

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 174 of 2017

STATE

V

LIVAI BATILOTE

Counsel	:	Mr. T. Tuenuku for the State.
	:	Ms. K. Vulimainadave for the Accused.
Dates of Hearing	:	06 October, 2020
Closing Speeches	:	07 October, 2020
Date of Summing Up	:	07 October, 2020
Date of Judgment	:	08 October, 2020

JUDGMENT

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

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

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

LIVAI BATILOTE between the 1st day of January to the 31st December, 2015 at Yasawa Island, in the Western Division, unlawfully and indecently assaulted “L.R” by licking the vagina of the said “L.R”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

LIVAI BATILOTE between the 1st day of January to the 31st day of December, 2015 at Yasawa Island in the Western Division, penetrated the vagina of “L.R”, a 10 year old child with his penis.


2. After the prosecution closed its case, this court acquitted the accused of the first count of sexual assault and proceeded with the second count of rape as charged.
3. The three assessors returned with a unanimous opinion that the accused was guilty of the offence of rape.
4. I adjourned overnight to consider my judgment I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called one witness, for the defence the accused exercised his right to remain silent and did not call any witness.
6. The complainant informed the court that the accused is her cousin and in the year 2015 she was 10 years of age and a class 4 student living with the accused and his family at Yaqeta village in the Yasawa Islands.

7. One day during the second term of school after the complainant came back from school, she was alone in the house with the accused. The accused told her to go to his bedroom and get a torch. When the complainant was in the bedroom the accused came and pushed her on the floor and made her lie on her back facing up. At this time, the accused removed her panty as she tried to get up he told her to lie down, not to move and to lie still.
8. The complainant was scared of the accused, he was wearing $\frac{3}{4}$ pants which he removed with his underwear, and then penetrated his penis into her vagina and had sexual intercourse for about 3 minutes. The complainant was embarrassed with what the accused had done to her.
9. After the accused finished he told the complainant not to tell anyone about what he had done to her. When the parents of the accused returned later that day she did not tell them about what the accused had done to her because the accused had told her not to tell anyone.
10. The complainant was also scared to tell her teacher, however, she told her aunt who was her namesake when she went to attend class 5 in Labasa. Despite the accused telling her not to tell anyone about what he had done to her the complainant told her aunt about what the accused had done to her.
11. On the other hand, the defence took the position that the accused did not commit the offence of rape as alleged. The accused did not rape the complainant by penetrating her vagina with his penis.
12. The complainant made this allegation since she wanted to leave her aunt's house in Labasa so the only way she could leave was to make up a story against the accused which she did so that her aunt would bring her over.

13. The complainant agreed that the accused had only touched her buttocks and did not do anything else showed that the story of being raped narrated by the complainant did not happen.
14. After carefully considering the evidence adduced and the line of defence put forward I accept the evidence of the complainant as reliable and truthful. From the demeanour of the complainant which was consistent with her honesty it was obvious to me that the complainant was a shy villager who nevertheless was able to express herself and recollect what had happened to her in court.
15. Even though the complainant at times took time to answer some questions asked I accept this be a natural occurrence considering a lapse of 5 years from the date of the alleged offending and the fact that the complainant was 10 years of age at that time.
16. I also accept that the complainant was scared of the accused when he pushed her onto the floor, removed her panty and had forceful sexual intercourse with her. The fact that the complainant did not raise any alarm or resist what the accused was doing to her, is immaterial considering her circumstances such as being afraid of the accused, it was the accused's house and that there was no one at home to come to her assistance does not affect the reliability of her evidence.
17. Moreover, the threat by the accused not to tell anybody about what he had done to her was enough to stop the complainant from telling the parents of the accused or anyone else about what he had done to her. I also accept that the complainant's age and the fact that she was living with the accused and his family also contributed towards her silence. However, the situation changed for the complainant when she was taken to Labasa by her aunt. When the complainant was away from the accused she was able to tell her aunt about what had happened to her.

18. The complainant was able to withstand cross examination and was not discredited although she had agreed to the defence suggestion that the accused had only touched her buttocks and that was all he had done to her in my judgment this admission does not affect the totality of the complainant's evidence.
19. The complainant had maintained in her evidence in chief, cross examination and re-examination that the accused had penetrated her vagina with his penis which I accept to be the truth.
20. On this basis, I do not give any weight to this admission by the complainant which does not make sense on the totality of her evidence. Taking into account the love and affection given to the complainant by the parents of the accused and his family and being the "pet" of the household in my judgment there was no motivation upon the complainant to raise any false allegation against the accused.
21. This court rejects the defence raised by the accused as implausible on the evidence adduced. The defence has not been able to create any reasonable doubt in the prosecution case.
22. This court is satisfied beyond reasonable doubt that the accused between the 1st day of January to the 31st day of December, 2015 had penetrated the vagina of the complainant a 10 year old child with his penis.
23. I agree with the unanimous opinion of the assessors that the accused is guilty of one count of rape as charged.
24. For the above reasons, I find the accused guilty of one count of rape and I convict him accordingly. Furthermore, the accused stands acquitted of one count of sexual assault as mentioned earlier.

25. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka

08 October, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.