

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No: HAC 217 of 2016

STATE

V

AVENAI RAKULANAWA

Counsel : Mr. J. B. Niudamu for the State.
: Ms. V. Diroiroi and Ms. P. Reddy [LAC] for the
Accused.

Dates of Hearing : 13 & 14 November, 2019
Closing Speeches : 15 November, 2019
Date of Summing Up : 15 November, 2019
Date of Judgment : 18 November, 2019

JUDGMENT

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

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

FIRST COUNT

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

Particulars of Offence

AVENAI RAKULANAWA on the 21st day of November, 2015 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of "LT" with his penis without the consent of the said "LT".

SECOND COUNT

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

Particulars of Offence

AVENAI RAKULANAWA on the 23rd day of November, 2015 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of “**LT**” with his penis without the consent of the said “**LT**”.

THIRD COUNT

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

Particulars of Offence

AVENAI RAKULANAWA on the 25th day of November, 2015 at Balekinaga, Nakorotubu, Ra in the Western Division, penetrated the vagina of “**LT**” with his penis without the consent of the said “**LT**”.

FOURTH COUNT

INDECENT ASSAULT: Contrary to section 212 (1) and (2) of the Crimes Act 2009.

Particulars of Offence

AVENAI RAKULANAWA on the 25th day of December, 2015 at Balekinaga, Nakorotubu, Ra in the Western Division, unlawfully and indecently assaulted “**LT**”.

2. At the end of the prosecution case this court ruled that the accused had a case to answer in respect of all the counts of rape as charged. In respect of the fourth count of indecent assault this court ruled that the accused did not have a case to answer since there was no evidence that the accused had indecently assaulted the complainant.
3. The trial proceeded in respect of counts one, two and three for the offences of rape.

4. During the summing up this court also gave a direction in respect of the lesser offence of defilement of a young person above the age of 13 years and under the age of 16 years since there was evidence that the accused had sexual intercourse with the complainant who was 15 years of age at the time.
5. The three assessors had returned with a unanimous opinion that the accused was not guilty of the three counts of rape but guilty of the lesser counts of defilement.
6. I adjourned to consider my judgment. I direct myself in accordance with the summing up and the evidence adduced at trial.
7. The prosecution called one witness the complainant and the accused gave evidence for the defence.
8. The complainant informed the court that in 2015 she was 15 years of age and a class 7 student. On 21st November, 2015 at about 8pm, she was in her bedroom, whilst her mother was asleep in another room and her father had gone to drink grog.
9. At this time she saw the accused enter her bedroom with a pillow in his hand he came and laid down. The accused called the complainant to come and lie beside him she went and laid beside him. The accused removed her t-shirt and her shorts and both had sexual intercourse.
10. The complainant did not push the accused since she was afraid of him and also she did not want to shout. The complainant stated that she did not like what the accused had done to her because they are cousins, she also did not tell her parents because she was afraid of them.
11. On 23rd November, 2015 at around 7pm the complainant was alone at home cooking when she saw the accused coming towards her house. At this time

she was in the kitchen, the accused came and stood at the door and was calling the complainant to go to him. He was watching a movie on his phone and the complainant saw it was a movie where a man and a woman were having sexual intercourse. After a while the accused came, pulled her hand and took her into the bedroom.

12. In the bedroom the accused took off his pants, made her lie down on the floor, took off her shorts and then laid on top of her and had sexual intercourse. The complainant did not like what the accused was doing to her she could not shout because the accused was blocking her mouth. The complainant told her teacher about what the accused had done to her.
13. On 25th November, 2015 the complainant was playing cards at one of her cousin's house. After the game ended the other children left, the accused stopped her from leaving the house, pulled her hand into the house, made her lie down, took off his pants and also her skirt and had sexual intercourse with her. She did not like what he was doing to her.
14. The complainant denied making up stories against the accused since her police statement did not match with her evidence in court. In respect of the fact that the accused was blocking her mouth the complainant stated that she did not know why it was not in her police statement but she maintained she had told the police about this.
15. In respect of 25th November, 2015 the complainant denied having sexual intercourse with the accused or touching the private part of the accused or undressing before having sex with him. However, after a while during cross examination the complainant changed her position and admitted having sexual intercourse with the accused on 25th November in her house.
16. When it was put to the complainant that on 21st, 23rd and 25th November she was having sexual intercourse with the accused when her parents were

not around, the complainant responded by saying she did not know the answer to this question.

