

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 213 OF 2018

BETWEEN :

STATE

AND :

JONE WESELE BOSOKA

Counsel :

Ms. S. Shameem for the State
Ms. L.M. Ratidara for the Accused

Voir Dire Hearing on :

04th of February & 05th of February 2019

Voir Dire Ruling on :

18th of February 2019

Summing up on :

21st of February 2019

Judgement on :

26th of February 2019

JUDGEMENT

(The name of the juvenile is suppressed and he will be referred to either by his initials, MT or by the witness number, PW1.)

1. The accused, Jone Wesele Bosoka is charged with one count of Rape, Contrary to section 207(1) and (2) (c) and(3) and one count of Sexual Assault contrary to section 210(1)(a) of the Crimes Act of 2009 alleged to have committed on MT, who is a child below the age of 13 years.
2. Those charges were;

COUNT 1

Statement of Offence

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

Particulars of Offence

Jone Wesele Bosoka, on the 29th day of April, 2018, 2017 at Korovesilou in the Central Division, penetrated the mouth of MT, a child under the age of 13 years, with his penis.

COUNT 2

Statement of Offence

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

Particulars of Offence

Jone Wesele Bosoka, on the 11th day of May 2018, at Korovesilou in the Central Division, unlawfully and indecently assaulted MT, by touching his thighs.

3. The accused pleaded not guilty to the charges and the ensuing trial lasted for 3 days. The juvenile and his uncle, with whom the juvenile was, gave evidence for the prosecution while accused gave evidence for the defense.
4. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused guilty to both the counts.
5. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
6. Prosecution case was based basically on the evidence of the PW1, the juvenile. His evidence is that;
 - i) When he was asked of his date of birth, he said it was 19th of May 2002. However, when shown his certificate of birth (PE1) he admitted it to be on the 18th of May 2005.
 - ii) He was staying in Korovesilou with his uncle Apemeleki, during the relevant times.
 - iii) In the night of the 28th of April 2018, his uncle with his aunt (uncle's wife) and few others were drinking grog in the kitchen while he was sleeping in his room.
 - iv) He heard his room door opening and Jone (the accused) came in. He has known Jone from his small days. Jone came to charge the lap-top and he woke the witness up. Jone has told him that he came to charge the lap-top. Thereafter Jone went back to drink grog.
 - v) Jone came back to his room after a while to check the lap-top and asked the witness to come with Jone to his house. Accordingly he has gone with Jone to his house. There, Jone has asked him to stay outside and because Jone's grandfather was still watching TV. Then Jone has asked the witness to hide behind the door, inside the house and once Jone's grandfather has gone to his room and closed the door, Jone has opened his room door and asked the witness to come in.
 - vi) In Jone's living room, the TV is on the right as you enter it from outside. Way the sofa was arranged a person sitting there will not be able to see a person entering the house.
 - vii) When he came in to the Jone's room, Jone asked him to lie down on the bed. Thereafter Jone has asked MT to lie down on the floor as the bed was making a loud noise. Then Jone has asked him to take off his pants, which the MT has

complied with. At that time Jone has put his penis into the witnesses' mouth. Jone's penis has been there inside his mouth for about 10 seconds. Thereafter, Jone has asked MT to sit on Jone's penis, which he refused, and putting on his pants gone home. Before he left Jone has asked him to not to tell his uncle about it.

- viii) On the 11th of May 2018 at about 1 O'clock in the morning, while he was sleeping at his uncle's house he had heard someone knocking on the door. He has heard Jone's voice asking him to open the door. When he did not open the door, Jone has gone to his uncle, who was in the other room and his uncle has opened the main door for Jone to come inside. Thereafter his uncle has gone back to sleep. After a while, he heard his room door opening and seen Jone coming into his room. Jone had come and started touching his stomach and wanted to touch his private parts. Jone has been drunk and when tried to touch his private parts, he has pushed Jone's hand away. Jone touched his penis for just about 2 seconds. Then Jone has gone back and lied on the floor and slept.
- ix) On the following day after the second incident, he has told these incidents to his uncle in the evening. In showing how Jone touched his penis, MT showed that Jone putting his hand inside his pants from the top. In answering a question from the court, the witness said the gap between the two incidents is one day.

