

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 170 OF 2015S

STATE

vs

KAMLESH LAL

Counsels : Mr. Y. Prasad and Ms. S. Serukai for State
Ms. M. Tarai for Accused
Hearings : 20 and 21 April, 2016
Summing Up : 22 April, 2016
Judgment : 25 April, 2016

JUDGMENT

1. On 20 April 2016, in the presence of his counsel, the accused pleaded not guilty to the following information:

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

KAMLESH LAL on the 17th day of April, 2015 at Nausori in the Central Division, had carnal knowledge of **L.K**, without her consent.

SECOND COUNT

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

KAMLESH LAL on the 17th day of April, 2015 at Nausori in the Central Division, assaulted **L. K** with intent to commit rape.

THIRD COUNT

Statement of Offence

KIDNAPPING: Contrary to Section 279 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

KAMLESH LAL on the 17th day of April, 2015 at Nausori in the Central Division, kidnapped **L. K**.

2. The trial before myself and three assessors then commenced. The prosecution called two witnesses, the complainant (PW1) and the doctor (PW2). After a submission of no case to answer, I dismissed count no. 3 against the accused and acquitted him on that count. He was called upon to defend himself on count no. 1 and 2. He gave evidence as DW1, and his female partner (DW2), also gave evidence.
3. I delivered my summing up on 22 April 2016. The assessors deliberated on the matter, and later returned with a mixed verdict. Assessors No. 1 found the accused guilty as charged on count no. 1 and 2, while Assessor No. 2 and 3 found the accused not guilty as charged on those counts.
4. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Decree 2009, which reads as follows:

- “...237 (1) *When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
- (2) *The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*
- (4) *When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
- (a) *written down; and*
- (b) *pronounced in open court.*
- (5) *In every such case the judge’s summing up and the decision of the court together with (where appropriate) the judge’s reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes...”*

5. In Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”

6. In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:


“...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts...”

7. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors on 22 April 2016. The assessors’ verdict was not

perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the majority not guilty opinion of the second and third assessors, and agree with the guilty opinion of the first assessor.

8. My reasons are as follows.
9. I find the complainant (PW1) and the doctor (PW2) as credible witnesses. They were forthright and not evasive when giving their evidence. PW1 said, the accused forced himself on her at the material time, inserted his penis into her vagina without her consent, at the material time. She said, the accused knew she was not consenting to sex with him, at the time, because he continued to assault her at the time. Furthermore, PW1 said the accused assaulted her in the taxi by slapping her repeatedly on 17 April 2015. This was while he was conveying her to his house.
10. At the accused's house, PW1 said, he continued to assault her by punching her stomach, ribs and chest. Later, according to PW1, he dragged her to the bedroom, and raped her therein. He stopped for a while. He got a cane knife, and struck her back on the flat side of the same. He later raped her again.
11. PW1 said, she was medically examined by PW2 later, at Nausori Health Centre. She reported her findings in a medical report which she tendered as Prosecution Exhibit No. 1. In section D(12) of the report, she pointed to the various injuries PW1 suffered. In my view, the injuries explained in D(12) of the report confirmed the complainant's version of events. I accept the complainant's (PW1) and the doctor's (PW2) evidence. They were credible witnesses.
12. I find the accused's (DW1) and his partner's (DW2) evidence not credible. In my view, DW1 was an evasive witness. He was not forthright. In my view, he was not telling the truth. This was also the case for DW2. In my view, she was there basically to prop up the accused's evidence. Their evidence was not credible, and I therefore reject them. They were not credible witnesses.

13. Given the above, I agree with Assessor No. 1's guilty opinion on both counts, and disagree with Assessor No. 2 and 3's not guilty opinion on both counts. I find the accused guilty as charged on Count No. 1 and 2, and I convict him accordingly on those counts.



Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Nausori
Solicitor for Accused : Legal Aid Commission, Nausori