

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 148 of 2016

STATE

V

P.K.

Counsel : Ms. L. Bogitini for the State.
: Ms. P. Reddy and Ms. N. Sharma for the Accused.

Dates of Hearing : 17, 18 February, 2020
Closing Speeches : 19 February, 2020
Date of Summing Up : 20 February, 2020
Date of Judgment : 21 February, 2020

JUDGMENT

(The name of the complainant is suppressed, she will be referred to as "LT". The name of the accused is also suppressed, he will be referred to as "P.K").

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

COUNT ONE
REPRESENTATIVE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154 (1) of the Penal Code.

Particulars of Offence

P.K between the 1st of January, 2006 to the 31st day of December, 2008 at Nausori, in the Eastern Division unlawfully and indecently assaulted "**LT**" by touching the vagina of the said "**LT**".

COUNT TWO
REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

P.K between the 1st day of January, 2009 to the 31st day of December, 2009 at Nakasi, in the Central Division unlawfully and indecently assaulted "**LT**" by touching the vagina of the said "**LT**".

COUNT THREE

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code.

Particulars of offence

P.K between the 1st day of January 2009 to the 31st day of January 2009 at Nakasi in the Central Division penetrated the vagina of "**LT**" with his penis, without the consent of the said "**LT**".

COUNT FOUR
REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K between the 1st day of January 2010 to the 31st day of December, 2011 at Nakasi in the Central Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT FIVE
REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K between the 1st day of January 2012 to the 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT SIX

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K on the 2nd day of July 2016 at Nadi in the Western Division penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

COUNT SEVEN

Statement of Offence

RAPE: Contrary to Section 207 [1] and [2] [a] of the Crimes Act 2009.

Particulars of offence

P.K on an occasion other than that referred to in Count 6, on the 2nd day of July, 2016 at Nadi in the Western Division had penetrated the vagina of “**LT**” with his penis, without the consent of the said “**LT**”.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of both counts of indecent assault but unanimously guilty of all the counts of rape.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called two (2) witnesses and the accused exercised his right to remain silent and also did not call any witness.
5. The complainant “**LT**” informed the court that the accused was her father and in the year 2006 she was 6 years of age and a class 2 student, living with her mum and dad the accused in Dilkusha, Nausori.
6. In 2006 the complainant recalled, the accused had touched her body where he was not supposed to touch in particular her vagina when she was alone with the accused in their house. At this time her mother was at work. This happened during the day time, the accused had used his hand to touch her vagina. The accused called her into the bedroom took off her clothes and then touched her vagina for about 10 minutes.

7. After this the accused told the complainant not to tell anyone he then apologized and assured her that he will not do it again. However, the accused did not stop. From 2006 to 2008 when the complainant was alone with the accused in the house he would touch her vagina with his hand on numerous occasions.
8. She did not tell anyone about what the accused was doing to her because she did not understand what was happening and the accused had also threatened her not to tell anyone about it because she was too young to understand what was happening to her and that nobody will believe her.
9. In 2009, the complainant with her parents and two brothers shifted to Nakasi. At this time the accused was unemployed for a few months. Thereafter, he got a job in a boat at the Suva Wharf. In 2009 she was 10 years of age and in class 5. It was this year the accused raped the complainant.
10. The complainant recalled on one occasion she was at home with her two brothers in the living room. The accused came and took the complainant into the bedroom. In the bedroom the accused asked the complainant to take off her clothes and then he inserted his penis into her vagina.
11. At this time she lost her virginity and her vagina was bleeding, during the sexual intercourse the complainant was crying and asking the accused to stop but he did not. This happened during the day time after school or during the school holidays. The accused also touched her vagina with his hands whenever he got the opportunity to do so.
12. According to the complainant the accused became abusive and was very strict on her whereabouts. He was short-tempered and he would assault her. The complainant further stated that she did not give consent to the accused to insert his penis into her vagina.

