



IN THE TULAGI MAGISTRATE COURT

Criminal Case 525 of 2019

**REGINA
V
SAMUEL SUBA**

Before: Principal Magistrate Ms. Fatimah Taeburi
Ms Gaytaba Waletofea appeared for the Crown
Mr. Hayniel Max appeared for the Defendant

JUDGMENT

1. The accused is charged with one count of indecent act of child under 15 contrary to section 139(2)(a) of the Penal Code (Amendment)(Sexual Offences) Act 2016.¹
2. He pleaded not guilty to the charge on the 28th of September 2019. A trial ensued in the matter. The crown called 2 witnesses. The defendant made an application on no case to answer. The court found that the accused has a case to answer. He gave sworn evidence in court.
3. The charge filed on the 28th of September 2019 states as follows;

Statement of Offence

Indecent Act – Child Under 15 – contrary to section 139(2)(a) of the Penal Code

Particulars of Offence

That Samuel Suba of Gumu Village, Central Islands Province, at McMahan Community High School, on 31st October 2018 did commit an indecent act on Nofo Lelei who is under 15 years old, to wit 7 years old by touching her vagina.²

4. The crown's allegation is that the accused committed an act of indecency on the victim by touching her vagina.

¹ Penal Code (Amendment) (Sexual Offences) Act 2016

² Refer to charge filed 28th September 2019

5. Section 139(2)(a) of the Penal Code (Amendment) (Sexual Offences) Act 2016 provides;

*A person commits an offence if the person commits an indecent act ona child who is under 15 years of age.*³

6. Section 139(3) of the Act provides, “it is not a defence to a charge for an offence under this section to prove that the child consented to the relevant act”.⁴

7. The elements of the offence that the crown is required to satisfy beyond a reasonable doubt are as follows;

- i. Accused
- ii. Commits an indecent act
- iii. On the victim
- iv. Who was under the age of 15 years old

8. The counsels in this case agreed that the issue for determination in this case is whether or not the accused did an indecent act on the complainant. It is clear from the issue identified by the counsels that all the elements of the offence are contested. The crown is required to established each of the elements of charge.

9. The memorandum of agreed facts, issues and list of witnesses and documents to be tendered by consent filed by counsels on the 2nd of July 2020 show that the following facts are not in dispute; that the complainant Miss Nofo Lelei was 7 years old in 2018. She was in class 1 at the McMahan Community High School at the time. The accused was also attending the same school. He was 18 years old then. It is also agreed that the alleged indecent act was committed on the 31st of October 2018 at the McMahan Community.

10. From the manner in which counsels have conducted examination of the witnesses in court, it is clear that the following facts are also not in dispute;

11. That on the 31st of October 2018, the victim and the accused were both at the McMahan Community High School.

12. At break time, several students from both the primary and the secondary schools were at the assembly area underneath the koilo tree playing various games. One of the games played at the time involved tying several children together in groups of 4 or 5. The victim was one of the children being tied with others. The accused was amongst the others who goes around to tie the smaller children in groups.

³ Refer to footnote #1.

⁴ Refer to footnote #1.

13. The school bell was rung and the children went to attend the school assembly. During the assembly the school principal made announcements in which he made various work arrangements in preparation for the school graduation.

14. I now consider the prosecution's evidence on each of the elements of the offence.

15. I first consider whether the victim was under the age of 15 years old when the alleged offence took place. The mother of the complainant testified that her daughter was born on the 3rd of December 2010 at the National Referral Hospital at Honiara. I am satisfied beyond a reasonable doubt that the victim was 7 years old at the time of the offending and was under the age of 15 years old.

16. I now move on to consider whether the acts allegedly committed are indecent.

17. Section 136B of the Penal Code (Amendments) (Sexual Offences) Act 2016 defines indecent act as,

*"an act of a sexual nature (including a person touching themselves in a sexual way or forcing another person to touch themselves in a sexual way), other than sexual intercourse, which a reasonable person would consider to be contrary to community standards of decency."*⁵

18. The provision went on further to state,

(2) Without limiting subsection (1), an indecent act may be committed;

- (a) By way of gestures or words; or,*
- (b) By conveying words or images.*⁶

19. The evidence of the victim is that on the 31st of October 2018, she was playing with other children at the assembly venue at the McMahon school. She said that a boy came along and tied her and her friends with a skipping rope. She said that her friends were stronger than her and they freed themselves and escaped. She could not escape.