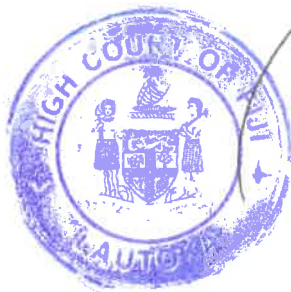
17. On the other hand the accused informed the court that he was residing at the Balekinaga Village for the past three years in 2015 with his uncle from his mother's side. The accused used to sleep at the house of the complainant which was bigger than his uncle's house, the complainant was his cousin.
18. On 21st November, 2015 the accused went to the house of the complainant, she was alone they were chatting, laughing and telling jokes to each other for about three hours from 1pm onwards. During this time the accused asked the complainant what was on her mind to which she laughed. There was no one else in the house apart from the two.
19. The accused told the complainant to go first into the bedroom when she went, the accused followed. In the bedroom the accused drew the curtains and told the complainant to lie down which she did and took off her clothes. At this time the complainant touched his penis and then both had sexual intercourse.
20. On 23rd November there was a function in the village. The accused had sexual intercourse with the complainant at about 1am inside Tevita's bedroom.
21. On 25th November the accused was lying down in the living room when the complainant approached him he was sleeping with the complainant's brother in the living room. The complainant came and sat by his side when he saw her, he held her hand and both went into Tevita's bedroom.
22. In the bedroom the accused told the complainant to lie down, which she did and then both had sexual intercourse for about 10 minutes. The allegation

of rape came about in October, 2016 and the accused was waiting for the police to come so that he can give his answers.

23. The accused maintained that on all three occasions he did not force the complainant to have sexual intercourse with him.
24. After carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of the accused as truthful and reliable. The accused gave an honest and truthful account of what had happened between him and the complainant.
25. The accused was not discredited in cross examination, in my judgment the accused was honest when he told the court that he had sexual intercourse with the complainant on three occasions as mentioned by the complainant and there is no dispute that the accused knew the complainant was a class 7 student at that point in time.
26. On the other hand, the complainant did not tell the truth when she told the court that the accused had forceful sexual intercourse with her on all the three occasions. The complainant and the accused are cousins and the accused used to sleep in the house of the complainant, it is also unbelievable to accept that the complainant was afraid of the accused.
27. The complainant did not mention of any threat of violence or force used on her before sexual intercourse except for one occasion when she said the accused had blocked her mouth, however when the complainant was referred to her police statement the complainant agreed this was not in her police statement. The complainant did not offer any credible explanation for this omission I do not accept that the complainant told the police officer writing her police statement about this. In my view this inconsistency was significant although I have directed my mind to the lapse of time which can lead to fading memory.

28. Furthermore, the complainant told the court she did not raise any alarm because she did not want to. From the demeanour of the complainant she did not appear to me to be a person who could be forced into doing something if she did not want to.
29. The complainant was also inconsistent in her evidence and her police statement which made her unconvincing and unbelievable.
30. The demeanour of the complainant in court is also something that I wish to highlight as well throughout her evidence the complainant was not serious she was time and again smiling as if nothing had happened.
31. The narration given by the complainant about the three occasions of rape is improbable it was obvious to me that the complainant was making up a story to implicate the accused. At times during cross examination the complainant contradicted herself with her evidence.
32. For the above reasons, this court is not satisfied beyond reasonable doubt that the accused on the 21st, 23rd and 25th of November, 2015 had sexual intercourse with the complainant without her consent. This was a case where the complainant and the accused had consensual sexual intercourse but the complainant for some reason withdrew her consent later and cried rape. The defence has been able to create a reasonable doubt in the prosecution case in respect of the three counts of rape.
33. In respect of the lesser count of defilement the accused knew the complainant was a class 7 student who was 15 years of age and he agreed having sexual intercourse with her on three occasions. This court is satisfied beyond reasonable that the accused on the 21st, 23rd and 25th November, 2015 had unlawful sexual intercourse with the complainant who was 15 years of age at the time.

34. In view of the above, the statutory defence that the accused had reasonable cause to believe and did in fact believe that the complainant was above the age of 16 years is not available to the accused. The accused and the complainant are cousins and the fact that he was living in the complainant's village and sleeping in her house for three years prior to 2015 also does not give any credence or support to the accused in his statutory defence. The prosecution has rebutted the statutory defence beyond reasonable doubt.
35. For the above reasons, I accept the unanimous opinion of the assessors that the accused is not guilty of the three counts of rape as charged but is guilty of the lesser counts of defilement. In summary the accused is acquitted of all the three counts of rape and the count of indecent assault but is guilty of the three lesser counts of defilement and is therefore convicted accordingly.
36. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

18 November, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.