13. In the year 2010 the complainant was in class 6 around 11 years of age between 2010 and 2011 the complainant and her family had moved houses in Nakasi. At this time it was only the accused who was working as a Seaman so he would be away from home but after 11 days of work he would have two weeks break and it was during this time he would sexually abuse the complainant by raping her.
14. The accused would ask her to remove her clothes and then have sexual intercourse with her without her consent in that the accused would penetrate her vagina with his penis in the bedroom after the complainant arrived home from school.
15. During this time her mother would not be at home and her two brothers were in another room. The sexual intercourse would take place for about 10 to 15 minutes. The accused would ask the complainant to go into the room she would refuse by making excuses but she did not have a choice but to listen to the accused who would threaten or assault her.
16. The complainant was scared of the accused that is why she did what the accused had asked her to do, he was also violent on her and her mother. The complainant never wanted to have sexual intercourse with the accused. He would force her on the bed, hold her hands in a way so that she wouldn't move although she would try to push him away.
17. The complainant further mentioned that between 2012 and 2015, the accused would continue to have sexual intercourse with her. On one occasion he took her into the bedroom by pulling her hair. Once in the bedroom, he asked the complainant to remove her clothes when she refused he forced her by removing her clothes and then he would force himself on her by penetrating her vagina with his penis.

18. The accused also threatened the complainant not to make any noise, he had also slapped her on her face since houses were very close to each other. The sexual intercourse lasted for about 10 to 20 minutes. During this time the complainant was crying but he would not stop or did not care. The complainant did not consent to what the accused was doing to her.
19. The complainant did not tell anyone because the accused had threatened her not to tell anyone. On 2nd July, 2016 the family had already moved to Navo, Nadi by this time she was 17 years of age and a Form 6 student. At this time the accused was the only one earning. In the afternoon her mother left the house for a church event, the complainant and her 2 brothers were with the accused.
20. After her brothers had slept the accused came and pulled the complainant's hand and took her into the bedroom. In the bedroom, he forcefully took off her clothes and then forcefully came on top of her and had sexual intercourse by penetrating her vagina with his penis for about 10 to 20 minutes.
21. All along the complainant was crying and asking the accused to stop but he did not. The complainant did not agree to have sexual intercourse with the accused. The accused threatened the complainant if she told anyone, the complainant and her 2 brothers will not have a breadwinner in the house. This was also one of the reasons why the complainant did not tell anyone about what he was doing to her.
22. Another reason, the complainant did not tell anyone when her mother was working was that the accused had threatened her that he will hurt her. The complainant knew that the accused was a violent and short tempered person so she kept quiet.

23. The complainant also stated that there was a second incident few hours after the first incident on 2nd July. During the night her mother had come home to pick something from the house and left. After sometime the accused came, forcefully pulled her once again to the bedroom and again had forceful sexual intercourse with her by penetrating her vagina with his penis. The complainant was crying and begging the accused to stop but he did not. The complainant did not consent to what the accused was doing to her.
24. The complainant also informed the court that after every abuse the accused would ask the complainant to get dressed he would sit down with her and pray, hug her and seek forgiveness from her as well as ask God to forgive him for what he had done. The accused also after every incident told the complainant that he will not do it again. Due to the actions of the accused the complainant has lost faith in God.
25. As a result of what the accused was doing, the complainant wasn't doing well in her school work. As she grew older she understood what was happening to her and she could not take it anymore.
26. One day, the accused called her and blamed her for not doing well in school during this conversation the accused told her that she will not achieve anything in life. The complainant could not cope with her studies so one day instead of going to school about a week after the last incident on 2nd July, 2016 the complainant went to her aunt's house and finally she told her aunt everything she was going through.
27. Her mother was called by her aunt and the complainant relayed everything to her mother. The complainant also informed the court that all the incidents happened when her mother would be not at home and her two brothers would be distracted by the accused to watch movies or they would be in another room.

