

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 143 OF 2011

BETWEEN : STATE

AND : JANEND KUMAR

Counsel : Ms. J. Fatiaki for State
Mr. Iqbal Khan for the Accused

Date of Hearing : 18th - 20th of January 2016

Date of Closing Submissions: 21st of January 2016

Date of Summing Up : 22nd of January 2016

Date of Judgment : 25th of January 2016

JUDGMENT

1. The accused person is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009. The particulars of the offence are that;

“Janend Kumar on the 14th day of June 2011 at Tute’s Sea Breeze Hotel in Sigatoka in the Western Division, had carnal knowledge with a girl namely Payal Parshna Kumar without her consent”

2. The accused person pleaded not guilty for this offence; hence the hearing of this action took place on 18th to 20th of January 2016. The prosecution called

four witnesses during the course of the hearing. At the conclusion of the prosecution case, the accused person gave evidence on oath and called three other witnesses for the defence. Subsequently, the learned counsel for the defence and the prosecution made their respective closing submissions. I then delivered my summing up to the assessors.

3. The three assessors returned with a split verdict, where two of them found the accused person guilty and one assessor found him not guilty. The assessors' verdict was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing.
4. Having considered the evidence presented during the hearing, respective closing submissions of the prosecution and the defence, and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
5. Sections 207 (1) and 207 (2) (a) states that;

"Any person who rapes another person commits an indictable offence.

A person rapes another person if-

(a) the person has carnal knowledge with or of the other person without the other person's consent,

6. Accordingly, the main elements of the offence of rape are that;
 - i. The accused,
 - ii. Inserted his penis into the vagina of the victim,
 - iii. Without the consent of the victim,

7. The prosecution presented evidence that the accused picked the victim, Payal at Sigatoka town and then took her to Tute's sea breeze motel in the evening of 14th of June 2011. He then took her into a room and forcefully removed her cloths while he too was undressing himself. He then sucked her breast and then inserted his penis into her vagina. The accused then took Payal back to her house. Payal told her mother about this incident in the night of 15th of June 2011. Her parent then called the parent of the accused and the wife of the accused and told them about this allegation. They came to her house together with the accused. The accused denied the allegation when he was confronted by his mother in the presence of others. The wife of the accused then offered Payal's family sum of \$ 28,000 if she settled the matter. Payal's parent refused the offer. On 18th of June 2011 Payal went to police with her parent and reported the incident.
8. The accused has denied the allegation of rape. However, he admitted that he picked Payal at the back of R. B. Patel Sigatoka on the 14th of June 2011 and then drew back home. He went to service station at Cuvu on his way. He stated that he wanted to go to the garage, but drew straight home as Payal was in his car. Mr. Prem Kumar, a brother of the accused, who lives in New Zealand stated in his evidence that he was demanded by the parent of Payal a sum of \$ 45, 000 if not they will report the matter to the police.
9. Bear in mind that the offence of sexual nature do not require evidence of collaboration, I now draw my attention to discuss the evidence of the victim in order to examine whether her evidence could be accepted as a trustworthy testimony.

10. At the beginning of her cross examination she was asked that whether she discussed this matter with her parent, for which she answered affirmatively. She stated that she asked her mom that they are her family and why did they do this to her. She was further asked that did her parent tell her what to say in court which she answered affirmatively too. The learned counsel for the accused in his closing submissions emphasised this part of her evidence and urged that her evidence was a made up story. However, it seems that her evidence is not materially similar as of her parent as she stated that her mother called her uncle who lives in New Zealand, but her mother and father in their evidence testified that they couldn't recall it. She further stated that she confided this incident to her mother on the same night, but actually it was on the following night according to her mother's evidence. In view of these reasons, I do not find that the submissions of the counsel of the accused that her evidence was a made up story of her parent has no merits.

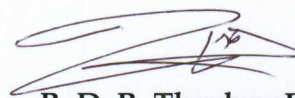
11. The victim in her evidence did not state that she resisted physical when the accused forcefully removed her cloths and had sexual intercourse. She had only told him that do not do this as she is his daughter. Considering the fact that her relationship with the accused who is her father's eldest brother and held a respectable position in her family, it seems that it is probable that she has not physically resisted to him at that time. The medical findings of the Doctor Lal collaborate the version of the victim as he stated that the penetration into her vagina could be either a forceful or normal one. According to his medical findings, he found only minor lacerations on left minor labia and hymen perforated. He has observed that the victim was disturbed and crying at the time of the medical examination. In view of these reasons, I am satisfied that the victim's evidence is supported by the medical findings of the Doctor Lal.

12. I now draw my attention on the issue of identification parade. The accused and his two brothers who gave evidence for the defence stated that the lady who came to identify the accused first identified their brother-in-law and then Sanjesh Kumar before she eventually identified the accused. However, there is no evidence before me to find out who was this lady who came for the identification and what was her involvement in this matter. The accused only stated in his evidence that a lady from a hotel somewhere came and made the identification. In view of these reasons, I do not find any relevancy in this issue of identification parade.

13. The accused denied that he took the victim to a hotel and raped her. The evidence of the two brothers of the accused who gave evidence for the defence were mainly focused on the issue of identification parade. Mr. Prem Kumar failed to provide any reasonable explanation for not reporting the police about the alleged demand of \$ 45,000 in his evidence. The accused in his evidence stated that he saw his wife was at the garden and the parents were sitting in a porch when he reached home with Payal in the evening of 14th of June 2011. However, Mr. Shanjesh Kumar in his evidence stated that he was also present there cleaning his car. Having considered the evidence given by the accused and other witnesses of the defence and their demeanour and the manner of presenting their evidence, I find the defence is not worthy to trust. Hence I do not accept the defence put forward by the accused. I further find that the evidence given for the defence has failed to create any form of doubt about the prosecution's case.

14. Having considered the foregoing facts that I discussed above and the demeanour and the manner the victim gave her evidence, I am satisfied to accept her evidence as credible and truth.

15. In view of these reasons discussed above, I find that the prosecution has proved the guilt of the accused beyond reasonable doubt. Hence, I do not find any cogent reasons to disregard the majority opinion of the assessors.
16. I accordingly find the accused is guilty for the offence of rape contrary to section 207(1) and 207 (2) (a) of the Crimes Decree and convict for the same.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

25th of January 2016



Solicitors : Office of the Director of Public Prosecutions

Iqbal Khan & Associates