

**STATE v AMITH KUMAR SINGH (HAM0005 of 2012L)**

HIGH COURT — CRIMINAL MISCELLANEOUS JURISDICTION

5 THURAIRAJA J

2, 7 March 2012

10 **Rape — indecent assault — 15 year old child — residing in Japan — whether evidence of virtual complaint can be led through Skype / Videolink — Criminal Procedure Decree ss 295, 296.**

15 The complainant, a Japanese national aged 15 years, was raped while she was in Fiji to study the English language under a home stay programme. Attempts to bring the complainant from Japan to Fiji had failed. The State made an application to take evidence of the complaint through Skype/Videolink. The respondent objected to the application, submitting that his counsel would not be able to cross-examine the victim in front of the Assessors, hence the respondent would be denied a fair trial.

**Held –**

20 Taking into account the best interests of the child, the worldwide use of information communication technology by other courts, the expense of bringing the complainant to Fiji and the arrangement for her to give evidence in the Fijian Embassy in Japan, the prosecution can lead evidence from the complainant via Skype/Videolink.

Application to take evidence via Skype/Videolink allowed.

25 *L. Vateitei* for the Applicant.

*Iqbal Khan* for Respondent.

[1] **Thurairaja J.** This is an application by the State to take evidence of a virtual complaint in a Rape case through Skype/Videolink.

30 [2] The Respondent abovenamed is originally charged by the Director Public Prosecution as follows:

**COUNT 1 Statement Of Offence**

**RAPE:** Contrary to s 207(1), 2(b) of the Crimes Decree No 44 of 2009.

**Particulars of Offence**

35 **AMITH KUMAR SINGH** on the 17th day of July 2011 at Lautoka in the Western Division penetrated the vagina of IRIA AOKI with his finger, without her consent.

**COUNT 2 Statement of Offence**

**INDECENT ASSAULT:** Contrary to s 212(1) of the Crimes Decree No 44 of 2009.

**Particulars of Offence**

40 **AMITH KUMAR SINGH** on the 16th day of July 2011 at Lautoka in the Western Division unlawfully and indecently assaulted IRIA AOKI.

[3] The State submits following reasons for this application.

- 45 (a) The virtual complainant is a 15 year old child.  
 (b) She was raped when she was in Fiji to study English language under home stay programme.  
 (c) Her mother is a single parent.  
 (d) The complainant is a Japanese national.  
 (e) She had returned to Japan on the 30th July 2011.  
 (f) Her mother is a single parent.  
 (g) The complainant and her mother are residing in Japan.  
 50 (h) The complainant cannot travel alone to Fiji because of her past experience.  
 (i) Both the mother and the complainant are unable to bear the cost of travel.

- (j) Attempts made to bring both of them from Japan to Fiji had failed.
- (k) Fiji Embassy at Japan is willing to facilitate Skype/Videolink conference to take evidence of the complainant.

[4] The Respondent objects to the application and submits following:

- 5 (a) Giving evidence via Skype will not enable his Counsel to cross-examine the victim in front of the Assessors hence denying the Respondent a fair trial.
- (b) Victim can lie to the Court and get away without being charge for perjury.
- (c) by giving evidence through video link the defence counsel and juries will not be able to read the expressions on the victims' face to see if she is really
- 10 (d) There is a vast difference from giving evidence directly and through video.

[5] Section 295 of the Criminal Procedure Decree states as follows:

- 15 (i) *Before the commencement of any trial, a prosecutor may apply to a judge or magistrate for directions as to the procedures by which the evidence of a vulnerable complainant or witness is to be given at the trial.*
- (ii) *The judge or magistrate shall hear and determine an application made under sub-section (1) in chambers, and shall give each party an opportunity to be heard in respect of the application.*
- 20 (iii) *The judge or magistrate may call for and receive any reports from any persons whom the judge or magistrate considers to be qualified to advise on the effect on the complainant or the vulnerable witness of giving evidence in person in the ordinary way or in any particular mode provided for in s 296.*
- (iv) *In considering what directions (if any) to give under s 296 the judge or*
- 25 *magistrate shall have regard to the need to minimize stress on the complainant or the vulnerable witness, while at the same time ensuring a fair trial for the accused.*
- (v) *A judge or magistrate may hear and consider an application by either party made during the course of any trial for an order prescribing the procedures by which the evidence of a vulnerable complainant or witness is to be given in the trial.*

[6] s 296 of the Criminal Procedure Decree states as follows:

