

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC. 14 of 2015

STATE

v.

EPELI TUTE

Counsel: Ms. S. Tivao with Ms. Navia for State
Mr. K. Vuki and Mr. P. Tawake for Accused

Dates of Hearing: 18th, 19th, 20th July 2016

Date of Summing Up: 22nd July 2016

Date of Judgment: 25th July 2016

JUDGMENT

[Name of the victim is suppressed. The victim will be referred to as ['R.R.']]

1. The accused is charged with one count of Rape.

First Count

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

EPELI TUTE on the 9th day of November 2014 at Vunivasa in Nabuna village, on Koro Island in the Central Division, had carnal knowledge of 'R.R.' without her consent.

2. After trial the three assessors unanimously opined that the accused is not guilty of Rape but guilty of the lesser offence of Defilement. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at the trial.
3. To find the accused guilty of the offence of Rape the prosecution has to prove the following elements beyond reasonable doubt.
 - 1 The accused had carnal knowledge of the complainant,
 - 2 Without her consent,
 - 3 He knew or believed that she was not consenting or did not care if she was not consenting.
4. For the prosecution 4 witnesses gave evidence including the complainant, and for defence accused gave evidence.
5. The accused has gone to collect the mangoes with the complainant and one Lanieta. It was evident that the accused had asked Lanieta to go home.
6. The complainant's evidence was that the accused made her lay down, took off her pants and then put his penis into her vagina. When she heard her father calling her, she said that she struggled and then ran to the father.

7. When the defence cross examined the complainant as to whether she screamed or yelled, she said 'No'. However, in re-examination when she was asked as to why she did not scream, then she said that the accused blocked her mouth when she tried to scream. One cannot say that the complainant consented merely because she did not scream.
8. Although the father asked her there whether the accused did anything to her, she has not said anything but had cried. Same day when the father got suspicious and asked her again, she has said, "Eveli had intercourse with me". This evidence was also confirmed by the evidence of the father of the complainant.
9. Accused in his evidence totally denied having sexual intercourse with the complainant. He said that he went with the complainant to collect mangoes and when 'R'R's father called her he was up on the tree picking mangoes.
10. However, the accused in his caution interview statement to the police had admitted having sexual intercourse with the complainant. Caution interview statement was produced in evidence. Although in his evidence the accused says that he admitted committing the offence as he was assaulted by the police, the evidence of the police officer who recorded the statement that the statement was made voluntarily, was not challenged by the defence by cross examination. The accused says that he admitted to have committed the offence as the police officer Sevuloni assaulted him in the presence of officer Rupeni who recorded

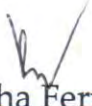
the statement. However, the defence never put this position to officer Rupeni when he gave evidence. Defence did not even cross examine the officer Rupeni.

11. I find that what the accused had said in his statement that he had sexual intercourse with the complainant was true. I have no reason to disbelieve the evidence of the complainant that the accused had sexual intercourse with her.
12. The complainant did not tell her father immediately at the scene when her father asked her whether Epeli did anything to her. As I have directed the assessors in my summing up, the evidence of a child has to be considered carefully. A child may always feel guilty of what happened to her. It is understood in that context why the complainant did not tell her father at that point about the accused having sexual intercourse with her. It is an admitted fact that the complainant was 14 years old at the time of the alleged offence.
13. The doctor found no injuries or bruises in the complainant's genitalia. Hymen had not been intact. Although the complainant said that the doctor saw little blood in the vagina, the doctor said that he did not notice any blood.
14. On the evidence of the complainant and the circumstances as to how the incident has taken place, I find that it was open to the assessors to

have a doubt whether the complainant consented to the sexual intercourse. I also find that it was open to the assessors to find that the accused had sexual intercourse with the complainant with her consent or that at least he knew or believed that she consented. I also find that it was open to the assessors to doubt the complainant's evidence on the element of consent considering the circumstances and the age of the complainant as she would have felt guilty as a child for what has happened. I also find that the accused was not truthful when he denied having sexual intercourse with the complainant.

15. I agree with the unanimous opinion of the assessors that the accused is not guilty of the offence of Rape and that he is guilty of the offence of defilement.
16. Hence, I find him guilty of the offence of defilement and convict him accordingly.




Priyantha Fernando
Judge

At Suva

25th July 2016

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for Accused.