

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 89 OF 2013

STATE

-v-

GURJEET SINGH

Counsel : Ms. L. Latu for the State
Mr. F. Koya with Mr. S. Raratabu for Accused

Date of Summing Up : 20th June, 2016

Date of Judgment : 23rd June, 2016

JUDGMENT

[1] Accused was charged with following counts and was tried before three assessors.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

GURJEET SINGH between the 13th day of April 2013 and 14th day of April 2013 at Ba in the Western Division penetrated the vagina of **PREETIKA MOREEN KUMAR** with his penis without the consent of the said **PREETIKA MOREEN KUMAR**.

SECOND COUNT
Statement of Offence

COMMON ASSAULT: contrary to section 274(1) of the Crimes Decree 44 of 2009.

Particulars of Offence

GURJEET SINGH between the 13th day of April 2013 and the 14th day of April 2013 in the Western Division unlawfully assaulted **PREETIKA MOREEN KUMAR** by slapping the said **PREETIKA MOREEN KUMAR** on her face.

- [2] Assessors unanimously found the accused not guilty of Rape as charged and found him guilty on the 2nd Count of Common Assault.
- [3] I direct myself in accordance with my own Summing Up and review the evidence led in the trial. I pronounce my judgment as follows.
- [4] Accused admitted having had sexual intercourse with the Complainant between 13th April, 2013 and 14th April, 2103. Only issue to be resolved is whether sexual intercourse took place without Complainant's consent.
- [5] Prosecution says that accused used violence and the sexual intercourse took place without complainant's consent. Accused denies the allegation.
- [6] Prosecution called three witnesses and based its case substantially on the evidence of the Complainant.
- [7] Prosecution adduced recent complaint evidence to prove consistency and credibility of the Complainant. Investigating Office WPC Miriama confirmed that she recorded the complaint of the Complainant at the Ba Police Station on the 14th April 2013 after reporting to work at 7.30 a.m. Complainant, in her complaint, had mentioned that she was slapped and raped by the accused. Her statement is substantially consistent with her evidence in Court. The so called omissions highlighted by the Defence are not material so as to affect the credibility of her evidence.

- [8] The sequence of event that led to the complaint being lodged with police should be given careful consideration in deciding the honesty and genuineness of her Complaint. She said that she made two statements to the Ba Police Station, but she remembered only the second statement given to WPC Miriama. There is no evidence that police officers had recorded a statement from the Complainant when she first visited the police station with the accused and Ashneel soon after the alleged incident. She however managed, on her first visit, to go to the hospital with a police officer to get her medical examination done.
- [9] Accused confirmed that Complainant was so drunk that she wasn't listening to police officers and started swearing at them. Then, police officers had told her to wait, and rest till they take the statement. Police officers were tired of her. Ultimately they warned her that they will put her in the cell till morning. Then only she agreed to leave the station. Quite surprisingly, police officers told Ashneel and accused to drop her back at her house. Ashneel confirmed the evidence of the accused on this point. Doctor Siteri confirmed that when she examined the Complainant between 4.25 a.m. and 4.50 a.m., she was drunk and talking excessively with a 'slurred speech' .
- [10] Complainant said that she made a second statement to police because officers present at the time were all against her. She wanted to meet officers of a different shift who can re-write her statement. She did not trust the officers at the Ba police Station at all.
- [11] There is no dispute that Complainant was drunk and swearing at police officers when she first visited the police station. She decided to leave the police station only when she was threatened that she will be put in the cell. Her behaviour was not received well by the officers. At that time, accused was also present at the police station talking to the offices. It appears that her first statement had not been recorded. She waited for the next shift and came back to the police station after 7.30 a.m. and managed to record her statement with WPC Miriama, who said, Complainant was sober' at that time. Complainant's behaviour is consistent with that of a woman who is determined to fight injustice caused to her.