28. The complainant went with her mother and reported the matter to the police.
29. The final prosecution witness, DC 3313 Josua Cakausese informed the court that he was the witnessing officer when the accused was caution interviewed by PC Inosi Ravouvou. PC Ravouvou has since migrated to Australia. The witness recognized his signature, the accused signature and the signature of PC Inosi Ravouvou.
30. The record of interview of the accused was marked and tendered as prosecution exhibit no. 1. According to the witness the accused was given all his Constitutional rights which he understood and acknowledged. The accused was cautioned and sufficient breaks were given as well.
31. The witness stated that the accused was treated fairly he was not threatened, assaulted, pressured, intimidated or induced to answer the questions asked. The accused answered the questions voluntarily. The witness identified the accused in court.
32. The accused remained silent and did not call any witness.
33. From the line of cross examination the defence takes the position that the accused did not commit the offences as alleged. The complainant hated the accused because he was a strict father and he would not allow the complainant to go out at nights with her friends. The accused was a concerned father who was not happy that the complainant was not doing well at school.
34. As a result of this hatred by the complainant towards the accused, when she did not go to school and knowing that the accused will be angry with her she made up a story against the accused.

35. After considering the evidence adduced by the prosecution I accept the evidence of the complainant as truthful and reliable. The complainant was able to recall and narrate to court what the accused had done to her over a period of time from 2006 when she was 6 years of age till 2016 when she was 17 years of age.
36. I also accept that the complainant was afraid of the accused due to his continued threats and short temper. The acts of the accused on the complainant were persistent and recurring which the complainant was able to recall clearly.
37. It was only when the complainant attained 17 years that brought with it courage to speak out. According to the complainant she could not take it anymore so she missed school and informed her aunty and her mother after the last incident on 2nd July, 2016. The complainant with her mother immediately reported the matter to the police. I accept the reason given by the complainant in not telling anyone about what the accused was doing to her.
38. The complainant was able to withstand cross examination and was not shaken or discredited. I have no doubt in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty. In cross examination the complainant was forthright and not evasive.
39. Even though the complainant did not inform anyone earlier about what the accused was doing to her does not create any doubt on the reliability of the complainant's evidence. A child in the situation and circumstances of the complainant from a tender age of 6 years cannot be expected to distinguish right from wrong. I also do not accept the defence contention that the complainant had made up a story to implicate the accused due to her hatred towards him.

40. The other prosecution witness DC Cakausesese was also a credible witness as well he was not discredited in cross examination. I accept the evidence of this witness as truthful. Furthermore, I have no reasons to doubt that the answers in the caution interview were not given by the accused voluntarily and that was not the truth.
41. The defence has not been able to create any reasonable doubt in the prosecution case.
42. I am satisfied beyond reasonable doubt that the accused between 1st of January, 2006 to the 31st December, 2008 and between 1st day of January, 2009 to the 31st December 2009 at Nausori/ Nakasi had unlawfully and indecently assaulted the complainant by touching her vagina.
43. Furthermore, I am also satisfied beyond reasonable doubt that between the 1st day of January, 2009 to 31st day of January, 2009 (count 3), between 1st day of January, 2010 to 31st day of December, 2011 (count 4), between the 1st day of January, 2012 to 31st day of December 2015 (count 5), on the 2nd day of July, 2016 (count 6) and on an occasion other than that referred to in count 6, on the 2nd day of July, 2016 (count 7) the accused had penetrated the vagina of the complainant with his penis without the consent of the complainant.
44. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time that is in respect of counts 3 to 7.
45. In view of the above, I overturn the unanimous opinion of the assessors that the accused is not guilty of the two counts of indecent assault. I agree with the unanimous opinion of the assessors that the accused is guilty of counts 3 to 7 of rape as charged.

46. I find the accused guilty for two counts of indecent assault and five counts of rape as charged and I convict him accordingly.

47. This is the judgment of the court.



Sunil Sharma

Judge



At Lautoka

21 February, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.