20. She struggled but the boy pulled her back. She explained that her hands were placed on both sides of her body and tied at the waist area. She said that the boy then forcibly slid his hand under her skirt, inside her trousers and touched her vagina.

21. I find that the act of touching the victim's vagina in the manner described by the victim to be indecent. The actions alleged in this case satisfy the meaning of indecent act in the Penal Code.

22. Is the victim telling the truth that she was indecently assaulted by her offender or did she make up the whole story about the incident?

⁵ Refer to footnote #1.

⁶ Refer to footnote #1.

23. The crown relied on the evidence of the victim and the fresh complaint evidence of the victim's mother.
24. In any prosecution of a sexual offence, fresh complaint evidence goes to support or corroborate the evidence of the victim that unlawful sexual conducts have occurred. The act of reporting an incident of unlawful sexual conduct is consistent with the behaviour expected of a victim who did not consent to an alleged sexual act. The evidence of fresh complaint therefore is relevant in cases where the prosecution is required to prove that the sexual acts alleged were actually committed and also to prove lack of consent on the part of the victim.⁷
25. In this case, lack of consent is not an issue for determination. The fresh complaint evidence is only relevant to prove whether or not the unlawful indecent acts as alleged by the victim did occur.
26. The victim said that after school that day, she went home. She felt pain when urinating and her mother enquired about what had happened to her. She said that she lied to her mother at first but then later she told her mother the truth.
27. The victim's mother also testified that her daughter returned from school on the 31st of October 2018 and complained of pain in her groin area when urinating. The mother said that she enquired with her as to what had happened to her. She said that her daughter told her about the incident at the school.
28. I accept that the complaint was made at the first reasonable opportunity available to the victim. I am however not satisfied that the complaint was made voluntarily and spontaneously. The victim had lied to her mother at first. The complaint was elicited out of the victim by her mother.
29. I am also not satisfied that the victim provided details and particulars of the alleged indecent acts committed to her mother. The victim said the following in court, "mi go back den lo hia lo mi soa, den mi cry. Den mami blo mi ask, wat na kasem u? den mi lie den hem se, osem bae mi takem u go lo clinic den mi just tallem hem true". She was not asked to give details and particulars of what she had told her mother about the incident.
30. In order to qualify as a fresh complaint, the prosecution must prove that the report was made at the first reasonable opportunity, that it was made voluntarily and spontaneously and that there is consistency in the evidence of the victim and the fresh complaint witness as to the details and particulars of the report.⁸
31. In this case, I am not satisfied that the evidence of the victim's mother could qualify as fresh complaint. The evidence of fresh complaint is therefore rejected.

⁷ *Regina v Ferris* [2004] SBHC 124

⁸ Refer to footnote #7

32. The other important aspect of the prosecution evidence in this matter is that both the victim and her mother testified that after the mother was informed of the alleged incident, she took her daughter to the clinic for medical examination and was further taken to the Tulagi Police to file a complaint. The mother said that her daughter was examined by a doctor. She also said that the doctor produced a report on the examination.
33. The crown has failed to present the medical evidence in court. The medical evidence would have supported and corroborated the victim's testimony that she was indecently assaulted as alleged. The medical evidence would have also proved the injuries allegedly sustained by the victim on her vagina. Although lack of consent is not an issue, the medical evidence would have been relevant to the issue of whether or not the acts of indecency were actually committed as claimed by the victim.
34. On the point of corroboration, I agree with the defence counsel that the evidence of the victim discloses that there were other crucial and relevant witnesses at the scene of the alleged offending on the day in question. There is however no other evidence presented by the prosecution to support the victim's story that she and her friends were tied together and that everyone else had left the scene except for the victim and her offender. If such evidence was obtained and presented in court, it would have supported the story of the victim to the extent that she was tied with a rope and left alone with a boy at the assembly area that day.
35. What I am left with now, is the uncorroborated evidence of the victim that she was indecently assaulted.
36. I note that the Evidence Act 2009 has abrogated the need for corroboration evidence.⁹ This means that I can consider the evidence of the victim alone on the issue of whether or not she was indecently assaulted that day.
37. The prosecutor in this case posed an important question on the issue of whether or not the court should accept the evidence of the complainant that she was indecently assaulted. Miss Waletofea asked, "Why would a young girl of tender age fabricate a whole story with such details and particulars to falsely accuse the defendant?" Miss Waletofea also argued that it is highly unlikely for a child of such tender age to fabricate a story with such detail.
38. I have assessed the victim's demeanour in court. I find her to be a very smart and confident young girl. She maintained direct eye contact with the counsels and the court all throughout examination. She answered questions clearly and spoke very confidently in court. She was consistent in her evidence. I find her to be a very impressive prosecution witness and a truthful one.
39. I am satisfied on the evidence of the victim alone that she was indecently assaulted at the McMahon Community High School on the 31st of October 2018 in the manner that

