

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 124 OF 2016

STATE

-v-

OSEA CAWI

Counsel : Ms S Navia / Ms S Alagendra for State
: Ms K Vulimainadave for Accused

Date of Summing Up : 17 September, 2018

Date of Judgment : 19 September 2018

(Name of the victim is suppressed. She is referred to as LV)

JUDGMENT

1. The Accused was charged with one count of rape and tried on following information before three assessors:

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

OSEA CAWI on the 07th day of June, 2016 at Sigatoka in the Western Division penetrated the vagina of LV a child under the age of 13 years by inserting his finger into the vagina of the said LV.

2. The Assessors unanimously found the Accused guilty of Rape as charged.
3. I direct myself in accordance with my own Summing Up and review evidence led in the trial. Having concurred with the opinion of Assessors, I pronounce my judgment as follows.
4. The Accused is charged with one count of digital rape. To find the Accused guilty of digital rape the Prosecution must prove beyond a reasonable doubt that the Accused penetrated victim's vagina with his finger.
5. The Prosecution called five witnesses including the victim and her mother Mariana. Prosecution's case is substantially based on the evidence of the child victim. Other witnesses were called to prove the consistency of the conduct of the victim and the confession to police. Prosecution says that victim's evidence is credible and is further bolstered by the confession of the Accused to police, recent complaint evidence and the medical evidence of the doctor.
6. Defence's case is one of denial. At the end of the Prosecution's case, Accused exercised his right to remain silent. The Defence Counsel cross-examined the witnesses for Prosecution on the basis that the Accused had never done the act alleged in the information and that victim's mother Mariana had made up this allegation against the Accused.

7. I am satisfied beyond reasonable doubt that the victim had been digitally raped and that it was the Accused Osea Cawi and nobody else that had committed this offence. The victim had known the Accused as her uncle prior to the incident. She had referred to the Accused as "Koko Osea" or uncle Osea when she relayed the incident to her mother Mariana. As soon as Mariana heard this she had accompanied the victim straight to the community hall where the Accused was at that time. Mariana confirmed that only Osea that her daughter knew in the village was the Accused.
8. The victim was 4-year old student at the time of the offence and now she is 6 years old. In the process of testing the competency of the child victim to give evidence and her capacity to understand the importance of telling the truth, I asked the victim "Why are you here today? She first said "I don't know".
9. When I was speaking to the victim, it appeared to me that she was not comfortable in speaking up. My understanding was that her reluctance was due to her being exposed to a highly child unfriendly and distracting environment in the precincts of the court house. Even though a lady from the Women's Crisis Centre was allowed to be seated beside the victim and a screen was set up to cover the Accused, I found those measures inadequate to make the victim comfortable. Therefore, on an application of the State, I adjourned the court for 15 minutes for the victim to familiarize herself with the court environment and to facilitate the staff to make her comfortable.
10. When the Court reconvened, I did not go on the bench but sat with lawyers on the bar table without the wig and the gown. The lawyers also had taken off their wigs. The victim was no longer sitting in the witness box. When I asked the same question "Why are you here today? The

victim said "*Osea used his finger to poke my vagina*". I reproduce the relevant proceedings below:

Crt: Why are you here today?

A: He used his finger to poke my vagina my Lord.

Crt: Who is he?

A: Osea my Lord.

Crt: Who is that Osea?

A: He resides in Korotogo my Lord.

11. In her closing, the Defence Counsel invited the assessors to consider if the victim had been coached during the adjournment to come up with her answers to court. I am unable to agree with Counsel's proposition that the victim would have been coached. If somebody wanted to coach the victim it could have been done well before the trial. My understanding is that the victim was feeling comfortable to open up with her story when the court reconvened in a more child friendly environment.
12. The victim in her statement that was read in evidence had told the same story to police on the 8th of June, 2016. She is consistent in her conduct because she had promptly informed her mother Mariana about the incident. Although the victim had made the complaint only when she was questioned by her mother upon a blood stain in her panty being noted, I consider it as reliable recent complaint that can be used to test the credibility of victim's evidence.

13. Defence Counsel suggested that Mariana made up this allegation. However, there was no reasonable basis for her suggestion. Mariana admitted that when she confronted the Accused after the incident she wanted to chop the Accused with a cane knife. However, she specifically said that the Accused was in good terms with her family and he used to come to her place and she had cooked food for him before the incident. Her evidence that Accused did not react to her anger further confirms Accused's conduct as to his guilt.

14. When the Defence Counsel suggested to the victim that she was not telling the truth, the victim denied and confirmed that she is telling the truth.

Q: *So Lati, when you said earlier that you are here because Osea used his finger to poke your vagina that is not true?*

A: *I am telling the truth my Lord.*

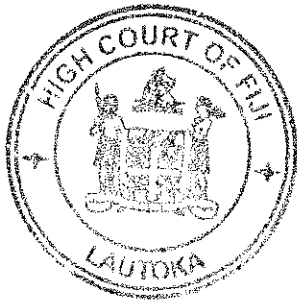
Q: *Osea did not poke your vagina he only chased you away from Tai Jo's house on that day that you came?*

A: *He poked my vagina my Lord.*

15. I observed the demeanor of the victim and her mother. I am not convinced that the victim or her mother had made up this serious allegation against the Accused who is related to the victim as her uncle.

16. The victim had blood stains in her panty soon after the alleged incident. She was medically examined by Dr. Rohitesh on the same day. The medical evidence is consistent with victim's evidence about the allegation of digital rape. Doctor's evidence boosted the credibility of prosecution's version of events although it did not implicate the accused.

17. At questions 28, 32, 33, 34, 40 and 41 in his caution interview the Accused had confessed to the crime. I am satisfied that the Accused had given those answers and had told the truth to police.
18. The victim said "*Osea inserted his finger in my vagina and it was paining*". The offence of digital rape is established. Prosecution proved the charge beyond reasonable doubt.
19. I agree with the unanimous opinion of assessors and find the Accused guilty of Rape as charged.
20. Accused is convicted accordingly.
21. That is the Judgment of this Court.



Aruna Aluthge

Judge

AT LAUTOKA

19 September, 2018

Solicitors: Office of the Director of Public Prosecution for State

Legal Aid Commission for Accused