

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 224 OF 2015

STATE

V

JOPE CATI

Counsel : Ms. K. Semisi for State
Ms. T. Rigsby for the Accused

Dates of Hearing : 01st - 02nd August 2016

Date of Summing Up : 02nd August 2016

Date of Judgment : 03rd August 2016

(Name of the complainant is suppressed. Accordingly, the complainant will be referred to as JR)

JUDGMENT

1. The accused is charged for the following offences;

FIRST COUNT

Statement of offence

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

Particulars of offence

JOPE CATI between the 1st day of December 2012 and the 31st day of January 2013 at Vanuabalavu, Lau in the Southern Division penetrated the vagina of JR, a child under the age of 13 years with his tongue.

ALTERNATIVE COUNT

Statement of offence

Sexual Assault: Contrary to Section 210 (1)(a) of the Crimes Decree No. 44 of 2009.

Particulars of offence (b)

JOPE CATI between the 1st day of December 2012 and the 31st day of January 2013 at Vanuabalavu, Lau in the Southern Division unlawfully and indecently assaulted JR by sucking her vagina.

2. Two assessors have returned with the opinion that the accused is guilty of rape and one assessor has opined that the accused is not guilty of rape but guilty of the alternative count, sexual assault.
3. I direct myself in accordance with the summing up delivered to the assessors on 02nd August 2016 and the evidence adduced during the trial.
4. I accept the evidence of the complainant when she said that the accused sucked her vagina at the accused's house. She said, "*he opened my vagina and sucked it*". She also said that the accused sucked inside her vagina and she felt pain.
5. I note that the complainant first said in her evidence that the accused touched her vagina and stroked it. Then when she was asked whether the accused did anything else, she said 'no'. After she was questioned about her informing about the accused to her aunt who was the second prosecution witness, she came out with the aforementioned evidence. The complainant was about 4 years old when the alleged incident took place and she was 8 years old when she gave evidence. The fact that the complainant did not come out with the evidence that the accused sucked her vagina when she was first asked by the prosecutor does not in my view make her an incredible witness. Getting a child witness to talk about what he/she experienced in relation to the charge is in fact a difficult task.
6. The complainant said during re-examination that she did not complain to her parents as the accused had told her not to tell anyone. She told her aunt about the incident about 7 months later. That was when the aunt questioned her regarding an incident where the aunt saw the complainant and another boy pulling up their pants. According to the second prosecution witness, the complainant told her that the accused licked the complainant's vagina. That is what the second witness had perceived from what the complainant related to her 7 months after the alleged incident.


7. In the case of *Raj v State* [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court while dealing with the issue of ‘recent complaint’, said thus;
“A complainant’s explanation as to why a report was not made immediately, or in its fullest detail, is to be expected. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.”
8. I accept the complainant’s explanation for her belated complaint and I find that her complaint to the second prosecution witness is consistent with the evidence the complainant gave in court.
9. Now the question is whether the prosecution has proved the elements of the offence of rape.
10. Though the complainant used the word “suck” (*domica*), she clearly said in her evidence that the accused opened her vagina and sucked it; the accused sucked inside; and it was painful. The element based on penetration of the offence of rape under section 207(2)(b) of the Crimes Decree is satisfied by penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis.
11. Therefore, the evidence of the complainant clearly establishes penetration as the complainant said that the accused opened her vagina and sucked inside which caused pain.
12. The complainant said in her evidence that she is 8 years old when she gave evidence. The second prosecution witness said that the complainant’s date of birth is 31/01/2008. The defence did not challenge this evidence. The time of offence is the period between 1st day of December 2012 and the 31st day of January 2013.
13. Therefore, I am satisfied beyond reasonable doubt that the complainant was below the age of thirteen years at the time of the offence and therefore she was not capable of giving consent in view of section 207(3) of the Crimes Decree.
14. In the light of the above, I am satisfied that the prosecution has proved the elements of the offence of rape beyond reasonable doubt.

15. I am convinced that the majority opinion of the assessors in finding the accused guilty of the offence of rape was not perverse and it was open for them to reach that conclusion based on the evidence adduced.

16. In the circumstances, I concur with the majority opinion of the assessors.

17. I find the accused guilty of the first count as charged and convict him accordingly.




Vincent S. Perera
JUDGE

Solicitors for the State: Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused: Rigsby Law, Nausori.