

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 24 of 2015

STATE

V

FEROZ KUMAR

Counsel : Mr. A. Datt for the State.
: Ms. J. Singh [LAC] for the Accused.

Dates of Hearing : 24, 25, 30 April, 2018
Closing Speeches : 01 May, 2018
Date of Summing Up : 02 May, 2018
Date of Judgment : 03 May, 2018

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "UN").

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (b) and 207 (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

FEROZ KUMAR aka **RAKESH KUMAR** aka **PILLU**, on the 24th day of August, 2010, at Naidrodro, Ba in the Western Division, penetrated the

vulva of "UN" with his finger and at the relevant time the said "UN" was under the age of 13 years.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

FEROZ KUMAR aka **RAKESH KUMAR** aka **PILLU**, on the 24th day of August, 2010 at Naidrodro, Ba in the Western Division, unlawfully and indecently touched the backside of "UN" without the said "UN"s consent.

2. The three assessors had returned with a unanimous opinion that the accused was guilty for both the counts as charged.
3. On the evidence before the court it was open to the assessors to reach such an opinion.
4. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called four (4) witnesses whilst the accused gave evidence for the defence.
6. The complainant in the year 2010 was 7 years of age and a Year 3 student. On 24 August, 2010 at about 8.30am the complainant was at her home alone with her one year old brother Rupeni.
7. The complainant was carrying her brother when the accused came into the house got hold of her brother and put him on the floor. After that the accused touched the backside/buttocks of the complainant with his hands. The complainant did not like it and had not allowed the accused to touch her buttocks.

8. Thereafter the accused lifted the complainant and took her to the settee in the sitting room where he took off her panty, leaned over her and poked her vagina with his middle finger. The poke was a hard one which was painful.
9. The complainant further stated that the accused poked inside her vagina and his finger went in a bit. The complainant was not sure how far the finger had gone inside and she did not like what the accused had done.
10. The complainant then went to the bathroom to have her shower and then to the bedroom to dress up. She locked the door of the bedroom with her brother inside with her since the accused was outside the bedroom. He was knocking on the door of the bedroom saying that he wanted to see the complainant's vagina.
11. The complainant did not open the door, after a while she came out of the bedroom with her brother and went to play in the porch of the house. At about 11.00am the complainant's mother came home but she did not tell her mother what had happened to her since she was afraid.
12. Next day in the morning the complainant's mother was preparing to go to town to sell 'kai'. At this time the complainant told her mother that the accused had come and carried her to the settee and poked her 'via' meaning her vagina.
13. The mother of the complainant Sereana Marama informed the court that when she was getting ready to go to the market on 25 August, 2010 the complainant told the witness in the iTaukei language which when translated in the English language meant: *"Mum Pillu came here lifted me onto the settee he then took off my panty and touched my vagina."*
14. The matter was reported to police the same day that is on 25 August, 2010 and the complainant was medically examined the next day at the Lautoka Hospital.

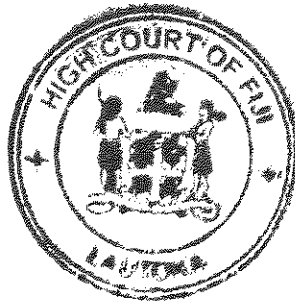
15. Dr. Eseta Vakasigaleka, who had examined the complainant on 26 August, 2010 stated that the areas of erythema (redness) seen in the vaginal area of the complainant was between the vaginal opening and the hymen after the labia majora, the labia minora and the vaginal opening known as the vulva.
16. The professional opinion of the Doctor at D (14) of the medical report was:


“The areas of erythema indicate a recent blunt injury most likely this week consistent with the patients story of use of a finger.”
17. The final prosecution witness the Investigating Officer WDC Miriama Nadumu had accompanied the complainant and her mother to Lautoka Hospital upon the recommendation of the Doctor at the Ba Mission Hospital. The officer also visited the crime scene and drew a rough sketch plan.
18. The accused in his evidence informed the court that on 24 August, 2010 he was at his home and did not go anywhere. The accused denied committing both the offences as alleged according to him the complainant had made up a story against him orchestrated by her mother.
19. I accept the evidence of the complainant as truthful and reliable. Although the incident happened some 7 years ago the complainant was able to recall what had happened to her. The complainant was straight forward and forthright in her evidence and was able to withstand cross examination. The complainant was referred to her police statement given to the police when the facts were fresh in her mind during cross examination.
20. I take into consideration that passage of time can affect one’s memory. At the time of the allegation the complainant was 7 years of age. After 7 years the complainant gave evidence I would have been surprised if there wasn’t any inconsistencies between what she had told the police then with her

evidence now. In any event the inconsistencies were not significant which did not adversely affect the credibility and reliability of the complainant's evidence.

21. I have no doubt in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty. After the complainant had informed her mother about what the accused had done to her the matter was promptly reported to the police. I accept that the complainant was afraid of her mother that is why she did not tell her mother on the day of the alleged incidents. The fact that the complainant did not tell her mother about the accused touching her backside/buttocks does not affect the reliability of the complainant's evidence at all. A child of such a tender age cannot be expected to relay every detail of what she had been through when faced with a situation of such anxiety.
22. The accused whilst giving evidence was not forthright and at times evasive in cross examination. It was obvious that the accused chose his words carefully when giving evidence and was using his medical condition of a bypass and a tube inserted in his private part as well his deteriorating kidney as a means to gain the sympathy of the court.
23. Furthermore, the accused was implicating someone else by shifting the blame yet in his evidence the accused informed the court that a good relationship existed between him and the complainant's family. In view of the good relationship that existed it is difficult to accept what would have motivated the complainant and her mother Sereana to blame the accused is beyond comprehension.
24. This court rejects the evidence of the accused as unreliable and unworthy of belief. The defence has not been able to create a reasonable doubt in the prosecution case.

25. I accept the evidence of all the prosecution witnesses as truthful and reliable.
26. I am satisfied beyond reasonable doubt that on 24 August, 2010 the accused had penetrated the vulva of the complainant "UN" with his finger and at the relevant time the complainant was under the age of 13 years.
27. Furthermore, I am also satisfied beyond reasonable doubt that the accused on 24 August, 2010 had unlawfully and indecently touched the backside/buttocks of the complainant "UN".
28. I agree with the unanimous opinion of the assessors that the accused was guilty of both counts as charged.
29. In view of the above, I find the accused guilty of one count of rape and one count of indecent assault accordingly he is convicted as charged for both counts.
30. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka
03 May, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.