- [12] Arguments of the Defence that accused also went to the police station with her and that he was not arrested at that time because he was innocent are not appealing to me. Accused's conduct is rather indicative of his determination to prevent a complaint being lodged against him and an attempt to discredit her version. If the police officers seriously believed her and recorded the Complainant's story of rape, and acted as responsible and impartial police officers, they would not have handed her back to the accused and Ashneel to be dropped her at her place, especially after the medical finding of forceful sexual intercourse. In my opinion, Complainant's drunkenness, her hostile behaviour and the accused's presence at the police station all prevented her from making a strong case against the accused and recording a statement.
- [13] I am satisfied that her complaint promptly made to police bolstered the prosecution case.
- [14] During the course of Complainant's evidence it was suggested to her that she could have yelled and otherwise objected to what the accused was doing if she was really raped. It was also suggested that she could have complained to the neighbors.
- [15] Complainant said she struggled and pushed him away. Under cross examination she said she yelled. She had failed to mention to police and to court in her evidence -in -chief that she yelled. She gave reasons for her omission. Police officers cannot be expected to cross examine a complainant at the police station the way the lawyers do in Court and she cannot be expected to tell everything in detail unless she is asked. She had come to the police station after an incident of violation of her body and after a sleepless night filled with alcohol.
- [16] Soon after Ashneel and Bittu returned from the liquor shop, she not only complained but also started yelling at accused for what he did to her. Accused confirmed he became a nuisance to neighbours and that behaviour prompted him to ask Ashneel to drop her at her house. She yelled and demanded that she be taken to the police station which Ashneel could not refuse although he is the cousin of the accused. Ashneel confirmed that he drove the Complainant to the police station. I do not see why she should run to neighbours seeking help when accused's own cousin acceded to her demand to go to the police station.

- [17] On the other hand, there is no any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity can respond in variety of different ways.
- [18] Prosecution also relies on doctor Siteri's evidence to prove that sexual intercourse took place without Complainant's consent. Injuries doctor noted on Complainant's face and at the base of her introitus are consistent with forceful sexual intercourse. Doctor said that bruising on her face could have been the possible result of punching or slapping. Doctor's evidence corroborated that of the Complainant.
- [19] Defence called Doctor Gounder to support its version that the injuries to the introitus had been caused by the plastic bearing (marble) that accused had in his penile foreskin area. Doctor Gounder, on a request of the Defence Counsel, had examined the accused two days prior to his evidence and had not observed accused's penis during the period of the incident, in 2013. He was not a gynecologist and he had never examined the Complainant's vagina or the injury to introitus. So he was not in a position to come to a definite medical finding whether the injury was caused by the bearing or not.
- [20] Doctor Siteri on the other hand had examined the vaginal area of the Complainant soon after the incident. She ruled out the possibility of causing an injury to introitus by a marble or bearing planted in the penile foreskin area. She gave reasons for her finding. I am satisfied with the finding of doctor Siteri.
- [21] Complainant does not dispute the facts that:
- a. she was in a relationship with the accused between 2006-2008.
 - b. she readily accepted the invitation by the accused for the meeting on the 13th April 2013.
 - c. she was socializing with the accused and two other friends and drinking alcohol in the accused's house.

- d. she went to the accused's house on her own free will, cooked for him without any form of pressure, consumed alcohol, took a shower at the accused's bathroom and wore one of his t-shirts.

[22] It is suggested on behalf of the accused that the conduct of the Complainant is consistent with the behavior of a woman in need of an intimate sexual relationship and that the alleged sexual intercourse is merely an extension of the past sexual relationship. Prosecution on the other hand argues that Complainant did not deny any of these behaviours because she is a genuine and honest witness, and that she must not be judged on the crucial issue of consent on the basis of the said behaviors and her past relationship with the accused.

[23] There appear to be an assumption behind defence Counsel's questions and closing address that this young woman, because she was behaving in an uninhibited manner during the social gathering, would have been prepared to engage in sexual activity with the accused, especially in the context that he was known to her and there had been a previous relationship between them.

[24] Complainant's past sexual relationship had nothing to do with the issue at hand. She had every right to say 'no' to sexual intercourse despite her past relationship with the accused. She had consumed alcohol and socialized with accused and his friends. From her uninhibited behavior during the social gathering, court is unable to draw the inference that this young woman would have been prepared to engage in sexual activity with the accused.

[25] Defence also took up the position that Complainant wanted to withdraw the allegation because the complaint she made to police was not true. Complainant explained the reason why she wanted to withdraw the complaint. She gave that withdrawal statement to the DPP, because accused was telling everybody that she was raped and it became the talk of the town. She was getting engaged. She knew this story was going to reach her mother-in-law to be. Indians won't like to hear this and she just wanted to get away from all this because it was just doing damages to her. Due to mental pressure she wrote the letter just to shut his mouth.

