

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 041 OF 2012

BETWEEN : **STATE**

AND : **WASEA RAMASIMA**

Counsel : Mr. Nath with Ms. Elo for the State
: Mr. Fesaitu for the Accused

Date of Hearing : 7th, 8th, 9th, and 10th April, 2014
Date of Summing Up : 11th April, 2014
Date of Judgment : 17th April, 2014

JUDGMENT

01. Mr. Waisea Ramasima, the accused is been charged with the following six counts of 'Rape' contrary to section 207 (1) (2) (a) of the Crimes Decree No: 44 of 2009.

First Count

[Representative Count]

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WASEA RAMASIMA between the 1st day and 30th day of April 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Second Count

[Representative Count]

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WASEA RAMASIMA between the 1st day and 30th day of June 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Third Count

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WASEA RAMASIMA on the 20th day of July 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Fourth Count

[Representative Count]

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WAISEA RAMASIMA between the 1st day and 30th day of September 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Fifth Count

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WAISEA RAMASIMA on the 7th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Sixth Count

Statement of Offence

RAPE: Contrary to section 207 (1) and section 207 (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

WAISEA RAMASIMA on the 8th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

02. After a full hearing on 07th, 08th, 09th and 10th of April 2014, all three assessors unanimously opined that the accused is "NOT GUILTY" of all the above stipulated charges. This court now proceeds to deliver its final judgment in terms of section 237 (2) of the Criminal Procedure Decree No: 43 of 2009.
03. The complainant, Ms. E. V., narrated her sexual experiences with the accused commencing from April 2011 to 08th of October 2011. Her testimony covered the incidents which laid down the basis for all the six charges. She said that

she surrendered to him in all the instances over the authority and the control he had over her life with his contribution to her living expenses and education. According to the complainant, the accused had “told” to simply abandon her and her sister if she divulges these sexual activities to anybody. Therefore, Ms. E. V. said that she had to think about their future; especially the education and where to go from the accused’s house, if they are chased away after going against his word. After all, the accused was her uncle.

04. The accused, in his evidence did not dispute the alleged sexual encounters with Ms. E. V., but said that everything took place between them with the full consent of both. The defense argued that up until 19th of December 2011, Ms. E. V. did not tell anything about her relationship with the accused to anybody as she was a willing participant to everything which took place between them. They went further to say that even on 19th December; she did not volunteer to tell about her pregnancy to Aunty Luisa. The accused said that had Ms. E. V. did not get pregnant, they would still be continuing with their relationship.
05. It is in this background this matter rotated around the issue of “consent” of the complainant to perform the alleged sexual acts.
06. The crucial factor which echoes against the complainant is the ‘belatedness’ to bring these alleged sexual activities to the attention of anybody for almost 9 months. It has to be decided now whether her explanation for the said belatedness, though a long delay in any context, justifies her silence or not. If not, it has to be agreed with the defense suggestion that she did not want to divulge her experiences to anybody as she was a willing participant and she had to credit the blame to ‘somebody’ with the emerging pregnancy.
07. It was led in evidence that Ms. E.V., the complainant was an older teen and a virgin, who was around 18 years of age, at the time of the initiation of these alleged offences. The accused was 46 years, married and having four children at that time. Ms. Luisa Adi said that Ms. E.V.’s mother passed away when she was 3 years of age and it was Ms. Luisa who looked after her since then. Ms. E.V and her sister had come to Viti Levu from Kadavu Islands to pursue their studies. It was her father’s younger sister, the wife of the accused, facilitated both of them in Viti Levu.

08. The accused admitted in his evidence that he chased out Ms. Luisa from his home as he did not like the way she treated his children. Earlier Ms. Luisa had also been residing in the same compound. Ms. Luisa also endorsed this claim of the accused. That is why the accused highlighted that had he did not chase Ms. Luisa from his home and Ms. E.V. did not get pregnant, their relationship would be still continuing.
09. It is in this background of facts one has to analyze the “belatedness” of the complainant to report the alleged incidents to a third party. Indeed, there is no disagreement at all that a delay of around nine (9) months to disclose her experiences to ‘somebody’ is fatal to the case of the prosecution, if not explained and justify in a plausible manner.
10. What was the exact time where she could have broken up the silence? Being adults, who are matured enough to assess things in a much more relaxed environment, it is easy for us to look back at the sequence of events which took place between Ms. E.V. and the accused and formulate opinions as to the available or missed opportunities which could have utilized to break the silence. We do speculate in such a manner from the perspective of grown adults and not in the perspective of a baffled, psychologically isolated or abandoned and frightened child or a teenager.
11. Therefore, a proper assessment on the events has to be made after stepping into the shoes of a girl of Ms. E. V.’s age and psychological background. It is after such a consideration that this court is of the view that the existed environment in the accused’s compound justifies the ‘silence’ of Ms. E.V. to maintain the whole episode as a ‘top secret’. It carries a lot of ‘weight’ when she said that she had to think not only about her, but her sister’s future as well, if the accused seized his assistance and asks them to leave his house.
12. It is quite understandable, even for an older teen of Ms. E.V.’s age, that she cannot hide the pregnancy from the eyes of the public forever. Still for all, she did not come forward to break the shackles. That itself is evident of the pressure she underwent in that environment. On the other hand, she had witnessed, as revealed in evidence, the way aunty Luisa was chased out of the house by the accused because of the differences with the accused. In such a situation, when the accused told her that he will chase both Ms. E.V. and her