7. This witness has been subjected to cross examination at length by the defense. Answering the cross examination, PW1 says that;

- i) On the night of the 28th of April 2018, there were there were people drinking grog with his uncle and aunt, at the kitchen. They were using his uncle's lap-top to listen to songs while drinking grog. The lap-top was powered by an extension cord, taken from the other kitchen. The witness admits to have known Artu who lives next to the Jone's house.
- ii) The witness admits that Jone came into his room to keep his uncle's lap-top, since his uncle's room was closed. He further admits that on that night, Jone went home with Artu and Masi, and he did not go to Jone's house with them. He further concedes that he has never been to the Jone's house.
- iii) In describing the Jone's house he admits that the TV is in fact on the left and though he earlier said it to be on the right. He acknowledges that Jone's living room door opens into the inside of the house and to hide behind he had to come inside the house. Further, concedes that a person in the living room of the Jone's house would see anyone who enters the house.
- iv) On the day of the second incident Jone tapped on the louvers of his room to call him to open the door. When suggested that Jone came around 5 O'clock in the morning, when his uncle was getting ready to go to work, the witness denies it and states he was not aware of the time. The witness concedes that Jone was too drunk then, to do anything to him.
- v) The witness admits Jone coming to see him to his school on the day of the second incident, to recover his wrist watch from the MT. He confesses to have taken the Jone's wrist watch while Jone was knocked out on the floor at his

uncle's house. Jone has informed that incident to his class master, Peni. The witness has complained of the allegations subsequent to that.

- vi) The defense successfully points out a contradiction in his evidence with his statement to the police, regarding the incident on 11th of May 2018, to wit; whether he touched the stomach and the penis as for the evidence or his thighs as for the statement to the police. At that moment the witness concedes what he said to the police is the correct version. It should also be noted that witness showing how Jone touched his thighs, showed that Jone put his hand from the bottom of the pants.
 - v) It was suggested by the defense that these allegations were framed because Jone confronted the witness at school regarding the stealing of his wristwatch and the witness denied it.
8. In re-examination the witness contradicts, many of his answers given in cross-examination. In addition, answering a question from court the witness states that the second incident took place after about three days from the first incident. Further the witness states that he doesn't know whether Artu and Masi went or not with Jone to his place in the night of the first incident. It should be noted that his unawareness, or the answer that he does not know, creates a serious doubt of his presence on that night.

Furthermore, it should be noted that witnesses' stance was that he was in a vulnerable position throughout the 1st incident, and had to do whatever Jone asked. Therefore he had to get up and go to Jone's house in the middle of the night, leaving the comfort and safety of his room. Yet it is evident that when they were at Jone's room, where the accused's dominance is much more, the witness had been able to refuse what Jone wanted and to go home without any resistance. It would be a question of possibility and probability which the assessors should have considered.

9. The PW2 was Mr. Apemeleki Waqanaceva, the uncle of the juvenile, MT. His evidence was that;
- i) He is also known by the name Epa, lives in Korovesilou for 36 years, since birth and MT is his nephew.
 - ii) On the 11th of May 2018, after about 5 O'clock in the morning, he has heard somebody pushing the door and gone there to see. He has seen Jone outside and has asked him to come inside, as Jone is a cousin of his and a frequent visitor to their house. Jone came in and sat on the living room. After about 7 minutes, when he came back Jone was not to be seen and when he went in to MT's room, he saw Jone asleep on the floor in the room. He has called MT to have a bath and to get ready to go to school.
 - iii) That evening when he returned from work, he was informed by his wife that Jone has gone to MT's school and blamed MT for taking his wristwatch. The PW2 has called the PW1 and when asked about taking the watch, MT has denied the taking the wristwatch of Jone. Thereafter MT has told him of the allegations and he has informed the mother of MT, who has informed it to the police.

- iv) The police has come to his place on the 15th of May 2018 and recorded the statement from him. He recognizes the accused as Jone.
10. Facing the cross-examination, the witness has said;
- i) In giving statement to the police, he did not tell the things MT has told him since he thought them to be unimportant.
 - ii) When he brought Jone in to his house on the 11th May morning, Jone was very drunk and Jone did not call him. By that time the witness was preparing to go to work and when he found Jone back, Jone was in the MT's room.
 - iii) The witness concedes to not to have seen any of the alleged things happen. He further concedes that these allegations were informed to him only after the MT was accused of stealing Jone's wristwatch.
 - iv) In answering a question from court, the witness says, that when MT denied of stealing Jone's wristwatch, he believed MT, as he did not see a wristwatch at Jone's wrist at the time he took Jone in and also because he saw Jone in the MT's room. He further states that MT did not inform of the allegations until he queried MT, of them.
11. With the leading of the above evidence and marking and producing PE1, the prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the alleged offences, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining and giving his due rights to the accused.
13. The accused having understood his rights, elected to give evidence on his behalf.
14. His evidence is that;
- i) He is 30 years old and works at Nanuku resort in Pacific Harbor.
 - ii) On the night of the 29th of April, 2018 he was drinking grog at Apemeleki's house together with Apemeleki, his wife, Masi and Artu. While drinking grog they listened to the music via the lap top. The power for the lap top was obtained from the other kitchen through an extension cord.
 - iii) After drinking grog, before leaving Apemeleki asked him to leave the lap top at MT's room. Accordingly he went to MT's room and left the lap top on a small table beside the MT's bed. Masi and Artu were waiting for him and he left for his home with them. The witness affirms what MT said about the allegations is not true.
 - iv) Testifying on the alleged incident of the 11th of May 2018, the witness states that there was a function on the previous night at his work place and returned drunk at about 5 O'clock in the morning of the relevant day. He was brought home by the official transport and he was knocked out close to the Apemeleki's house. He went there as it was like a 2nd house for him.
 - v) Apemeleki came and woke him up and took him inside the house and left him at the living room. The witness denies that he went inside the MT's room and was

