

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 020 OF 2017**

**BETWEEN** : **STATE**

**AND** : **BARMA NAND**

**Counsel** : **Mr. J. B. Niudamu for the State**  
**Mr. J. Reddy for the Accused**

**Hearing on** : **24th of February 2020 – 27th of February 2020**

**Summing up on** : **02nd of March 2020**

**Judgment on** : **06th of March 2020**

(The name of the victim is suppressed and will be referred to as ML, PW1 or the complainant.)

**JUDGMENT**

1. The accused, Mr. Barma Nand was charged with 4 counts of Rape, initially. The matter was taken up for trial and at the conclusion of the prosecution case the court has acquitted the accused on the 3<sup>rd</sup> and the 4<sup>th</sup> counts as the prosecution has failed to adduce sufficient evidence. The defense was called only in respect of the first two counts.
2. Those charges were;

**COUNT 1**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

**Barma Nand**, between the 01<sup>st</sup> day of January, 2015 and 31<sup>st</sup> of December 2015, at Rakiraki, in the Western Division, penetrated the vagina of ML, a 10 year old girl, with his finger.

**COUNT 2**

*Statement of Offence*

**RAPE:** Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

**Barma Nand**, between the 01<sup>st</sup> day of January, 2016 and 31<sup>st</sup> of January 2016, at Rakiraki, in the Western Division, penetrated the vagina of ML, a 10 year old girl, with his penis.

3. The accused had pleaded not guilty to these charges and the ensuing trial lasted for 5 days. The complainant ML, her aunt Urmila and Dr. Ranita Vikashini Maharaj, who examined ML at the Ba Mission Hospital gave evidence for the prosecution while the accused having understood his rights, gave evidence on his behalf.
4. At the conclusion of the evidence and after the directions given in the summing up, the three assessors by majority found the accused guilty to the alleged 2 counts of Rape.
5. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
6. The sole witness to substantiate on the alleged incidents is the PW1, ML. The law requires no corroboration. Therefore it can be acted on the evidence of a sole witness. However, if we are to rely on a sole witnesses' evidence we must be extremely cautious of the credibility and the dependability of such evidence.
7. On the other hand the PW1, ML is presently 14 years old and she was only about 10 years old when the alleged incidents alleged to have happened to her.

Therefore, we should not adopt the same standards we adopt in evaluating adult witnesses evidence, in respect of the child's evidence.

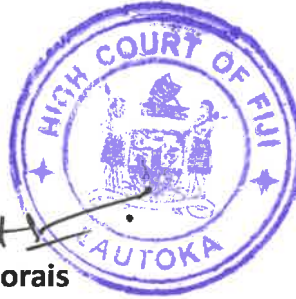
### **Analysis**

8. When analyzing the above evidence I am mindful that only direct evidence which relates to the alleged incidents is the evidence of the PW1. I am also mindful that law does not require any corroboration of the complainant's evidence as per section 129 of the Criminal Procedure Act. Therefore, the ultimate question would be whether her evidence would be trustworthy and reliable.
9. The PW1's evidence is clear. However there were few inconsistencies highlighted. When we look at the said inconsistencies, the first was where she has told that papa has dressed her after the first incident. She denies stating so to the police. The second was regarding what her mother said after examining her private area. She states that what she told to the police was not properly written there. The third was of turning her around during the second incident. The witness states that she forgot to mention it before, in examination in chief. The fourth inconsistency, pointed out by the defense was about licking of her vagina before inserting his penis into her vagina. Though she has said so in her statement, she has not mentioned it in her evidence. The explanation offered by the witness was that she forgot to tell about it. When looked at these inconsistencies, none of them directly goes to the root of the alleged charges. Even in consideration of the said inconsistencies, having observed the witness and her demeanor, together with the circumstances of this case, I am convinced that the allegations, she make against the accused is true and I bear no doubt about them.
10. Though there is some uncertainty about the sequence of events or the time frames, during which the said incident is said to have happened, they would not be the essential ingredients of the alleged counts. The vital issue would be whether the accused did penetrate the vagina of the PW1 with his finger at least once and whether he penetrated the vagina of the PW1 with his penis at least once.
11. The evidence of the PW1 is well supported by the evidence of the rest of the witnesses on all material points. The only serious inconsistency between PW1 and PW2 was whether PW2 was there with the PW1 at the time PW1 gave her

statement to the police. In any event it is established that PW2 did not inform anything other than what was told to her by the PW1. On the other hand it suggests a possible explanation for the alleged inconsistencies. Though I thoroughly condemn the prosecution furnishing the witnesses with their statements, in this case it has not affected the evidence of the PW1, to any considerable extent. Therefore that factor would be overlooked.

12. The prosecution has led sufficient evidence covering all the requisite elements of the alleged offences of Rape. I am convinced that the prosecution has proved that the accused has committed that alleged offences beyond a reasonable doubt. Now I will consider the version of the accused manages to create any reasonable doubt in the prosecution case.
13. It is obvious that the majority of assessors have rejected the evidence of the accused. I am mindful that the accused bears no burden to prove his innocence. Therefore even if he has lied or given incorrect instructions, it should not be considered against him. His conduct would not strengthen the prosecution case. The burden of proof should always be with the prosecution.
14. Now I will consider whether the defense manages to create a reasonable doubt in the prosecution case. The stance taken by the defense on the instructions of the accused is that; He has not engaged in any sexual activity with the PW1 and he was framed for this by the PW2. When the evidence of the PW1, is accepted as true, the allegation that the accused was framed bears no ground. Therefore, the accused fails to create any reasonable doubt in the prosecution case.
15. Having carefully listened, taken down all the evidence and observed the demeanor of all the witnesses, I decide to accept the evidence of the PW1 as truthful and acceptable. Therefore I find that the prosecution has proved the alleged charges beyond a reasonable doubt.
16. Having thoroughly and carefully considered the evidence and all the relevant material before me and being satisfied that the prosecution has proved the guilt of the accused beyond a reasonable doubt, I agree with the opinion of the majority of the assessors and concur with their finding. Accordingly, I convict the accused Barma Nand for the 2 counts of rape as charged.

17. This is the Judgment of the Court.



  
Chamath S. Morais  
JUDGE

***Solicitor for the Prosecution :***      ***Office of the Director of Public Prosecution, Lautoka***  
***Solicitor for the Accused :***        ***Jiten Reddy Lawyers, Suva***