⁹ Evidence Act 2009.

she had described in court. I agree with the views and arguments raised by the prosecutor on this issue.

40. The most crucial issue in this case is the identity of the accused.
41. In any case where the identity of the accused is raised as an issue, the court must be satisfied on two things; firstly, that the witness who gives identification evidence is an honest or truthful witness.¹⁰
42. In this case I have already made the finding that Nofo Lelei is a truthful witness. The second question is whether or not her evidence of identification is right or could she have been mistaken? It is a fact in life that even the most honest person can make a mistake about a fact.
43. The victim repeatedly said that she does not know the name of her offender. In court she said that she identified her offender because of a dot on his forehead between his eyebrow area. It is not clear from the complainant's evidence as to when she noticed the dot on the offender's forehead. The question to clarify her evidence on whether or not she noticed the dot during the time of the offending at the school was not put to her in examination in chief.
44. There was also no question asked to the victim to establish the circumstances in which she noticed the dot at the school when the offending occurred. It is crucial in these type of cases that the prosecutor asks the witness questions to establish matters such as, how close or far was she and the offender, how long was the witness looking at the offender's face, what was the position of the offender and the witness when she recognised the dot, was he standing behind or in front of her, what were the surrounding circumstances in the area at the relevant time and so forth.
45. It is also crucial in these types of the cases for the prosecutor to ask questions to elicit evidence relevant to the familiarity of the victim with the offender. In this case, no questions were asked to the victim as to whether she has seen the offender in the school before the incident. No questions were asked to establish whether she knows that the offender was a student at the McMahon Community High School. No questions were asked to the victim to say whether she saw the offender on the 31st of October 2018 when she and her friends were playing at the assembly venue before the incident. No questions were asked to her to describe her offender's appearance at the time. There are quite a number of questions that could have been asked to establish the victim's familiarity with her offender prior to the incident. This was not done by the crown.
46. The evidence of the victim's mother that the accused was identified by her daughter as her offender on a later date at the school is also very important and crucial to the element of identity of the accused. The mother of the victim said that she and the victim and the police went to the McMahon School on a later day for the victim to

¹⁰ *R v Turnbull* [1976] 3 WLR 445

identify her offender. The mother said that they went firstly to the Form 3 class and to the Form 2 where the victim identified this accused as the offender. The accused was then arrested and charged for this offence.

47. There was however no question asked to the victim as to how she made the identification of the accused in the classroom. No questions were asked to the complainant to establish the circumstances in which she made the identification of the accused in the classroom.
48. No statement was produced by the police officers who had accompanied the mother and the victim to the school to identify the victim's offender.
49. The only evidence on identification is that the offender is described by the victim to have a dot on his forehead and the accused also bears the same dot on the same area of his face.
50. If the crown is to rely on the evidence of the dot on the forehead as the only evidence of identification of the accused as the offender then the prosecution must be able to rule out all possibilities that there could be another boy in the same description of the accused who was present at the assembly venue on the 31st of October 2018.
51. Mr. Max on behalf of the accused argued that the prosecution has failed to prove beyond a reasonable doubt that in 2018, the accused was the only boy at McMahon School who bears a dot on his forehead. The defence counsel also argued that the prosecution failed to prove that on the 31st of October 2018, the accused was the only boy who was playing at the assembly venue who bears a dot on his forehead.
52. I agree with the arguments raised by the defence counsel. I have serious doubts as to the whether the identification made by the victim of the accused in the classroom was correct. I cannot rely on the evidence of identification from the complainant. Furthermore the prosecution has failed to adduce evidence to rule out all other reasonable possibilities that the offence could have been committed by someone other than the accused in this case.
53. I find the accused not guilty and I acquit him. He is free to go.

Dated this 3rd Day of July 2020