- 30 (i) *On application under s 295, the judge or magistrate may give any of the following directions in respect of the mode in which the evidence of a vulnerable complainant or witness is to be given at the trial –*
- 35 (a) *where a videotape of the evidence was shown at a preliminary hearing, a direction that the evidence be admitted in the form of that videotape, with such exclusions (if any) as the judge or magistrate may order under sub-section (2):*
- (b) *where the judge or magistrate is satisfied that the necessary facilities and equipment are available, a direction that the complainant or*
- 40 *vulnerable witness shall give his or her evidence outside the courtroom but within a Court precinct, or from some other suitable location, the evidence being transmitted to the courtroom by means of closed circuit television or such similar quality secure audio visual electronic means;*
- (c) *a direction that, while the complainant or vulnerable witness is giving*
- 45 *evidence or is being examined in respect of his or her evidence, a screen, or one-way glass, be so placed in relation to the complainant or vulnerable witness that-*
  - (i) *he or she cannot see the accused; but*
  - (i) *the judge or magistrate, the assessors, and counsel for the accused can see the person;*
- 50 (d) *where the judge or magistrate is satisfied that the necessary facilities and equipment are available, a direction that, while the complainant or*

- 5 *the vulnerable witness is giving evidence or is being examined in respect of his or her evidence, he or she be placed behind a wallow partition, constructed in such a manner and of such materials as to enable those in the courtroom to see the complainant or witness while preventing the complainant or witness from seeing them, the evidence of the complainant or witness being given through an appropriate audio link;*
- (e) *where the Judge or magistrate is satisfied that the necessary facilities and equipment are available, a direction that-*
- 10 (i) *the complainant or vulnerable witness gives his or her evidence at a location outside the Court precincts; and*
- (ii) *that those present while the complainant or vulnerable witness is giving evidence include the judge or magistrate, the accused, counsel, and such other persons as the judge or magistrate thinks fit; and*
- 15 (iii) *that the giving of evidence by the complainant or vulnerable witness be recorded and that the complainant's evidence be admitted in the form of that recording with such excisions (if any) as the Judge or magistrate may order under sub-section (2).*
- (ii) *Where a recording of the complainant's or vulnerable witness's evidence is to be shown at the trial, the judge or magistrate shall view the recording before it is shown, and may order excised from the recording any matters that, if the evidence were to be given in person in the ordinary way, would be excluded either-*
- 20 (a) *in accordance with any rule of law relating to the admissibility of evidence; or*
- (b) *pursuant to any discretion of a judge or magistrate to order the exclusion of any evidence.*
- 25 (iii) *Where a recording of any evidence is to be shown at the trial, the judge or magistrate shall give such directions under this section as the judge or magistrate may think fit relating to the manner in which any cross-examination or re-examination of the witness is to be concluded.*
- 30 (iv) *Where the witness is to give his or her evidence in the mode provided for in sub-s (1)(b) or (d), the judge or magistrate may direct that any questions to be put to them shall be given through an appropriate link to a person, approved by the judge or magistrate, placed next to the witness, who shall repeat the question to them.*
- 35 (v) *Where the witness is to give his or her evidence at a location outside the Court precincts, the judge or magistrate may also give any directions under sub-section (1) (c) and (d) that the judge or magistrate thinks fit.*
- 40 (vi) *Where a direction is given under this section, the evidence of the witness shall be given substantially in accordance with the terms of the direction; but no such evidence shall be challenged in any proceedings on the ground of any failure to observe strictly all the terms of the direction.*
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[7] Considering the above section the Prosecution is entitled to make an application to obtain evidence via Skype/Videolink.

50 [8] Considering the nature of the application I am convinced that the State has to incur heavy expenditure to bring down the complainant to Fiji.

[9] Further, I am mindful that the Respondent should get a fair trial.

[10] The complainant is a child who is less than 18 years old. Fiji is a signatory to United Nation Child Rights Charter, according to Article 3, the State is bound to consider the best interest of the child.

5 [11] At present the Information Communication Technology had developed to a very high level at a fraction of cost. The picture and sound quality almost closed to natural if not more.

[12] In number of cases Courts in Fiji and worldwide used and using the Skype technology to obtain evidence from witnesses.

10 [13] This witness will be giving evidence from the Embassy of Fiji in Japan, under Vienna Convention, technically the Embassy is within the jurisdiction of Fiji.

[14] If State takes steps to bring down the complainant and her mother it will be costly and time consuming. This might affect the accused.

15 [15] Considering all, I make order that the Prosecution can lead the evidence of the virtual complainant via Skype/Videolink.

*Application allowed.*

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