

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 94 of 2016

[CRIMINAL JURISDICTION]

STATE

V

JOSEVATA HENAO

Counsel : Ms. L. Bogitini for State
Ms. B. Malimali for Accused
Hearing on : 05th – 08th June 2017
Summing up on : 09th June 2017
Judgment on : 12th June 2017

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

JUDGMENT

1. The accused is charged with the following offences;

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

JOSEVATA HENAO between the 1st day of November 2015 to the 30th day of November 2015 at Nasinu, in the Central Division had carnal knowledge of AK without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

JOSEVATA HENAO between the 1st day of January 2016 to the 31st day of January 2016 at Nasinu in the Central Division had carnal knowledge of AK without her consent.

2. The assessors were divided in their opinion. The majority found the accused not guilty of both counts above and also not guilty of the alternative offence of defilement they were directed to consider in respect of each count. One assessor opined that the accused is guilty of both counts as charged.
3. I direct myself in accordance with the summing up delivered to the assessors on 09th June 2017 and the evidence adduced during the trial.
4. The prosecution led the evidence of the complainant, the doctor who had medically examined the complainant and four witnesses whom the complainant had approached and informed about her encounter with the accused at different stages before her complaint was recorded by the police. The accused gave evidence and called one witness.
5. According to the complainant, the accused had sexual intercourse with her without her consent on two occasions. Both incidents had taken place between 3am and 4am in the morning; one in November 2015 and the other in January 2016. In both instances, the accused had asked her to open the door for him while she was sleeping, when she opened the door he had taken her to the toilet, removed his cloths and her cloths, made her sit on the toilet pan and had inserted his penis inside her vagina. On both occasions the accused had his penis inside the complainant's vagina for 10 minutes. After that the accused put on his cloths, told her not to tell anyone and went to his room. She also wore her cloths, went to her room, checked the time on her phone and went to sleep after both incidents.
6. The complainant also said that on both occasions she wanted to shout but she couldn't because the accused covered her mouth with his hand. However, it was not her evidence that the accused kept her mouth covered during the entire

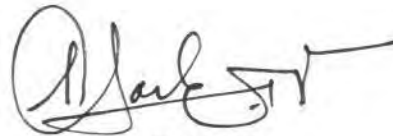
incident. The evidence suggests that the complainant had the opportunity to shout during each incident and if she did, her grandparents whose room was close by would have heard her.

7. It was the complainant's evidence that the accused inserted his penis inside her vagina while he stood on the left side of the toilet pan with his knees bent. Considering the evidence that came out when the complainant was cross examined, the accused's evidence and the photograph tendered by the defence as DE 07, it was clear that it is not possible for the accused even to comfortably stand on the left side of the said toilet pan due to the narrow space between the wall and the toilet pan.
8. Given the striking similarity between the accounts given by the complainant in respect of the two alleged incidents and the improbabilities noted in her version of events, I find that the complainant's evidence on what happened between her and the accused is unreliable.
9. The fact that the complainant had told the second prosecution witness after the first alleged incident that there was no physical confrontation between her and the accused; the fact that the third prosecution witness was told by the complainant that the incident took place in the complainant's room and the fact that the complainant had told the sixth prosecution witness who conducted the medical examination that there were two incidents in November 2015 and one in January 2016, indicated that the complainant had not been consistent with regard to her version of events. This inconsistency further strengthens the view that the complainant's evidence is not credible and reliable.
10. The evidence presented in this case suggests that the accused may have had sexual intercourse with the complainant on one or more than one occasion but not in the manner testified by the complainant. Therefore, it appears that the offence of *defilement of young person between 13 and 16 years of age* may have been

committed by the accused. Needless to say, an assumption is not sufficient to find an accused guilty of an offence.

11. All in all, I find that the prosecution has failed to prove the two counts above and also the alternative offences of defilement under section 215(1) of the Crimes Act beyond reasonable doubt. In the circumstances, I agree with the majority opinion of the assessors.
12. I find the accused not guilty of the two counts he is charged with and not guilty of the alternative offences of defilement under section 215(1) of the Crimes Act.
13. The accused is acquitted accordingly.




Vincent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Pacific Chambers, Barristers & Solicitors, Suva.