainant was sleeping she felt someone was touching her vagina in a rough manner, she woke up when she felt pain. At this time the complainant screamed by saying “oye”.
8. After the complainant screamed she turned and looked up and recognized the accused from the light outside the house. The complainant was shocked

the accused continued to have his hand inside the complainant's undergarments. According to the complainant the accused may have put his two middle fingers inside her vagina.

9. The sleeping arrangement was that the complainant's mother was sleeping in the corner, next to her was her brother then her sister then her father followed by the complainant and finally beside the complainant was the accused.
10. As a result of what had happened the complainant jumped on her sleeping mother, her mother woke up and asked her what had happened. The complainant told her mother about what the accused had done, that is he had touched her private part. The complainant's mother hugged the complainant and told her that they will talk about the incident in the morning when the complainant was talking to her mother the accused stood up and went outside the house.
11. In the morning the complainant went with her father to the police station and reported the matter, thereafter she was taken to the hospital for a medical examination. The complainant did not consent to what the accused had done to her since she would never allow anyone to touch her body.
12. On 26th October, 2019, Dr. Kautoga had examined the complainant. In the professional opinion of the doctor the area of redness noted at the os meaning the vaginal opening was painful to the patient, likely secondary to trauma and the hymen was not intact. According to the doctor the redness of the vaginal opening was not normal.
13. Meresiana Nataci the mother of the complainant informed the court that in 2019 she was residing at Rarawai, Ba with her husband and children. The accused was also living with them, in the early hours of 26th October, the

witness got a shock when her daughter “S.T” jumped on her whilst she was fast asleep.

14. When Meresiana woke up she saw her daughter shivering and looking scared. According to the witness “S.T” was talking and crying at the same time. She hugged her daughter and tried to calm her down after a while the witness asked her daughter about what had happened to her.
15. The witness was told by her daughter that when she was sleeping she felt the accused touch her private part with his hand when she felt pain she jumped over to the place where her mother was sleeping. Meresiana also saw the accused stand up and go outside the house.
16. PC 5623 Josefa was the interviewing officer who had conducted the caution interview of the accused in the ITaukei language at the request of the accused. The interview was hand written by the witness in ITaukei language. The record of interview was signed by the witness, the accused and the witnessing officer on all the pages.
17. According to the witness the accused was not forced to be interviewed by anyone or forced to sign the interview. The accused was cooperative, he gave the answers noted in the interview willingly and the accused did not raise any complaints. The accused was also informed of the allegation which he had understood was cautioned and given his rights as well.
18. The witness was referred to Q & A 62 of the caution interview which was read as follows:

“Q. 62 Do you want to read your statement of interview?”

Ans: No, I don't know how to read.”

19. When it was put to the witness that after the interview the document was not read to the accused the witness disagreed. When further questioned the witness agreed that he did not read the caution interview to the accused. When asked since the interview had not been read to the accused so how would the accused have known the answers in the interview were his, the witness stated that he wrote everything the accused had said in his interview.

20. The witness denied that he had fabricated the answers in the caution interview. The witness clarified that the reason why he said there was no fabrication of the accused's answers were because he wrote everything the accused had said and that there was no complaints from the accused that the interview was not read to him.

21. The final witness PC 5934 Apimeleki Vunaki was the charging officer. He had charged the accused in the ITaukei language on 28th October, 2019. The witness had signed the charge statement with the accused and the witnessing officer. The accused was not forced to sign the charge statement.

22. The witness stated that before the charging the accused was calm and cooperative who made no complaints before the charging and was giving all the answers. The accused was not forced to give his answers and he had not made up the answers.

23. The witness agreed that the signing was done after the charge statement was printed out. The witness had asked the accused whether he was able to read the charge statement which was not in the charge statement, the answer he had received from the accused was that he could not read.

24. The witness was referred to Q. 15 paragraph 3 which was read as follows:
- “I have read my statement and I wish to say that this is my true statement and I have given it on my own free will I was told that I can add, alter or correct anything in my statement”.*
25. When it was put to the witness that the accused could not have read the charge statement as mentioned, the witness replied that he had showed the accused the document who had looked at it so the witness knew the accused was reading. The witness took the document back and explained the contents to the accused. When questioned where he had noted this in the charge statement the witness said he did not. The witness again stated that he did not ask the accused whether he knew how to read but he had explained the document to the accused.
26. Finally, the witness agreed that he had pre-typed the questions and answers and told the accused to sign it.
27. On the other hand, the defence argued the allegation was not probable as narrated by the complainant. The accused did not do anything as alleged. The complainant did not like the accused sleeping beside her and smoking so she went to sleep beside her mother and then made up a story to implicate the accused so that he leaves the house.
28. The complainant was not sleeping alone her father was sleeping next to her the least the complainant could have done was to wake her father rather than jump from one end to the other. The complainant did not tell her mother the most crucial aspect of the incident that was the penetration of the finger into her vagina in effect she did not even tell her mother about the touching of her vagina. It was both the complainant and her mother who had raised this false allegation against the accused since the mother of the complainant did not want the accused to be with them.

