

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 112 OF 2014

STATE

-v-

SIMIONE TUI

Counsel : Ms. J. Fatiaki for the State
Mr. Jitoko with Ms. Qiowasa for Accused

Date of Summing Up: 11th August, 2016
Date of Judgment: 15th August, 2016

JUDGMENT

1. The Accused Mr. Simone Tui is charged with the following Information and tried before three assessors.

Statement of Offence

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

Particulars of Offence

SIMIONE TUI on the 17th day of August 2014 at Sigatoka in the Western Division, had carnal knowledge with a woman namely **RADILAITA MARAMA** without her consent.

2. Assessors unanimously found the Accused not guilty. Having disagreed with their opinion, I proceed to give my reasons as follows.

3. Prosecution adduced evidence only of the Complainant. At the end of the Prosecution case, Accused elected to give evidence and called Mr. Nagata to support his version.
4. There is no dispute as to the identity of the Accused. Sexual intercourse with the Complainant was also admitted by the Accused.
5. Prosecution says that Accused forced the Complainant and the sexual intercourse took place without complainant's consent. Accused denies the allegation. He says that the sexual intercourse took place with her consent. Conflict is dramatic and turns on one word against the other.
6. Prosecution based its case entirely upon the evidence of the Complainant. I am satisfied that the evidence of the Complainant is truthful and believable. I proceed to give my reasons as follows:
7. Complainant and the Accused were working companions in the River View Nigh Club, former as a bar tender and the latter as security personnel. They were known to each other very well. On the date of the incident, after the night shift was over, they were drinking alcohol with other working companions and friends in room 107 of the Club. This was not the first time they had behaved like this even though they were not permitted by the management to do so.
8. At the crack of the dawn, people started leaving the gathering one by one. They had consumed considerable amount of alcohol. Ultimately, only the Accused and Complainant remained in room 107. Accused asked if she had a boyfriend. She said that her boyfriend was staying in Lautoka. Then he said he 'wanted her'. In reply she said that she didn't like to go out with boys who deal with marijuana.
9. Whilst they were talking, Complainant noticed Accused going to the door to lock the room. As soon as he came back there was a knock on the door. She saw two friends at the door. As soon as they came in, she quickly rushed out without talking to them.

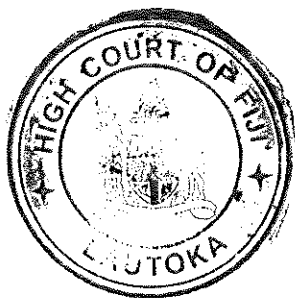
10. She did not return to Room 107 and lied down with Tania for 15 minutes near the bottle shop. Then she packed her clothes and went up in Room 105 to have a bath before heading to Lautoka.
11. Accused did not deny that Complainant left Room 107 after the drinks had finished. Complainant knew, by the time she left the room, that he had 'wanted her' and what he was up to. If she really wanted to have sexual intercourse with him he could have returned to Room 107 where the Accused was. Instead, when she got an opportunity, she rushed out and went down stairs to lie down with Taina for some time. Furthermore, she expressed her displeasure at him and said that she didn't like boys who deal with marijuana.
12. Having realized that she had to go to Lautoka, Complainant went to Room 105 to have a shower. Accused admitted that Complainant had informed him that she was going to have a bath in Room 105 because she had to go to Lautoka.
13. Complainant locked the window and the door before going to the bathroom in Room 105. On her way out from the bathroom, she saw Accused inside the room. She looked around to see the window open. Accused admitted that he entered Room 105 uninvited whilst Complainant was still having a bath in the bathroom. He said that he entered Room 105 from the back door. There is no evidence that there was a back door to the room. It was not put to the Complainant that there was a back door to discredit her version that Accused had entered the room from a window.
14. Complainant told Accused that she was having menstruation. By then, his hands were on her shoulders and he was pushing her down to lie down. She said she was so scared and helpless. She could feel his penis in her. Then she passed out.
15. Accused admitted that, when he asked her about the truthfulness of the relationship, she had told Accused that she was having menses. Then Accused had told her that, if she didn't want him to sell marijuana or bring any other girl into the room, she should show it to him. Then she told him to wait for one week. He accepted that as she was having her menses. This conversation clearly indicates that Complainant was not willing to have a sexual intercourse at that point of time.

