

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 221 of 2012

BETWEEN: THE STATE COMPLAINANT

A N D: WAILETIA MICE ACCUSED

Counsel : Mr. M. Delaney with Ms. J. Prasad for the State
: Ms. V. Tamanisau for the Accused

Dates of Hearing : 6th, 7th October 2014

Date of Summing Up: 08th October 2014

Date of Judgment : 09th October 2014

JUDGMENT

1. Mr. Wailetia Mice, the accused has been charged by the Director of Public Prosecutions with the following counts.

First Count

Statement of Offence (a)

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

Particulars of the Offence (b)

WAILETIA MICE on the 23rd day of June 2012 at Naqarawai village in Navua, in the Central Division, had carnal

knowledge of **MEREWALESI LIKUSELALA**, without her consent.

Alternative Count

Statement of Offence (a)

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE: contrary to section 215 (1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence (b)

WAILETIA MICE on the 23rd day of June 2012 at Naqarawai village in Navua, in the Central Division, had unlawful carnal knowledge of **MEREWALESI LIKUSELALA**.

2. Majority of the three assessors returned with an opinion of 'Not Guilty' to the 1st count of Rape, but "Guilty" to the alternative count of Defilement of a young person between 13 and 16 years of age, contrary to section 215 (1) of the Crimes Decree.
3. Ms. Merewalesi Likuselala, the complainant told court that the accused dragged her inside one Temo's house from the verandah whilst 'lot of people' were there. After taking her to a room, she claimed that she was forced by the accused to remove her under pants. Then the accused had himself got undressed and tried to enter his penis into her vagina. Failing to have the entry to her vagina for about three minutes, Ms. Likuselala said that the accused took his penis 'out'. Thereafter, both of them had come out of the room and reached the verandah. First to come was Ms. Likuselala followed by the accused. Even at that point she said that there were several people waiting in the verandah.
4. From Temo's house she had gone back to the church concert which was in progress at the village hall and waited there before she went home to sleep. On Monday, she had gone to school as usual and nothing in relation to this incident had divulged to anybody until she was confronted by the deputy principal of the school.

5. When the learned prosecutor questioned Ms. Likuselala about the way she behaved at the material time, she expressly admitted that she never made any noises, alarms, screams or complains from the point she was 'dragged' inside the house until she returned to the verandah. Going a step further, she told court that she did not even utter anything throughout this whole process and did not make any efforts to show the accused that she is not happy of what he is doing. But, she claimed that she was not happy of what he did.
6. The accused had admitted during the caution interview that he had consensual sexual intercourse with Ms. Likuselala on that night. The learned defence counsel agreed that this 'consensual sexual intercourse' was turned into 'rape' when the complainant was questioned by the deputy principal.
7. It should be noted that the testimony of the complainant itself created a huge doubt over the issue of 'penetration'. For several times she stressed that the accused tried to insert his penis into her vagina, but failed. Leaving that apart, this court analyzed the behaviour of the complainant during the material times. According to her own narration it was a busy night in the village with the church concert. 'Lot of people' had been waiting in an ordinary scale verandah of a village house for tea. The accused had dragged her forcefully inside the house in the presence of 'lot of people'. Most importantly, when Ms. Likuselala was asked, both by the learned prosecutor and the defence counsel, the reason for her stoic silence she said that she cannot reply to that.
8. This 'strange behaviour' of the complainant was not explained or justified by the prosecution. In fact, with all his valiant efforts, the learned prosecutor could not lead the court to any plausible conclusion as to why Ms. Likuselala maintained such a stoic silence throughout the entire duration. Thus, I conclude that the "reasonable doubt" the criminal justice system demands in this type of a situation is been generated from the complainant's evidence itself.
9. In this context the accused cannot be held guilty for the offence of 'rape'. I do agree with the opinion of the majority of the assessors that the accused is not guilty of the offences of rape or even attempt to rape.
10. The scenario which has to be analyzed in relation to the 'Alternative Count' is different. 'Consent' does not play any role there when the alleged victim is over

13 years and below 16 years of age. The only available defence to the accused is his reasonable belief of that she is above the age of 16 years. Here, it is never disputed or rather agreed by both parties that the complainant was below 16 years at the material time.

11. It is indeed unfortunate that the defence did not lead even an iota of evidence in relation to this readily available defence. Apart from the accused's answers in his caution interview that though he was aware that the complainant was in Form 3 of Wainimakutu Secondary School and he did not know her age, nothing was brought before this court to say what the accused genuinely thought or believed about her age. The absence of this explanation leaves this court with the sole option of resting the fate of the accused with the alternative count of Defilement of a young person between 13 and 16 years of age. In this context, I have no hesitation to endorse the majority opinion of the assessors that the accused is guilty of the alternative count.
12. The accused is found guilty for the 'Alternative Count' of Defilement of a young person between 13 and 16 years of age and convicted accordingly.
13. That is the Judgment of court.



Janaka Bandara
Judge

At Suva

Solicitors

Office of the Director of Prosecution for State
Office of the Legal Aid Commission for Accused