29. The defence further stated that the medical report whilst mentioning there was redness at the vaginal opening does not conclusively suggest that there was penetration when there are other causes for such redness such as infection. In respect of the caution interview and the charge statement the defence submitted that the admissions in both these documents were unfairly obtained and made up by the police officers.
30. After carefully considering the evidence adduced by the prosecution and the defence raised by the accused I am unable to accept the evidence of the complainant that the accused had inserted his finger into her vagina as truthful and reliable. However, the narration by the complainant about how the accused had touched her vagina by putting his hand inside her undergarments is believable.
31. From the evidence of the complainant it was obvious to me that she was not sure whether the accused had penetrated his finger into her vagina she told the court that the accused "*may have put his two middle fingers inside her vagina*" creates a reasonable doubt on whether the accused had indeed penetrated his finger into the complainant's vagina. I do not accept the complainant told the truth in cross examination when she said the accused had penetrated her vagina with his index finger and I reject it as a recent invention at the moment of questioning and based on the following:
 - a) Immediately after the incident the complainant had told her mother that the accused had touched her vagina. The complainant was not under any threat by the accused when she was relating her ordeal to her mother who had left the house by this time;
 - b) The complainant was consistent and clear about what the accused had done to her that is he had only touched her vagina;


- c) I have also directed my mind to the age of the complainant at the time and the circumstances that prevailed, in my judgment after listening to the complainant and observing her demeanour she struck me as a person who was responsive and an alert person who was conscious of what was happening to her she knew the danger and she reacted swiftly before anything serious could happen. She was 16 years of age at the time with a strong character hence I don't see any reason why she would not have openly spoken to her mother if the accused had inserted his finger into her vagina. The complainant was bold when she immediately told her mother about what the accused had done to her.
32. The complainant was honest when she stated that the accused had touched her vagina and she also told the truth to her mother. The complainant gave a coherent account of what the accused had done to her that is about the touching of her vagina. She was also not discredited in cross examination in this regard. The demeanour of the complainant in court was consistent with her honesty.
33. The complainant's mother also told the truth when she told the court that the complainant had told her the accused had touched her vagina. I also give weight to the observations made by this witness of the complainant's distressed situation at the time.
34. The opinion of the doctor is also acceptable and credible the medical findings also support the evidence of the complainant that the accused had touched her vagina in a rough manner which had resulted in pain to her.
35. I find all the above prosecution witnesses to be credible and worthy of belief in respect of the lesser count of sexual assault.

36. In respect of the caution interview and the charge statement both the police officers did not tell the complete truth about how they were able to obtain the admissions in the caution interview and charge statement. The accused prior to Q & A 38 in the caution interview was in denial, thereafter he started admitting what the interviewing officer was putting to him questions. Both the police officers knew the accused was educated up to class 7 and he could not read what was written in the documents.
37. The interviewing officer did not read the caution interview to the accused after the interview had finished. This failure was fatal to the admissions contained in the interview because the accused was not aware of what was written in the interview hence he did not have the opportunity to add or alter anything in the caution interview. This tactic by this police officer was unfair and deceptive when the accused an ordinary cane cutter/labourer was told to sign on the document without having a clue of what he was signing.
38. The interviewing officer should have acted fairly in recording the interview of the accused. I accept the defence contention that this police officer had fabricated the answers in the caution interview.
39. In view of the above, I give no weight to the admissions in the caution interview. It does not matter that the accused did not raise any complaints that the interview was not read to him. How could the accused have known what was in his interview if it was not read to him before signing.
40. In respect of the charge statement the charging police officer had misled the accused at Q. 15 paragraph 3 of the charge statement. The accused could not read, the officer knew this and yet the above question states that the accused had read the statement and confirmed that his admission was the truth is incorrect and misleading.

41. I reject the evidence of this officer that he had explained the document to the accused as unworthy of belief. I accept that this officer had pre-typed the charge statement with the admissions and he asked the accused to sign the document who had obliged.
42. Like the caution interview I do not give any weight to the admissions in the charge statement.
43. On the totality of the evidence there is reasonable doubt in respect of the offence of rape this court is not satisfied beyond reasonable doubt that on the 26th October, 2019 the accused had inserted one of his fingers into the vagina of the complainant without her consent.
44. In respect of the lesser offence of sexual assault the defence has not been able to create a reasonable doubt in the prosecution case.
45. This court is satisfied beyond reasonable doubt that the accused on 26th October, 2019 had unlawfully and indecently assaulted the complainant by touching her vagina.
46. I agree with the unanimous opinion of the assessors that the accused is not guilty of the offence of rape as charged but unanimously guilty of the lesser offence of sexual assault. On the evidence adduced it was open to the assessors to come to this opinion.
47. In view of the above, I acquit the accused of the offence of rape as charged and I find the accused guilty of the lesser offence of sexual assault and I convict him accordingly.

48. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

28 January, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.