16. Furthermore, she had informed the Accused that she had undergone an operation and was under medical advice to refrain from sexual intercourse. Accused admitted in his re-examination that, during sexual intercourse, she had informed him to do it slowly because she had a surgery on her stomach.
17. I am sure Complainant was not willing. She had indicated to Accused that she did not want to have sexual intercourse with him at that point of time.
18. Defence Counsel suggested that Complainant was lecturing Accused to leave marijuana because she really loved him. I am unable to accept Counsel's proposition. Complainant admitted that she advised him to leave marijuana and lectured him to be a good man. She said that she cared about Accused the same way she cared about others. Accused had no reason to believe her advice to be an invitation to have sexual intercourse.
19. There appear to be an assumption behind defence Counsel's questioning that this young woman, because she was having drinks in late night with men in a hotel room, would have been prepared to engage in sexual activity with the Accused. That is only an assumption on which the assessors would have liked to capitalised on. However, that assumption is not supported by evidence led in this case.
20. Complainant had gone to the Police Station with Ana and made a complaint within hours. She has maintained her position and been consistent in her version.
21. 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. In his closing argument Defence Counsel submitted that her failure to yell or protest, demonstrates that she was not telling the truth.
22. Complainant said loud music was on in the club. She had been in a closed room with a well-built man. She said she was helpless. She then passed out.

23. There is no 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 respond in variety of different ways.
24. Defence took up the position that Complainant made up this story and went to the police station at the instigation of Ana because she (Ana) did not like to see her lesbian relationship with Complainant broken by the intervention of the Accused. Complainant flatly denied that she was in a lesbian relationship with Ana. Defence witness Semi Nagata's evidence that he had seen her in such a relationship is unbelievable.
25. Accused admitted that he had a good relationship with the Complainant before this incident and there was no apparent reason to fabricate a story. I am convinced Complainant did not fabricate this allegation against the Accused.
26. Evidence of the Accused is not credible and plausible. According to him, he has had sexual intercourse with the Complainant for a period of one hour. The session that was filled with various forms positions of sexual activities included licking of Complainant's vagina during her menstruation. Accused had later realized that having sexual intercourse with a woman during menstruation is a sin according to the Bible.
27. Complainant was never asked about various positions and forms of sexual activities that are alleged to have taken place during the whole session. If the Accused had adequately instructed his Counsel about these important factual scenarios he (Counsel) seemed quite capable to put Accused's version to the Complainant during cross examination.
28. Defence witness Semi Nagata's evidence is totally unacceptable and unbelievable. He is a working companion of the Accused. According to him, he had been watching the 'erotic drama' through the window for nearly an hour. He spoke as if he was the 'peeping tom' in this night club. He had even watched intimate lesbian relationships happening in the Club amongst girls working for the Club. In that particular morning, he had set off and was home bound when he quickly realized the importance of seeing the Complainant and had come back to the Club to witness this 'drama'.

29. He was the one who informed the Accused about the allegation that the Complainant had lodged with police. He told Accused to go straight to the police station and tell the truth. However, he had not accompanied the Accused to police station to give a statement about the 'truth' he had witnessed although he thought it important to tell the truth in Court.
30. Witness Nagata's evidence is not consistent with the evidence of the Accused. According to the Accused and also according to the Complainant, she was wearing only a towel. However, he saw the Complainant going down taking off her trousers.
31. According to Nagata's evidence, Complainant and Accused had gone to the single bed to perform this 'erotic drama'. According to the Accused's evidence, Complainant preferred the single bed as it was not visible to outsiders. If the small bed was not visible to outsiders, how the witness was able to watch the activities that took place on it so clearly from the balcony?
32. I am sure Nagata came forward to give evidence not to tell the truth but to protect the Accused, his close associate.
33. I watched the Complainant and Accused giving evidence in Court. Complainant was straightforward and not evasive. Complainant's demeanor is consistent with her honesty.
34. Accused did not give evidence confidently. He was murmuring. Accused's conduct and demeanor were not consistent with his honesty.
35. For the reasons given, I accept the version of the Prosecution and reject that of the Defence. Defence failed to create any doubt in the Prosecution case. Prosecution proved the case beyond reasonable doubt.

36. I reject the unanimous opinion of the assessors. I find the Accused guilty of Rape and convict the Accused accordingly.



AT LAUTOKA
15th August, 2016



Aruna Aluthge
Judge

Solicitors for State:
Solicitors for Accused:

Office of the Director of Public Prosecution for State
Office of Messrs Qarcia for the Accused