

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 225 of 2016

[CRIMINAL JURISDICTION]

STATE

V

KALISITO BOLATOLU

Counsel : Ms. K. Semisi for State
Mr. L. Qetaki and Ms. L. Manulevu for Accused

Hearing on : 16th - 18th October 2017

Summing up on : 20th October 2017

Judgment on : 23rd October 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "RK".)

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

KALISITO BOLATOLU on the 18th day of April 2016 at Mead Road, Nabua in the Central Division penetrated the vagina of RK, a child under the age of 13 years, with his fingers.

SECOND COUNT

Statement of Offence

SEXUAL ASSAULT: contrary to section 210(1)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

KALISITO BOLATOLU on the 18th day of April 2016 at Mead Road, Nabua in the Central Division unlawfully and indecently assaulted RK, a child under the age of 13 years by touching her thigh.

2. The assessors have returned with the unanimous opinion that the accused is guilty of both counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 20th October 2017 and the evidence adduced during the trial.
4. The complainant and two other witnesses were called by the prosecution and the accused gave evidence in his defence.
5. In essence, the evidence of the complainant who was 12 years old at the time material to this case was that;
 - a) The accused waved at her on 17/04/16 around 2.00pm when she was feeding the dog outside the house;
 - b) She got scared that he might do something to her because of how he looked at her. So she ignored him and went back inside the house;
 - c) The accused called her from her Aunt Losena's room around 8.00pm on 18/04/16 when she went to the kitchen;
 - d) She felt scared because the accused called her from a dark place and she went back to the sitting room;
 - e) Later she wanted to use the toilet and because her cousin Patrick was inside the toilet, she sat on the chair beside the doorway to the sitting room;

- f) She saw the accused walking towards her and she stood up. Then the accused pushed her down onto the chair by touching her chest and then touched her thigh;
 - g) When she went inside the toilet after Patrick came out, the accused signaled her asking her whether he could come inside. She ignored and closed the door;
 - h) When she came out of the toilet, the kitchen light was off. On her way to the sitting room through the kitchen and when she was about to go inside the sitting room, the accused grabbed her hand;
 - i) The accused then touched her stomach; moved his hand down and touched the top of her vagina; opened it with his two fingers and played with it. She said the accused put his two fingers inside her vagina;
 - j) She complained to her sister, the second prosecution witness who came home soon after the incident. She said she told her sister the same thing she said in court.
6. The prosecution called the aforementioned sister of the complainant as the second prosecution witness inviting this court to accept her evidence as recent complaint evidence. However, the second prosecution witness' evidence was not consistent with the evidence of the complainant. According to the evidence of the second prosecution witness which I have no reason to disbelieve, the account given by the complainant to the said witness soon after the alleged incident was different from the account given by the complainant in her evidence before this court.
7. No attempt was made by the prosecution to offer any acceptable explanation for this inconsistency which in my view is significant.
8. The complainant in her evidence denied that her mother was filling grog into small packets inside the bedroom but the mother who gave evidence as the third prosecution witness admitted doing that. Though the fact whether or not

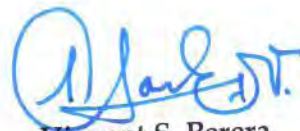
the third prosecution witness was making packets of grog on the night in question is not directly relevant to the elements of the two offences, it is relevant to the issue whether the complainant is a credible witness or not especially given the aforementioned inconsistency between the complainant's evidence and the evidence of the second prosecution witness.

9. The complainant also denied the suggestion that there will be a sound if someone was pushed onto the chair she was referring to, where the second prosecution witness admitted the same suggestion. This admission made by the second prosecution witness suggests that the complainant's evidence that she was pushed onto to the chair by the accused may be improbable.
10. Moreover, according to the complainant, she had reasons to be scared of the accused on 17/04/16 and then again around 8.00pm on 18/04/16 when she was in the kitchen to boil the water on her mother's request. Her evidence was that she went inside the sitting room because she got scared when the accused called her from Losena's room on 18/04/16 while she was in the kitchen. I have no problem in believing her version up to this point.
11. But, if the complainant was scared of the accused to the extent she indicated in her evidence, then the question is whether it is probable for the complainant to again go out of the sitting room alone, especially after she got scared when she was inside the kitchen as mentioned above.
12. The aforementioned inconsistencies and the improbabilities when taken together creates a strong doubt in my mind as to whether the complainant had given a true account of what happened on the day in question.
13. The accused in my view was not a credible and a reliable witness. His version of events was not consistent with what was suggested to the complainant during cross examination. Considering all the circumstances and the accused's

demeanour and deportment when he gave evidence, his version with regard to the allegations against him was not credible and reliable. Needless to say, however, an accused cannot be convicted of an offence for the mere reason that his/her evidence is incredible.

14. All in all, I find that the prosecution has failed to prove the two offences against the accused beyond reasonable doubt.
15. In the circumstances, I cannot agree with the unanimous opinion of the assessors.
16. I find the accused not guilty of both counts and acquit him accordingly.




Vincent S. Perera
JUDGE

Solicitors for the State
Solicitor for the Accused

: Office of the Director of Public Prosecutions, Suva.
: Legal Aid Commission, Suva.