

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 70 OF 2015

STATE

vs

NAND KISHORE

Counsel : Ms. L. Latu for the State
Ms. K. Vulimainadave for Accused

Date of Summing Up : 21st July, 2017

Date of Judgment : 25th July, 2017

(Name of the Complainant is suppressed. She is referred to as KV)

JUDGMENT

1. The Accused was charged with the following count and tried before three assessors.

FIRST COUNT
Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree 44 of 2009.

Particulars of Offence

NAND KISHORE, on the 22nd day of April 2015 at Elevuka, Ba, in the Western Division, penetrated the vagina of KV, a child under the age of 13 years, with his finger.

2. 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.
4. Having concurred with the opinion of Assessors, I pronounce my judgment as follows.
5. Prosecution called 4 lay witnesses and 7 police witnesses and based its case substantially on the evidence of the Complainant.
6. It is admitted that the Complainant was 8 years old at the time of the alleged incident. Therefore the only issue to be decided at the trial was whether the Accused penetrated the Complainant with his finger.
7. There was no dispute that Accused was the only person doing renovation work at Complainant's landlord's house when the alleged incident occurred. It was also not disputed that the Accused had done some renovation work at Complainant's house a week before the incident. There was a reasonable basis for a dock identification to which the Defence did not object. Complainant, her mother Vara and landlord's wife Anjula recognised the Accused in Court. I am satisfied that Prosecution established the identity of the Accused beyond reasonable doubt.
8. Prosecution relied on recent complaint evidence to establish Complainant's consistency and credibility. Complainant had made a prompt complaint to her mother, Vara, soon after the incident and, in the same afternoon, to her landlady, Anjula, and, finally to police. Both Vara and Anjula gave evidence and said that they received the complaint that Accused had poked a finger in Complainant's vagina.
9. Before the summing up, I gave a careful consideration to satisfy myself as to whether her complaint could be considered as a 'recent complaint evidence'. There was no doubt that it was made promptly after the alleged incident. Complainant had disclosed evidence of material and relevant unlawful sexual conduct on the part of the Accused. Both the Complainant and recipients of the complaint testified and said that they received such a complaint.
10. However, the complaint was received by her mother when the question - 'what happened?' was repeatedly asked for the third time. By that time, her mother had got angry.
11. In *Peter Campbell v Regina* (SCCA No 17/2006 – delivered 16 May 2008), paragraph 30, it was observed:

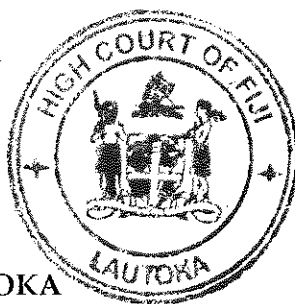
"We have examined a number of authorities on recent complaints and have extracted the following principles from the cases:


... Questions of a suggestive or leading character such as 'did so and so (naming accused) assault you' or 'did he do this and do that to you' will have that effect; but not natural questions put by a person in charge such as 'what is the matter' or 'why are you crying'. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant must be left to the discretion of the judge ..."

12. Complainant's mother was standing outside the house and she had noticed rather a peculiar behavior in Complainant. Soon after the incident, Complainant had run into the kitchen, shaking and crying. Her mother had followed her into the kitchen and asked 'what happened?' She answered mother's third question and told what was done to her by the carpenter. Complainant was 8 years old at that time. She was frightened. In these circumstances, I considered her complaint as a recent complaint evidence and emphasised to Assessors that the complaint is not evidence of the facts complained of, and must only be regarded, if believed, as consistent with the Complainant's evidence.
13. Prosecution also relied on the caution statement and the charge statement allegedly made by the Accused to police. In answer to question 43 and 52, of the caution interview, and in answer to question 13 of the charge statement, Accused had admitted that he had poked the finger in the vagina of the Complainant.
14. Accused in his evidence denied making such a confession to police. Police witnesses said that Accused was properly cautioned and afforded all his constitutional rights during interview and charging and he gave those statements voluntarily. They rejected allegations of trickery and fabrication.
15. Accused's statements are consistent with prosecution's version of events. Accused had not made any complaint elsewhere that the statement was fabricated by police. I am satisfied that caution statement and charge statement contained truthful statements of the Accused.
16. Prosecution also relies on doctor's medical finding to prove the credibility of the Complainant's version. Doctor had examined the Complainant within hours after the incident. Medical finding does not implicate the Accused.

However, the redness around Complainant's vaginal area and the fact that her hymen not being intact are consistent with version of the Prosecution.

17. There is no reason or motive on the part of the police or Complainant who was only 8 years of age at that time to fabricate a story against the Accused.
18. I watched the Complainant giving evidence in court. Complainant was straightforward and not evasive. She admitted that she read her statement before coming to give evidence and practiced. Her enthusiasm to give evidence does not make her a liar.
19. Accused was evasive and not straightforward. Accused's evidence is not consistent with the stance taken by his Counsel in the course of cross examination of prosecution's witnesses.
20. Version of the Prosecution is credible and believable. Accused's evidence did not create any reasonable doubt in the prosecution case. I am satisfied that the Complainant told the truth.
21. Complainant in her evidence said that the carpenter pulled her shorts and poked her vagina with his hand. Complainant demonstrated her pointing finger to explain what part of Accused's hand poked her vagina. Digital penetration was established. Prosecution discharged its burden and proved each element of the charge beyond reasonable doubt.
22. I accept the version of the Prosecution and the unanimous opinion of assessors. I reject the version of the Defence. Prosecution proved the charge beyond reasonable doubt. I find the Accused guilty of Rape as charged and convict him accordingly.
23. That is the judgment of this Court.




Aruna Muthge
JUDGE

AT LAUTOKA
25th July, 2017

Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused