

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 54 of 2017

STATE

V

KALISITO KALOUGATA

Counsel : Ms. S. Naibe for the State.
: Ms. V. Diroiroi and Mr. R. Filipe for the Accused.

Dates of Hearing : 10, 11, 12, 15 February, 2021
Closing Speeches : 16 February, 2021
Date of Summing Up : 16 February, 2021
Date of Judgment : 19 February, 2021

JUDGMENT

(The name of the complainant is suppressed he will be referred to as "W.L")

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

COUNT ONE

(Representative Count)

Statement of Offence

Unnatural Offences: Contrary to Section 175 of the Penal Code.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2007 to the 31st day of December 2007 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

COUNT TWO

(Representative Count)

Statement of Offence

Unnatural Offences: Contrary to Section 175 of the Penal Code.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2008 to the 31st day of December 2008 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

COUNT THREE

(Representative Count)

Statement of Offence

Unnatural Offences: Contrary to Section 175 of the Penal Code.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2009 to the 31st day of December 2009 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

COUNT FOUR

(Representative Count)

Statement of Offence

Unnatural Offences: Contrary to Section 175 of the Penal Code.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2010 to the 9th of February 2010 at Nadi in the Western Division, had carnal knowledge of “W.L” against the order of nature.

COUNT FIVE

(Representative Count)

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

Kalisito Kalougata between the 10th day of February, 2010 to the 31st day of December 2010 at Nadi in the Western Division, had carnal knowledge of “W.L” a child under 13 years.

COUNT SIX

(Representative Count)

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Particulars of Offence

Kalisito Kalougata between the 10th day of February, 2010 to the 31st day of December 2010 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, a child under 13 years.

COUNT SEVEN

(Representative Count)

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2011 to the 31st day of December 2011 at Nadi in the Western Division, had carnal knowledge of “W.L”, a child under 13 years.

COUNT EIGHT

(Representative Count)

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2011 to the 31st day of December 2011 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, a child under 13 years.

COUNT NINE

(Representative Count)

Statement of Offence

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

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2012 to the 31st day of December 2012 at Nadi in the Western Division, had carnal knowledge of “W.L”, without his consent.

COUNT TEN

(Representative Count)

Statement of Offence

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

Particulars of Offence

Kalisito Kalougata between the 1st day of January, 2012 to the 31st day of December 2012 at Nadi in the Western Division, penetrated the mouth of “W.L” with his penis, without his consent.

2. After the prosecution closed its case, this court ruled that the accused had a case to answer in respect of counts one and two being unnatural offences and counts seven to ten being for the offences of rape.
3. The three assessors had returned with a unanimous opinion that the accused was not guilty of all the offences as charged.
4. I adjourned to consider my judgment I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called three witnesses whereas the defence called the accused.
6. The complainant informed the court that in 2007 he was 8 years of age, on one occasion the accused asked him and his younger brother to accompany the accused to get firewood. After cutting the firewood the accused asked the complainant's brother to go home.
7. When the complainant was alone the accused took the complainant to the nearby mangroves and told him to remove his pants. The complainant was scared of the accused so he did what the accused told him. The accused then inserted his penis into the anus of the complainant when the accused did this the complainant felt pain. According to the complainant the accused had also inserted his penis into his mouth.
8. The complainant did not do anything to defend himself but to submit to what the accused was doing to him because he was a child. When the accused was doing this, the complainant was embarrassed, he also did not scream and

run away because he didn't know where to go since he was staying at the house of the accused.

9. On another occasion the complainant went with the accused to get firewood but at a different spot. After the firewood was cut the accused told the complainant to remove his pants and then inserted his penis into the complainant's anus for about 3 to 4 minutes.
10. After the accused had finished he told the complainant to get home first and then he will follow. The complainant did not tell anyone at home because the accused had told the complainant not to tell anyone and if he did the accused will do something to him.
11. In the year 2008 sometimes in the night at about 9 to 10 pm when the accused came home from work he would come into the complainant's bedroom and lie beside him. After waking the complainant the accused would tell the complainant to remove his pants and then inserted his penis into his anus. The complainant's aunt and her children would be sleeping in another bedroom.
12. The complainant would take off his pants as told by the accused he would feel embarrassed by what the accused would do to him. Although the complainant felt pain he did not scream since he was scared the accused might do something to him.
13. On another occasion in 2008 the complainant went with the accused to get firewood after cutting firewood the accused would tell the complainant to remove his pants after the complainant did this, the accused would insert his penis into the complainant's anus. The complainant was ashamed of what the accused was doing to him since the complainant was always scared of the accused he did not shout or run away from the house of the accused.

14. In 2009 the complainant left the house of the accused and went to Natabua to stay with his aunt Usenia. Here he was attending Natabua Primary School. After finishing his primary school he moved back to Nadi to the house of the accused and his family. Nothing happened to the complainant in the years 2009 and 2010 since he was away from the accused.
15. In 2011 the complainant was 12 years of age and in form 3 he moved back to the house of the accused from Natabua. In the night the accused would come and harass him by removing his pants and insert his penis into the anus of the complainant, after the accused was done he would tell the complainant to sleep.
16. The complainant's aunt and her children would be sleeping in the other bedroom. When the accused inserted his penis into the complainant's anus, the complainant felt ashamed, he was scared and embarrassed so he did not do anything. The complainant was so embarrassed that he did not tell his aunt Melania about what the accused had done to him. According to the complainant the accused might do something to him.
17. In 2011 apart from doing the above, the accused would take his penis and insert it in the complainant's mouth. On these occasions the accused would tell the complainant not to tell anyone.
18. In 2012 the complainant was in form 4 he recalled during the latter part of the year he would go with the accused to get firewood. After cutting firewood the accused would tell the complainant to remove his pants thereafter he would insert his penis into the complainant's anus for about 3 to 4 minutes. The complainant removed his pants because he was scared of the accused. When the accused would do this the complainant would be scared and ashamed.
19. After the accused had finished he would tell the complainant to go home first and then he would follow. On another occasion in 2012 the accused had

inserted his penis into the mouth of the complainant. The complainant was ashamed and scared so he did not tell anyone at home about what the accused had done to him. The complainant did what he was told to do by the accused because he was scared that the accused might do something to him.

20. When the complainant was residing in Natabua with his aunt he was embarrassed to tell his aunt about what the accused had done to him when he was in classes 5 and 6 that is in the years 2007 and 2008.
21. When the complainant was at the house of the accused in 2011 and 2012 he did not tell his aunt Melania about what the accused had done to him because he was embarrassed to tell her.
22. Finally in the year 2017 when the complainant was in form 6, one morning his grandmother came and asked him if he was having an affair with his aunt Melania. The complainant denied this and then he told his grandmother about what the accused had been doing to him. The complainant's grandmother then told his aunt Melania.
23. In cross examination when it was put to the complainant that he had told the court that the accused did not do anything to him in 2009 and 2010 the complainant agreed. When asked to explain why then he had told the police that the accused had sexually abused him from 2007 to 2012 the complainant did not have any answer. The complainant also did not have any answer when it was put to him that he was not truthful about his allegations from the year 2007 to 2012.
24. The complainant agreed that he was not truthful to the police in 2017 and was also not truthful to the court in 2021.
25. The complainant had no answer when he was asked to explain why he had agreed that he was not being truthful to the police in 2017 and now to the court in 2021.

26. The next witness Elenoa Kirisitiana the grandmother of the complainant informed the court that the accused is married to her daughter Melania. In the month of December, 2016 she came from Taveuni and stayed with the accused and his family where the complainant was living.
27. In January, 2017 the witness overheard the accused and her daughter talking, the accused mentioned the name of the complainant and at this time she suspected that the accused was jealous of the complainant. On this day the complainant didn't go to school, so the witness asked the complainant if he has harassed his aunt Melania.
28. The complainant upon hearing this cried and told the witness that the accused had been harassing him since he was in class 5. Thereafter, both started crying when Melania came home from work the witness told Melania about what the complainant had told her and then asked that the matter be reported to the police.
29. Upon hearing this Melania went into her bedroom where the accused was sleeping and told the accused if what she has heard was true he should pack his clothes and leave. The accused packed his clothes and left.
30. The witness said the complainant had told her that the accused would take him to get firewood then remove his clothes and do forceful acts on him such as remove his pants and do to his anus.
31. During her stay the witness had observed that the complainant would not talk much and he will just sit alone. When the complainant was relaying his story he was crying and there was no eye contact.
32. In cross examination by the defence counsel the witness stated that she used to visit the complainant every month. When the complainant was in form 3 the complainant had requested her to take him to Taveuni.