lying down in the sitting room adjacent to the MT's room. At about 10 O'clock, he woke up and looking for the time realized his wristwatch is not there. When he asked Apemeleki's wife she told him to ask MT and accordingly, went to MT's school and met his master. When told the master of the incident, master called MT and queried. MT took the wristwatch from his right pocket and gave it to Jone.

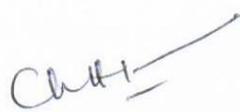
- vi) The accused affirms that these allegations were framed as he confronted the juvenile in respect of stealing of his wristwatch.
15. In cross examination, the accused states that;
- i) The accused has known MT for about a year and he is a frequent visitor to Apemeleki's house.
 - ii) On the 29th of April 2018, he was drinking grog at Apemeleki's house and Apemeleki and his wife went to bed early. After drinking grog he removed the lap top and the power extension, and went into MT's room. The witness denies waking up or taking MT to his house and all alleged subsequent incidents.
 - iii) When queried of the incidents of the 11th of May, the witness concedes that he could not clearly recollect them as he was heavily drunk then. The accused denies the subsequent allegations leveled against him on that day.
16. In re-examination, the accused state that since the light on the porch is on, anyone entering through the front door could easily be seen by anyone in the living room of his house.
17. When analyzing the above evidence I am mindful that only direct evidence which relates to the alleged incidents is the evidence of the PW1. I am also mindful that law does not require any corroboration of the complainant's evidence as per section 129 of the Criminal Procedure Act. Therefore, the ultimate question would be whether his evidence would be trustworthy and reliable.
18. The PW1's evidence has many contradictions. One area of such contradictions is; in respect of the second or the sexual assault incident. In the statement to the police PW1 says that Jone touched his thighs. Showing how he touched, the witness shows the accused putting his hand from the bottom (leg opening) of his pants. In giving evidence the PW1 states that the accused touched only his stomach. On another occasion says that the accused touched his stomach and the penis. Further, showing how the accused touched his penis, shows putting hand from top (waist opening). Further, when shown the contradiction, the PW1 states what he told to the police is the correct version implying that the evidence given by him is wrong.
19. It is an established fact that MT did not come out with the allegations until his uncle, PW2 queried him specifically. Furthermore, it is also a fact that MT lied to his uncle about stealing of the accused's wristwatch. PW1's evidence when scrutinized, there are many occasions, where he is proved to be incorrect and improbable (irrespective of

whether they are deliberate lies or not). As for the legal maxim, '*Falsus in uno, falsus in omnibus*' and having heard and observed the PW1 giving evidence, I would be extremely hesitant to rely and place confidence entirely on the evidence of the PW1, and would not be able to confirm that there is no reasonable doubt on my mind.

20. In addition to what I have observed in paragraph 8, 18 and 19 above, having considered many contradictions and the demeanor of the PW1 in giving evidence, I am of the view that there is a possibility of these allegations being false. There are reasons to suggest that MT had a motive and the ability to fabricate. When there is a reasonable doubt in the prosecution case, the accused is entitled to the benefit of such.

Though I cannot conclude that the accused has not done the alleged acts, it is the duty of the prosecution to prove beyond a reasonable doubt that the accused has committed the acts as stated in the information. My view is that due to aforementioned uncertainties, the prosecution fails to rebut the presumption of innocence in favour of the accused.

21. Though I have clearly explained the legal principals and the danger in relying on the contradictory evidence of PW1, the only witness who testifies to the alleged incidents, the assessors seems to have overlooked my directions as they may have overcome by emotions, seeing a 13 year old child giving evidence, against a 30 year old man. Though I have given much weight and consideration to the opinion of the assessors, on this occasion, I regret to conclude that I would not be in a position to conquer with their opinion.
22. In the circumstances, I acquit the accused, Jone Wesele Bosoka of all the counts, as the prosecution has not been able to prove this case beyond reasonable doubt.
23. This is the Judgment of the Court.


Chamath S. Morais
JUDGE



Solicitor for the Prosecution : ***Office of the Director of Public Prosecution, Suva***
Solicitor for the Accused : ***Office of the Legal Aid Commission, Suva***