

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

CRIMINAL CASE NO: HAC. 254 of 2013

STATE

V

INOKE VALEKULA

Counsel : Ms. S. Puamau with Ms. S. Naibe for State
Ms. C. Choy for Accused

Dates of Hearing : 30th November – 01st December 2015

Date of Summing Up: 02nd December 2015

Date of Judgment : 02nd December 2015

JUDGMENT

1. The accused is charged with the following count;

COUNT

Statement of offence

Rape: Contrary to Section 207 (1) and (2)(a) of the Crimes Decree 2009.

Particulars of offence

INOKE VALEKULA, between the 22nd day of September 2012 and the 30th day of September 2012, at Sector 2, Lomaivuna in NAITASIRI in the CENTRAL DIVISION had carnal knowledge of **ALITI KALOKALO** in that he penetrated the vagina of **ALITI KALOKALO** with his penis, without the said **ALITI KALOKALO**'s consent.

2. The assessors have returned with a unanimous opinion that the accused is not guilty of the above count but guilty of Defilement of a person between the age of 13 and 16 years.
3. I direct myself in accordance with the summing up delivered to the assessors on 02nd December 2015 and the evidence adduced during the trial.
4. To prove the offence of Rape, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused
 - b) had carnal knowledge of Aliti Kalokalo
 - c) without her consent
 - d) accused knew or believed that she was not consenting, or was reckless as to whether or not she was consenting
5. It is an admitted fact in this case that *'The accused had inserted his penis into the vagina of the alleged victim on a date between the 22nd day of September 2012 and the 30th day of September 2012; and this act occurred in the house belonging to Aliti Kalokalo and her family at Sector 2, Lomaivuna, Naitasiri'*.
6. In view of the above admitted fact, the first two elements should be regarded as proven beyond reasonable doubt.
7. The issues to be decided in this case therefore is whether;
 - a) The penetration was done without the complainant's consent
 - b) The accused -knew or believed that she was not consenting, or
-was reckless as to whether or not she was consenting
8. According to the complainant just before the incident happened, she was sleeping. She woke up when she felt the accused massaging her legs and trying to remove her panty. When she tried to stand up, the accused pushed her down. When she tried to call her sister, the accused kissed her. This is the complainant's account of what took

place before the accused inserted his penis into her vagina. She clearly said that she did not consent to have sexual intercourse with the accused.

9. It was an admitted fact that the complainant was 13 years and 3 months old at the time of the incident. I observed the manner in which she gave evidence, her demeanour and deportment. The only inconsistency in her evidence was regarding the time she told her mother and her aunt about the incident. In her evidence in chief, she said she was 3 months pregnant when she told her mother and the aunt what happened and in cross examination she agreed that she was 8 months pregnant by that time. This was reaffirmed in re-examination. I find this inconsistency to be immaterial and insignificant.
10. In the circumstances I have no reason to disbelieve the complainant's evidence with regard to what took place, the night the accused inserted his penis into her vagina. I also accept her reason for not complaining about the incident until she was questioned where she said "*I was afraid to tell my father and mother because he is my Ta Levu, my uncle*".
11. The complainant's evidence shows that the accused used force on her just before he inserted his penis into her vagina and that she did not consent for sexual intercourse. Considering her age at that time, one cannot expect her to act or react to that force as an adult would.
12. Accused's defence was that the complainant consented for him to have sexual intercourse with her.
13. The accused knew that the complainant was his brother's daughter, he knew that she was 13 years and 3 months old at the time of the incident where he was 46 years old, he approached the complainant when she was asleep, when the complainant woke up and realised that the accused was massaging her legs and was trying to remove her panty she tried to stand up, the accused pushed her down and then he kissed her when she tried to call her sister. Then he inserted his penis into her vagina. These circumstances clearly support the inference that the accused knew or believed that the complainant was not consenting for him to insert his penis into her vagina. In anyway,

given those circumstances it is clear that he was aware of the risk that the complainant may not be consenting for him to insert his penis into her vagina and having regard to the same circumstances, it was unjustifiable for him to take the risk and insert his penis into her vagina.

14. I am satisfied that the evidence in this case is sufficient to prove the offence of Rape beyond reasonable doubt. Therefore, it is not necessary to consider the lesser or alternative count of Defilement.
15. In light of the above, I am unable to agree with the unanimous opinion of the assessors that the accused is not guilty of Rape.
16. I find the accused guilty for the offence of Rape as charged and convict him accordingly.



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.