REGINA
-V-
NOEL ZEZAPA

HIGH COURT OF SOLOMON ISLANDS
(PALMER CJ.)

Criminal Case Number 4 of 2021

HEARING: 6-7 December 2021
Judgement: 8 December 2021.

For the Crown: Mr. A. Meioko
For Defence: Mr. D. Kwalai

Palmer CJ.

1. The defendant, Noel Zezapa ("the Defendant") is charged with one count of sexual intercourse with a child under the age of 15 years contrary to section 139(1)(a) of the Penal Code [Cap. 26] as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016 ("the Act").

2. It is alleged that the Defendant at his dwelling house at Pangoe Village, Northwest Choiseul pushed his finger into the vagina of the victim, who is at the time of the incident on the 8th August 2020, was two years old.

3. The Defendant entered a not guilty plea and a trial has been held.

4. Prosecution called only one witness, the mother of the victim and tendered two documents, the Notice of Birth of the victim (marked as Exhibit 1), and the Medical Report of the victim dated 1st September 2020 (marked as Exhibit 2).

The prosecution case.

5. The prosecution's case is that on the 8th of August 2020 the victim had been playing outside with other children while the mother was in the house sewing clothes. After sometime she called for her child as she did not see her outside anymore. She then walked over to the Defendant's house and climbed onto the veranda of the house. She peeped through the window and saw the victim and the Defendant sitting together. She saw the Defendant touching the victim's vagina before inserting his finger into her vagina. She then spoke to the Defendant and asked him what he was doing to the victim. The Defendant got up and walked to a room inside the house. She then got the victim and took her back with her.

The defence case.

6. The defence denies the allegation and required the prosecution to prove its case beyond a reasonable doubt. The Defendant elected to give evidence under oath.

Facts not in dispute.

7. It is not in dispute that on the said day the victim was in the house of the Defendant. It is also not in dispute that the Defendant is related to the father of the victim as a granny to him and therefore the victim is like his great grandchild.

8. It is not in dispute that the Defendant on occasions has been entrusted with the care of the victim and that the victim can go in and out of his house at will.

The law.

9. Section 139(1)(a) of the Act provides:

> "*(1) A person commits an offence if the person has sexual intercourse with a child who is under 15 years of age.*
>
> *Maximum penalty:*
>
> *(a) if the child is under 13 years of age or the offender is a person in a position of trust in relation to the child – life imprisonment;*"

10. Sexual intercourse is defined in section 136D (2) as follows:

> "*(2) In this Part, "sexual intercourse" means any of the following:*
>
> *(a) the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person, except if that penetration is carried out for a lawful medical purpose or is otherwise authorised by law;*"

11. The allegation is that the Defendant committed sexual intercourse with the victim by penetrating her vagina with his finger. It is not in dispute that his action if proved falls within the definition of sexual intercourse.

The issue in this case.

12. The issue in this case is whether Crown had established on the evidence beyond a reasonable doubt that the Defendant had committed the said act on the victim.

The evidence

13. In her evidence in chief, the mother of the victim told the court how she climbed up the ladder to the house of the Defendant and then looked into his house through the window. She saw the Defendant touching the vagina of the victim and then pushed his finger into her vagina.

14. She told the court that the victim was wearing a slack underpants at that time. She saw him lifting her leg before pushing his right finger into her vagina.

15. In cross examination, evidence was led and introduced to establish that the Defendant used to look after the victim on occasions when the witness was busy. She would drop her off with the Defendant and then pick her up after she had completed her work. She also confirmed that at times the Defendant would take the child around the village with him. He would give her sweets, such as chewing gum and lollies. He would also give them food.

16. On this occasion she confirmed that the victim had been playing outside the house. It was raining a bit at that time towards the afternoon at around 4:00 pm. When she came out to look for the child she did not see her and was told when she enquired she had gone to the Defendant's house.

17. In cross examination she agreed when it was put to her that she shouted for the victim to come back to her. She denied however that the Defendant had responded and said that the victim was with him.

18. It was then put to her that when she got to the window and looked into the house, the Defendant was busy fixing his solar battery and the victim was playing by herself in the house. She however denied this.

19. When it was put to her that when she went in to collect the victim, the Defendant was walking into his room to put away the solar battery, she also denied this. However, when it was put to her that as he walked into his room the victim ran after him, she agreed. She also agreed that the Defendant then took the victim and carried her to her mother and gave the child to her. She also agreed when it was put to her that the victim asked if she could stay with the Defendant (her Granny) but that she did not agree and took the child back with her.

20. It was also put to her that when she went to pick up the child, she was not crying or shouting, but was happy and playing. She agreed that this was so.

21. It was also put to her as a follow up question that because she could not see clearly she thought that he may have pushed his finger into her vagina to which she answered in the affirmative. It was then put to her that this was why she had asked him what he was doing to her little girl, to which she answered in the affirmative.

Analysis of the evidence.

22. I have had the opportunity to carefully consider the evidence of the Crown as opposed to the evidence of the Defendant. It is for the Crown to prove beyond a reasonable doubt that the Defendant pushed his finger into the vagina of the victim.

23. While the Crown witness maintains that she saw the Defendant push his finger into the vagina of the victim, during cross examination, some of her answers throw some doubt to the accuracy and thereby the reliability of her evidence.

24. In the first instance, she agreed that she shouted for her daughter, the victim, to come back to her. When it was put to her that the Defendant had responded to her shout, she denied this. The Defendant on the other hand says that he told her that she was with him. It would seem more probable than not for the Defendant to respond to the shout than not to. The Defendant says that he responded to the shout and said that the child was with him. The evidence in this instance weighs in favour of the Defendant.

