

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 72 OF 2013

STATE

-v-

VILIAME TUBUYA

Counsels : Mr. A. Datt for the State
Ms. S. Nasedra for the accused

Date of Trial : 1 April 2014 to 2 April 2014

Date of Summing Up : 3 April 2014

Date of Judgment : 3 April 2014

(Name of the victim is suppressed. She will be referred to as ML)

JUDGMENT

1. The Accused is charged under following counts:

First Count
Statement of Offence

INDECENT ASSAULT: Contrary to Section 154 (1) of the Penal Code Cap 17.

Particulars of Offence

VILIAME TUBUYA, between the 1st day of May 2006 and 31st day of August 2006, at Rarawai, Ba in the Western Division, unlawfully and indecently touched the vagina of **ML**.

Second Count
Statement of Offence

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

Particulars of Offence

VILIAME TUBUYA, on the 2nd day of April 2013, at Rarawai, Ba in the Western Division, penetrated the vagina of **ML** with his finger without the consent of the said **ML**.

2. The three assessors unanimously found accused Guilty of the 1st count and Not Guilty for the second count.
3. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the assessors.
4. Considering the nature of the evidence before the court, I am convinced that the prosecution had proved the case beyond reasonable doubt in respect of 1st count.
5. Obviously, the assessors have not accepted the prosecution's version of events in respect of the 2nd count. It appeared that they have found the prosecution had not proven its case beyond a reasonable doubt in respect of the 2nd count.
6. Prosecution case was based on the complainant's evidence. She was born on 16.9.1993. While she was at home on a Saturday in 2006, her father had sent her brother to shop. Her mother had gone to river to pick mussel. Her step father (the accused) had started to touch her legs while playing. He had touched up to vagina using his fingers. He had lifted her panty and put his fingers inside. She felt scared. This had continued for about 10 minutes. The accused had told her not to tell anyone. He had told her he will kill her or punish her. He had promised her to give pocket money in return for not telling anyone.
7. In 2008 she had told about this to her mother. She was scared to tell her mother as she is her mother. On 2.4.2013 she was alone at home. The accused had come home. He had asked her whether she had sex with anyone. She had told that she had sex once with a male. He had taken garden fork and threatened her. She was scared and frightened. Then accused had come from behind and had hugged her. Then he had put her had into her vagina. His tallest finger went into her vagina.
8. After that she had packed her clothes and gone to aunt's place to report the matter to police. She was medically examined on 3.4.2013 at Ba mission hospital.

9. Under cross examination she admitted that her brother and wife live close to her house in 2006. However, according to her, they left to the village on this day. She admitted that she had close relations with her friends and teachers. She admitted that she did not tell her friends and teachers about this. She said that even though the accused was not at school she was scared to tell this to anyone. She had not yelled at the time of the incident in 2006 as she was really scared.
10. She admitted that she had an affair with Shaheed for some time. She admitted that the accused asked about this affair on 2.4.2013 and she agreed. She denied that she raised these allegations as she was not happy that her affair was caught. She said that she quickly informed her mother before she went to police station. She admitted that she left her house as the father came to know about her affair.
11. In the caution interview the accused had admitted the 1st charge and had denied the 2nd charge.
12. In my view, the assessor's verdicts were not perverse. It was open for them to reach such conclusions on the evidence.
13. It is Judge's duty to listen to the view of the community when it comes to a conflict of version of events.
14. In this case, the assessor's verdict is not binding on me. However, on careful assessment of the case, I am prepared to accept their unanimous Guilty verdict in respect of count 1 and unanimous Not Guilty verdict on the count 2 and give the accused benefit of the doubt in respect of the 2nd count.
15. I accept the assessor's verdict and I find that the prosecution has proven its case against the accused beyond reasonable doubt in respect of the 1st count and not proven the case against the accused in respect of the 2nd count.
16. I find the accused Guilty as charged on the 1st count of Indecent Assault contrary to Section 154 (1) of the Penal Code and convict him of the said count. I further find the accused Not Guilty as charged on the 2nd count of Rape contrary to Section 207 (1) and 2 (b) of the Crimes Decree No. 44 of 2009 and acquit him accordingly of the 2nd count.
17. This is the Judgment of the Court.

Sudharshana De Silva

JUDGE

**At Lautoka
3rd April 2014**

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