

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

CRIMINAL CASE NO: HAC. 324 OF 2014

STATE

V

TOMASI VOSAICAKE

Counsel : Ms. D. Kumar for State
Ms. L. Ratidara for the Accused

Dates of Hearing : 06th – 08th July 2016

Date of Summing Up : 11th July 2016

Date of Judgment : 11th July 2016

(The name of the complainant is suppressed. The complainant will be referred to as SG)

JUDGMENT

1. The accused is charged for the following offences;

FIRST COUNT
Representative Count
Statement of offence

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

Particulars of offence

TOMASI VOSAICAKE between the 1st January 2014 and 26th November 2014 at Suva in the Central Division, penetrated the mouth of a girl, namely, SG, a 7 year old girl, with his penis.

SECOND COUNT
Representative Count
Statement of offence

Attempted Rape: Contrary to Section 208 of the Crimes Decree No. 44 of 2009.

Particulars of offence (b)

TOMASI VOSAICAKE between the 1st January 2014 and 26th November 2014 at Suva in the Central Division, attempted to have carnal knowledge of a girl, namely, SG.

THIRD COUNT
Representative Count
Statement of offence

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

Particulars of offence (b)

TOMASI VOSAICAKE between the 1st January 2014 and 26th November 2014 at Suva in the Central Division, unlawfully and indecently assaulted SG, by licking her vagina.

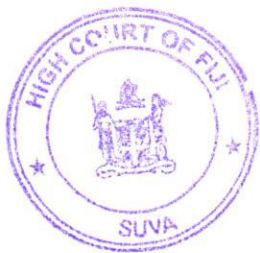
2. Assessors have returned with a majority opinion that the accused is guilty of all the three counts above. One assessor opined that the accused is not guilty of all three counts.
3. I direct myself in accordance with the summing up delivered to the assessors on the 11th July 2016 and the evidence adduced during the trial.
4. Having considered the demeanour of the complainant and her evidence, I am convinced that she was a credible witness. She was 7 years old during the time material to this case and was 9 years when she gave evidence before this court. I noted that there were certain inconsistencies in her evidence. In my view, the reason for those inconsistencies to surface was not that the complainant was trying to fabricate evidence, but because of the way she understood the questions and because of her way of describing or explaining things. However, it is pertinent to note that there were no significant inconsistencies with regard to the main allegations against the accused.
5. Considering all the evidence led in this case and the demeanour of the accused when he gave evidence, I am unable to accept his version as credible and reliable. The wife of the

accused and the daughter of the accused who were the second and third defence witnesses did not appear to me as credible witnesses. Where the accused clearly admitted in his evidence that he told his wife about the evidence of the complainant and her mother the day before he gave evidence, accused's wife in her evidence denied that fact. However, her evidence and the evidence of the third defence witness do not suggest that the events the complainant alluded to did not take place.

6. I accept the evidence of the complainant that the accused penetrated her mouth on the day he sent her two brothers out of the house to have a rain bath during the period between the 01/01/14 and 26/11/14. It is agreed that the complainant was 7 years old in 2014 and therefore pursuant to section 207(3) of the Crimes Decree she was incapable of giving consent. Therefore, I am satisfied that the prosecution has proved all the elements of the first count of rape beyond reasonable doubt.
7. To prove the second count of attempted rape, the prosecution should prove beyond reasonable doubt that the accused had the intention to have carnal knowledge of the complainant and he did an overt act which manifests that intention. To prove this offence, the prosecution relies on the complainant's evidence where she said that the accused placed his penis on her vagina when she went to give a towel to the accused who was bathing inside the bathroom. Though I accept the evidence of the complainant, I am not satisfied that the said evidence is sufficient to establish beyond reasonable doubt that the accused had the intention to have carnal knowledge of the complainant. The evidence was that the complainant who was 7 years old was standing on the toilet pan and the accused placed his penis on her vagina. There is no evidence to suggest that the accused wanted to do anything more than placing his penis on the complainant's vagina. The act of placing his penis on the complainant's vagina cannot be regarded as an act which clearly indicates an intention to insert his penis into the complainant's vagina. Therefore, I find that the prosecution has not proved the second count.
8. To find the accused guilty of the third count, the prosecution should prove that the accused unlawfully and indecently assaulted the complainant by licking her vagina at least on one occasion during the period between 01/01/14 and 26/11/14. I accept the evidence of the complainant that the accused licked her vagina on the day she was washing rice inside the bathroom. That act is sexual in nature which was unlawful and

indecent. Therefore, I find that the prosecution has proved the third count beyond reasonable doubt.

9. In the circumstances, I find that the prosecution has proved the first and the third counts beyond reasonable doubt. I find that the prosecution has failed to prove the second count.
10. I am therefore convinced that the majority opinion of the assessors in finding the accused guilty of the offence of rape and of the offence of sexual assault as charged was not perverse and it was open for them to reach that conclusion.
11. I concur with the majority opinion of the assessors that the accused is guilty of the first and third counts as charged. I find the accused guilty of the first count and of the third count and convict him accordingly.
12. For the reasons given above, I do not agree with the majority opinion of the assessors that the accused is guilty of the second count. I find the accused not guilty of the second count and I acquit the accused of the second count.



Vinsent S. Perera

JUDGE

Solicitors for the State: Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused: Office of the Legal Aid Commission, Suva.