- [26] Complainant was shown two letters addressed to the DPP. She denied having signed the first statement shown to her and admitted only the second statement dated 11th August 2013. She had refused to sign the first letter because it contained untruth that sexual intercourse happened with her consent. It is clear that accused had drafted the first letter and made an attempt to obtain her signature to show that sexual intercourse was consensual. She had refused to sign it. Reason given for her having signed the 2nd letter is quite probable and did not damage the credibility of her version.
- [27] Accused and his family also forced her to withdraw the letter. She did not report the interference because she did not trust the officers of the Ba Police Station. She also wanted to see to an end to this drama in the expectation of getting married. This piece of evidence, although adduced by the Defence, proved the fact that Complainant had maintained consistency of her version right throughout that sexual intercourse was not consensual.
- [28] Reasons adduced by the accused in respect of the motive of the Complainant to lie to this Court are not tenable and acceptable. In his evidence accused said that Complainant made up this story because she was not happy with him getting married to another woman.
- [29] He had given different reasons to police at the caution interview. He had said there had been no animosity between him and the Complainant still she made up this story because he refused her request to be with him and also her request to take care of his daughter. Accused had got married long before the incident and had a daughter by that marriage. If she was not happy with his marriage with another woman, she could have made up a story like this long before. If he was prepared to satisfy her prurient demands despite his marriage why should she be unhappy and make a serious allegation against him.
- [30] Defence Counsel suggests that her words ‘whatever you did to me is going to come around you’ manifest her real motive to make up a story against the accused. Those words should be understood in the context. At that moment she was talking about accused’s wife who had been convicted.
- [31] Defence took up the position that Complainant continued to have sexual relationship with the accused despite the serious charge she leveled against him. Complainant

flatly denied the accused's version. She admitted meeting him only once and that was the day she gave the letter addressed to the DPP's office.

- [32] Prosecution says that Defence version is not consistent and implausible. It also says that the version of the Defence that the Complainant continued to have sexual relationship with the accused in a hotel in Suva and at the Nausori Yard house were never put to the complainant because it was fabricated.
- [33] Accused is expected to disclose to his Counsel the places and the events of sexual activity that took place after this incident in 2013, if that is the case. Defence Counsel never put the position of the Defence to the Complainant and failed to give an opportunity to meet the stories when she was in the witness box.
- [34] I am unable to comprehend why she wanted to continue this relationship when a serious allegation against him was still pending. The witnesses called to support the Defence version are not independent witnesses. They were working partners of the accused in the same company.
- [35] Ashneel's evidence that he saw them having sexual intercourse in an open room is highly implausible in a context where two other people were also in the house. Ashneel is a drinking partner of the accused and also accused's' cousin although accused did not want to reveal to Court the relationship and the fact that Ashneel was also drinking alcohol that night. Ashneel is a not an independent witness so far as Defence case is concerned.
- [36] Assessors found the accused guilty on the count of Common Assault and found him not guilty of Rape. Their finding on the rape charge is not supported by evidence led in the trial. In coming to their opinion on the Common Assault charge, assessors had believed the Complainant when she said that she was slapped by the accused before the alleged rape incident. It is highly unlikely that after such an assault Complainant had consented to having sexual intercourse with accused.
- [37] I watched Complainant and accused giving evidence in court. I am satisfied that demeanor of the Complainant is consistent with her honesty. Prosecution version is consistent and believable. Prosecution proved the case beyond reasonable doubt. Accused's conduct and demeanor were not consistent with his honesty. Defence failed to create any doubt in the Prosecution case.

[38] For the reasons given, I accept the version of the Prosecution and reject that of the Defence. I reject the unanimous opinion of assessors in respect of the Rape Charge. I agree with their opinion in respect of the second count of Common Assault. I find the accused guilty of both the charges and convict the accused accordingly.



AT LAUTOKA

23rd June, 2016

Aruna Aluthge

Judge

Solicitors for State:

Solicitors for Accused:

Office of the Director of Public Prosecution for State

Siddiq Koya Lawyers for Accused