

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 152 of 2016

STATE

V

SEMI MALAI

Counsel : Ms. S. Navia for the State.
: Ms. V. Diroiroi with Ms. E. Radrole for the Accused.

Dates of Hearing : 21 and 22 May, 2019
Closing Speeches : 23 May, 2019
Date of Summing Up : 23 May, 2019
Date of Judgment : 24 May, 2019

JUDGMENT

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

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

SEMI MALAI, on the 23rd day of July, 2016, at Sigatoka, in the Western Division, inserted his penis into the mouth of "VH".

COUNT TWO

Statement of Offence

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

Particulars of Offence

SEMI MALAI, on the 23rd day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her vagina.

COUNT THREE

Statement of Offence

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

Particulars of Offence

SEMI MALAI, on the 23rd day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her breasts.

2. The three assessors had returned with a unanimous opinion that the accused was guilty of one count of rape and two counts of indecent assault.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with the summing up and the evidence adduced at trial.
4. The prosecution called two witnesses whereas the accused exercised his right to silence and did not call any witness.
5. The complainant who was 7 years of age in 2016 informed the court that she was on her way to the beach near her house looking for her mother when “Vava” Semi meaning uncle Semi the accused held her hair and took her into the bushes.

6. In the bush the accused told the complainant to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused and the complainant were standing at this time. The accused also touched her body by putting his hand inside her t-shirt from her breast down to her private part. The accused had touched her private part by putting his hand inside her panty.
7. On this day the complainant was wearing a t-shirt and a skirt. She wanted to run away but the accused grabbed her hand and then gave her a \$2 coin. Both went to the beachside, the complainant wanted to call out to her grandmother but the accused blocked her mouth with his hand. After a while her mother came and asked her what had happened whilst crying the complainant told her mother that the accused had touched her private part.
8. Upon hearing this, the complainant's mother started to cry the matter was then reported to the police.
9. The final prosecution witness was the mother of the complainant Miriama Naioba, on 23rd July, 2016 between 2pm to 3pm the witness returned from the beach. When she could not find the complainant at home she started asking around the village whether someone had seen the complainant. After a while the witness came to know that the complainant was standing beside the by-pound crying. When the witness went to where the complainant was the complainant said *"Mum both you and dad always told me that if anyone touches my private part I should tell you"*. The witness then asked the complainant what had happened. The complainant told the witness the accused had forced her to suck his penis and touched her private part. The complainant also showed the \$2 coin the accused had given her.
10. On the other hand the defence position was that the accused did not commit the offences as alleged by the complainant. The allegation by the complainant was made up by the complainant's mother Miriama after she

was told by some villagers that they had seen the complainant with an unidentified boy near the bush. It was due to Miriama's suspicion that she had told the complainant to make up a story to implicate the accused.

11. I accept the evidence of both the prosecution witnesses as truthful and reliable. The complainant gave a coherent account of what the accused had done to her some three years ago and she was also able to describe clearly what the accused had done to her.
12. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. The complainant was able to withstand cross examination and was not discredited she was also forthright in her answers and not evasive.
13. As soon as the complainant saw her mother after the accused had left she immediately told her mother about her private part being touched by the accused.
14. The complainant's mother Miriama Naioba also told the truth in court when she narrated what the complainant had told her. I accept that it is only natural for a person who has just gone through an unexpected sexual experience to be affected psychologically, here a 7 year old child who has just had an unexpected experience was not expected to tell her mother everything that had happened to her at the first instance. In this situation as soon as the complainant told her mother about the touching of her private part her mother started crying.
15. In any event the complainant did disclose material and relevant information about the unlawful conduct of the accused. There is no requirement of the law that a complainant has to tell all the details of the unlawful sexual conduct on the part of the accused to the first person he or she meets. The fact that the complainant had told her mother about her private part being touched by the accused was sufficient in the circumstances to alert the

complainant's mother that something had happened to her daughter (*see Anand Abhay Raj vs. State, CAV 003 of 2014 (20 August, 2014)*).

16. The defence of denial that the complainant's mother had told the complainant to make up story against the accused to implicate him is a supposition which cannot be believed. The fact that Miriama had made up her mind that something had happened to the complainant after she received information that the complainant was seen near the bush with a boy does not give credence to the fact that Miriama had asked the complainant to fabricate a story against the accused.
17. Mere suspicion by Miriama that something had happened to her daughter does not give rise to the fact that she would have framed the accused on a false accusation through her 7 year old daughter is untenable considering the totality of the evidence.
18. Miriama was also a straight forward witness who was also able to withstand cross examination. There was no suggestion by the defence that Miriama was giving evidence against the accused as a revenge for what her daughter had told her. Miriama in my judgment told the truth in court and I accept the evidence of Miriama as reliable and worthy of belief.
19. The defence has not been able to create a reasonable doubt in the prosecution's case in respect of all the counts the accused is charged for.
20. I am satisfied beyond reasonable doubt that on the 23rd day of July, 2016 the accused had inserted his penis into the mouth of the complainant a child under the age of 13 years.
21. Furthermore I am also satisfied beyond reasonable doubt that on the 23rd day of July, 2016 the accused had unlawfully and indecently assaulted the complainant by touching her vagina and her breasts.

22. I agree with the unanimous opinion of the assessors that the accused is guilty of one count of rape and two counts of indecent assault.
23. For the above reasons, I find the accused guilty as charged and I convict him accordingly.
24. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka
24 May, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.