25. The second piece of evidence relates to her responses to questions put to her that the victim was not crying, shouting or in distress when picked up by the mother. While there may be some reasonable explanation for this, we are not told.

26. In his submissions Mr. Kwalai submits that the demeanour and appearance of the child at the time she was picked up by the witness, that she was not crying, or in pain, or displaying any form of discomfort, is significant and should be weighed carefully by the Court in favour of the Defendant. He points out that during cross examination, the court was told that the child was alright, playing in the house, that she ran after Defendant when he went into his room and that he had to carry her back to her mother and told her to go back to her father.

27. He submits that this is not supportive of someone who had been penetrated by any object. He submits that since a two-year-old child is much smaller, any form of penetration would present visible discomfort and pain to the child.

28. He also referred the court to the medical report (which I will refer to separately in this judgement), that when the Doctor was in the process of examining the child, she was crying (disturbed) and had to be calmed by her mother. He sought to make the comparison that if the Defendant had sought to do anything to the victim, like spreading or opening her leg, he submits that the victim would have displayed similar reactions, that she would be hesitant and not willing to comply. He submits that the medical report that the genitalia was normal is consistent with the facts that there was no discomfort or distress shown by the victim at the time it was alleged her vagina had been penetrated and therefore no penetration could have occurred.

29. I have had the time to carefully consider the submissions of counsel on this matter and in particular the way the evidence had been led and adduced in court both in examination in chief, cross examination and re-examination.

30. I would agree with Mr. Kwalai's submission that her appearance and reaction if true, that she had been violated by the Defendant with his finger, that it is more likely than not, that she would be in some form of distress, discomfort or even crying. The fact that this was virtually absent raises a doubt that she had been violated at the said time, *a fortiori*, when the evidence shows that she was happy, playing and ran after the Defendant when he went into his room. When he took her back, she asked if she could stay with him; I assume this was to play at his house and to return later. This is inconsistent with the allegation that she had just been sexually violated.

31. This piece of evidence is inconsistent with that of a victim (a child) having been violated sexually and who, one would expect to have been in so much pain, discomfort or distress. This inconsistency raises a doubt as to the accuracy and reliability of the evidence of the Crown witness and which should go in favour of the Defendant.

The Medical Evidence.

32. I have had the opportunity to also carefully assess the medical evidence in relation to the medical examination of the vagina of the victim and submissions of counsel. In terms of genital examination it is described as being normal.

33. In his submissions for the Crown, Mr. Meioko submits that the finding of the Doctor in the report that the hymen is absent supports the Crown case that there was penetration of the vagina. He submits that this is consistent with the evidence of the Crown witness.

34. The case for the defence is that there is no sign of any injury or bruising to the vagina which would be inconsistent with the act of penetration.

35. On the question as to whether the medical report supports the Crown's case, I find this to be inconclusive. Notably the description of the report of a tiny opening of *0.5 mm x 0.5 mm* to be vague and ambiguous. I am not sure if this is a mistake in measurement, whether what is meant is 0.5 cm (½ of a cm) or actually 0.5 of a millimetre. If so, it would be extremely tiny and virtually inconsistent with any suggestions of penetration with the finger of an adult; more likely what is meant is 0.5 cm.

36. I note that no evidence of the actual size of the opening has been adduced (the Doctor not required to give evidence), but judicial notice can be taken of the size of different objects. For instance, the size of a pencil is about 7 mm in diameter or 0.7 cm. A smaller object like a fountain pen cartridge or refill, would be even smaller at 6 mm in diameter, or 0.6 cm. In

contrast the average width[1] of the fore finger of most adults ranges **from 1.6 to 2 cm (16 mm – 20 mm).**

37. When this is contrasted with the size of the opening referred to in the report, it would virtually be an impossibility or impracticality, that the finger of an adult man (in this case the Defendant) would be able to penetrate such opening without causing severe bruising, a tear and injury, or harm to the victim and which in turn would be quite upsetting and disturbing for the victim. The fact that she was not upset or crying, or in any form of discomfort, but rather was playing and happy is more consistent with the defence version that no penetration occurred.

38. It is also pertinent to note that the report states that no "*speculum and digital examination*" was done by the Doctor, as no appropriate size of instrument was available. This is quite revealing and is consistent with the finding that the opening was too small and that they were not able to find any instrument small enough to carry out any internal examination.

Conclusion.

39. The evidence of the prosecution has been challenged and a doubt raised as to whether penetration as alleged did occur or not. Any doubt raised, provided it is reasonable should go in favour of the Defendant. I am satisfied there is a reasonable doubt in my mind that the penetration as alleged did occur, that it is possible that the witness was mistaken when she said that she saw the Defendant push his fore finger into the vagina of the Defendant. Crown having failed to discharge that onus of proof, I am satisfied a finding of not guilty should be entered and the Defendant acquitted, I so order.

Orders of the Court:

1. **Find the Defendant not guilty of the offence of sexual intercourse contrary to section 139 (1) (a) of the Penal Code [Cap. 26] as amended by the Penal Code (Amendment) (Sexual Offences) Act 2016.**

2. **Direct that he be acquitted herewith.**

SIR ALBERT R. PALMER CBE

The Court.

[1] An MIT Touch Lab study of Human Fingertips to investigate the Mechanics of Tactile Sense found that the average width of the index finger is 1.6 to 2 cm (16 – 20 mm) for most adults.