sister out of his house and there will be no one to look after them, it is something that bothers a girl of Ms. E.V.'s age and background.

13. Ms. E.V. went on to say that she did not tell even her aunt the experiences that she was undergoing as she thought, even her aunt, being the wife of the accused, would take his side and disbelieve her.
14. The feeling of being disbelieved by the others, may it be the relatives or close associates, could be something very painful, which adds insult to the injury. When analyzing the events which took place after Aunty Luisa came to know her plight, one could hardly disagree with Ms. E. V. 's speculations. Apart from she been taken to the police to report the matter, Ms. Luisa had taken Ms. E.V. back to her sister or the wife of the accused to seek forgiveness from her. Then Ms. E. V. had been asked to tender a letter to the police in view of withdrawing the complaint as Ms. Luisa thought it will damage the reputation of the family if the matter goes to court. It was not elicited by either party, as to why Ms. E.V. sought forgiveness from the accused's wife. And Ms. E.V. said that she was pressured or forced to sign the withdrawal letter.
15. Rape is all about power and not sex. The perpetrators use variety of ways and means to take over the control of their victims, ranging from actual physical force or violence or threats to emotional assaults and even intellectual bribes. Whatever the mode of 'power' it may be, the rape victims have to go through an act of life threatening violent experience.
16. In a given scenario, where the 'consent' to have sexual intercourse is disputed, the burden of disproving that there was no such 'consent' is on the prosecution. Blackstone's Criminal Practice 2011; page 283 says that "*Consent covers a range of behavior from whole hearted enthusiastic agreement, to reluctant acquiescence*". But, such an 'agreement' should be 'free' from any kind of 'interference' and simply because the alleged victim freezes with no protest or resistance does not say that she consented to the physical act. Therefore, it is highly essential to recognize the difference between 'consent' and 'submission' to the sexual acts.

17. In the case of *Kirk* [2008] EWCA Crim. 434, a rape conviction was upheld by the England Court of Appeal even with the absence of any pressure, threats or deception on the victim, a 14 years old vulnerable and destitute girl, who was submitted to have sexual intercourse with the accused for money to buy food. Lord Justice Hallett in *Hysa* [2007] EWCA Crim 2056 said that simply because the complainant did not say 'NO' at the moment of initial penetration, it is not fatal to the prosecution case. In *Malone* [1998] 2 Cr App R 447 the English courts went on to say that there is no requirement that the absence of consent has to be demonstrated or communicated to the accused. (Blackstone; supra page 285)
18. It is clear from section 206 (2) (d) of the Crimes Decree No. 44 of 2009 that 'consent' is not freely and voluntarily given if it is obtained by 'exercise of authority'.
19. Having considered the factual and legal background relevant to the matter before hand, this court concludes that the narration of the complainant did convince the court beyond reasonable doubt that she did not consent freely and voluntarily to have sexual intercourse with the accused in any of the given instances, but simply submitted herself to the accused due to her sheer vulnerability.
20. In the light of the above this court is not inclined to accept and believe the version of the accused that Ms. E.V. was a willing participant to the 'sexual activities' that he shared with her. The complainant been around 18 years at the time of the period in issue, could have explored lot of avenues had she "wanted to have something" as the accused claimed. The assertion of the accused that it was the complainant who initiated the whole episode with her behavior sounds to be far-fetched from the reality.
21. Hence, the unanimous opinion of "Not Guilty" of the assessors is not accepted by this court. The prosecution has proved it beyond reasonable doubt that Ms. E.R. did not 'consent' to have sexual intercourse with the accused in any of the instances reflected in the six (6) charges.
22. The accused is found 'GUILTY' for all the six counts in the information separately and convicted accordingly for the six (6) counts separately.

23. That is the Judgment of the court.

Janaka Bandara
Judge

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