33. According to the witness the complainant is very close to his aunt Melania and he considers his aunt as his mother and he would converse and share jokes. When further questioned the witness stated that the complainant would only talk with his aunt and then after that he would go and sit alone.
34. The final witness Melania Cagi the aunt of the complainant informed the court that the accused was her husband. In January, 2017 when the witness returned home from work she saw her mother and the complainant were sitting in the house and the accused was sleeping in the bedroom.
35. When she saw the complainant and her mother they looked confused, then her mother told her about what had happened to the complainant. The witness then went into the bedroom where the accused was sleeping. She went and kicked the accused to wake him up, when the accused woke up the witness asked him *"Kali what is it have you been harassing the complainant"*. The accused only responded by saying *"yes"*. At this time the witness told the accused to pack his clothes and leave the house. The accused stood up and left.
36. According to the witness the accused had admitted to what he had done to the complainant and he left. From the time the complainant had come to stay with the witness in 2003 and when in forms 3 and 4 the witness noticed that the complainant was not that close to her like before but their daily conversations were the same such as the witness assisting in the complainant's school work and so on.
37. In cross examination the witness agreed that when she had asked the accused if he had harassed the complainant the response received was he had. When questioned whether the witness had told this to the police the witness said she had not. The witness had forgotten to tell this to the police because she only wanted to take the complainant to give his statement to the police and at this time she did not think of telling the police that the accused had

admitted the allegations. It was only after the report was lodged when she returned home then she remembered that she should have told the police about the accused admission.

38. The witness did not go back to the police to inform them because she thought if the complainant had lodged his report then that was it she did not think she was required to give another statement to the police.
39. The witness denied that as a couple they used to argue with each other in fact they loved each other. According to the witness the relationship between the accused and the complainant was normal and didn't show any sign that something was going on between them. The witness could not recall that on the day she came to know about the allegations she was having an argument with the accused in her bedroom.
40. When it was suggested that the allegations brought by the complainant only came after her mother had questioned the complainant about having an affair with her. The witness stated that she was only hearing this in court because the reason for the separation was that the accused had harassed the complainant.
41. On the other hand, the accused informed the court that he is married to Melania Cagi and they have two children. In 2007 he was staying at Korovuto, Nadi with his family namely his wife, their children, wife's sister and her family, the complainant, the complainant's brother Vilimone and his mother in law.
42. Since the accused was working at Malolo Island he would work for 11 days and then spend 3 days at home. When at home he would converse with his wife, get to know their children, look at their school work and also he would go and get firewood for cooking.

43. When going to get firewood the accused would be accompanied by the complainant, complainant's brother and both his children. The accused would cut the firewood and the children would pile up and after tying it up the firewood would be taken home.
44. According to the accused the complainant, the complainant's brother and the accused two sons and his sister in law's son were sleeping in the living room. The accused and his wife would mostly argue because of their children.
45. Before 2017 the accused was suspicious of Melania and the complainant by their behaviour most of the time he would tell the complainant to sit properly and sometimes the accused would tell his wife to go and dress appropriately.
46. In the morning of January, 2017 the accused was sleeping and he got a shock when Melania came and kicked him. Melania then asked the accused whether he had done what the complainant had alleged the accused had said yes". Upon hearing this, the accused was told to leave the house which he did.
47. The reason why the accused said "yes" was because he was hurt due to arguments he was having with his wife. When he heard what his wife had said he did not know what to do.
48. The accused further stated that his arguments with his wife started in 2016 because of his suspicion about his wife and the complainant having an affair. When he spoke to his wife about this issue his mother in law would interfere. Melania would tell the accused to shut up and swear at him.
49. The accused denied all the allegations he stated that he was ashamed and embarrassed to learn about what the complainant was saying about him.
50. After carefully considering the evidence adduced by the prosecution and the defence I am unable to accept the evidence of the complainant as truthful and reliable. The complainant's demeanour was not consistent with his honesty.

51. He did not give a coherent account of what the accused had done to him, his narration was vague and lacked particulars of how the accused had carried out the unlawful acts on him.
52. I also reject the evidence of the complainant that he was ashamed and/or embarrassed to tell his aunt Melania or his grandmother about what was happening to him as unbelievable. The complainant was close to his aunt Melania with whom he used to tell funny stories and jokes yet he did not complain to her does not make sense. The complainant was also close to his grandmother who was visiting him every month yet the complainant did not complain to her.
53. Furthermore, the complainant had gone to the house of his aunt Usenia and had stayed with her during 2009 and 2010 yet he did not tell his aunt anything. The complainant was a “free agent” away from the accused there is no evidence of any threat by the accused when the complainant was at his aunt’s house at Natabua or that the accused had even tried to contact the complainant when he was there.
54. Then in 2011 the complainant on his own without any hesitation left Natabua to go to the house of the accused, by this time he was about 12 years of age. I also reject the assertion by the complainant that he had nowhere to go if he was chased out of the accused house since he had his aunt Usenia in Natabua to rely on.
55. Even though the complainant was a quiet person it does not mean that he could not speak out against what he was going through. The complainant had a cordial relationship and communication with his aunt Melania and he was also talking to his grandmother does indicate that the complainant was a talkative person after all.

56. The complainant had agreed that he lied to the police when he told them that he was being abused by the accused from 2007 to 2012 when in court he mentioned that the accused did not do anything to him in 2009 to 2010. The complainant also agreed that he did not tell the truth in court.
57. From what I have heard and seen it is obvious to me that the complainant had made up the allegations against the accused to save himself from the allegation of having an affair with his aunt and to divert the attention of everyone to the accused. In my judgment the grandmother of the complainant was actually misled by the complainant by his story which led her to become emotional and believe the complainant's words without any probing by her.
58. I reject the assertion by Melania that her relationship with the accused was a happy one. It was obvious to me that Melania and the accused had an unhappy marriage which was riddled with arguments and distrust. It is difficult to believe that Melania did not know about the accused suspicion until she heard it in court.
59. On the other hand, the accused gave a credible account of what had happened during the years the complainant was living with him and his family. He was honest in admitting that he had said "yes" when confronted by Melania after she had kicked him to wake up.
60. I accept the accused's explanation that when he was suddenly kicked he woke up and when confronted he did not know what to say so he admitted the allegations. In view of the circumstances of the accused that was prevailing at the time I give no weight to this admission. Even if I have to accept this admission it does not give any credence to the complainant's discredited evidence which is improbable.
61. The accused was able to withstand vigorous cross examination he was not discredited to the extent that he could not be believed. The failure by the accused counsel to put certain propositions of the prosecution witnesses

without any objections by the state counsel when the accused was giving his evidence did not affect the reliability of the accused evidence.

62. Finally, the delay in reporting by the complainant is substantial. There is a delay of about 10 years from the first allegation and 5 years from the last allegation. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*“[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

*“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of *Thulia Kali v State of Tamil Nadu*; 1973 AIR.501; 1972 SCR (3) 622:*


“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through

its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

63. The reason given by the complainant for the delay in reporting by the complainant is that he was afraid of the accused and that he had been threatened by the accused not to tell anyone otherwise the accused will do something to him. I have also taken note of the age of the complainant in this regard, however, this explanation is not plausible on the totality of the evidence particularly when the complainant had all the opportunity to tell his aunt Melania, his grandmother and also his aunt Usenia. The complainant was also going to school meeting his friends, and school teachers yet he did not tell anyone about what he was going through.
64. In view of the above, I do not accept that there was any compelling circumstance that prevented the complainant from reporting the matter promptly. The explanation of the complainant is not convincing at all.
65. Based on the above, there is a reasonable doubt in the prosecution case hence it is unsafe to find the accused guilty on all or either of the allegations made by the complainant.

66. This court is not satisfied beyond reasonable doubt that the accused had committed all or either of the offences as charged.
67. I agree with the unanimous opinion of the assessors that the accused is not guilty of all the counts the accused is charged with. On the evidence before the court it was open to the assessors to come to this opinion.
68. In view of the above, I acquit the accused of two counts of unnatural offences and four counts of rape as charged.
69. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

19 February, 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.