

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 271 of 2015

STATE

v.

SAMISONI TIKOINASAU TABUA

Counsel: Ms. K. Semisi for State

Hearing: 2nd and 3rd October 2017

Summing Up: 4th October 2017

Judgment: 5th October 2017

JUDGMENT

1. The Accused is being charged with two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

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

Particulars of Offence

SAMISONI TIKOINASAU TABUA on the 7th day of August 2015, at Suva, in the Central Division, had carnal knowledge of **MILIKA TUIVANUAVOU** without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SAMISONI TIKOINASAU TABUA on the 7th day of August 2015, at Suva, in the Central Division, on an occasion other than the First Count had carnal knowledge of **MILIKA TUIVANUAVOU** without her consent.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SAMISONI TIKOINASAU TABUA on the 7th day of August 2015, at Suva, in the Central Division, unlawfully and indecently assaulted **MILIKA TUIVANUAVOU**.

2. Consequent to the plea of not guilty entered by the accused, the matter proceeded to hearing. The hearing was set down on the 3rd of October 2017. However, the accused had chosen not to attend to the hearing. Having satisfied that the accused and his counsel were properly informed and aware of the hearing, the court proceeded the hearing in the absence of the accused. The prosecution presented the evidence of the complainant. Subsequently, the learned counsel for the prosecution made her closing address, which was followed by the summing up.

3. The three assessors returned with mixed opinions. Two assessors in their respective opinions found the accused guilty for the first count of Rape, while one assessor found him not guilty. Two assessors in their respective opinions found the accused is not guilty for the second count of Rape, while one assessor found him guilty. In respect of the third count of Sexual Assault, two assessors in their opinions found the accused not guilty and one assessor found him guilty.
4. Having carefully considered the evidence adduced during the hearing, the closing address of the prosecution, the summing up and the opinions of the three assessors, I now proceed to pronounce the judgment as follows.
5. The prosecution alleges that the accused met the complainant at Suva bus station on the 7th of August 2015. They had their lunch together. During the lunch, the accused had suggested the complainant to go to Peninsula Hotel for them to chill out, for which the complainant agreed. According to her evidence, the complainant had thought that they will go and have a drink either at the poolside or in the bar. However, the accused had taken the complainant into a room in the hotel. The complainant had neither resisted nor refused to go into the room. There is no evidence to suggest that the accused had forced or threatened her to go into the room. The prosecution alleges that the accused had sexual intercourse with the complainant twice without the consent of the complainant. While doing it, he had indecently and unlawfully touched the breast of the complainant.
6. The accused has admitted in the agreed fact that he went to the hotel room with the complainant and had sexual intercourse with her. Accordingly, the main disputed issue in this matter is whether the complainant had given her consent to the accused to insert his penis into her vagina.
7. The Fiji Court of Appeal in **Gounder v State [2015] FJCA 1; AAU0077.2011 (2 January 2015)** found that the conduct of the complainant and the accused before and after the alleged sexual intercourse need to be considered in order to determine the issue of consent for the alleged sexual intercourse. In Gounder, the appellant and the complainant had met at the mini bus station at Lautoka and went into a motel. They

both had gone into a room, where this alleged sexual intercourse took place. The complainant had not sought any help or assistance from anyone in the hotel. She had not raised alarm to anyone. After the incident she had gone out of the hotel. Basnayake JA in **Gounder (supra)** held that:

“Should not the court consider the evidence relating to the conduct of Emma and the appellant before and after the act of sexual intercourse? Emma's meeting with the appellant was on a pre-arrangement. After the sexual act Emma left Lautoka to return to Nadi by bus. The appellant accompanied Emma to the bus stand and paid her bus fare. On reaching home, Emma says that she met a neighbour by the name of Ansude to whom she complained of the rape. However, no such person was called to give evidence at least to show the credibility of Emma.”

8. Having extensively discussed the evidence given by the complainant, Basnayake JA concluded that:

“At the end, it is only the evidence of Emma for the prosecution as against the evidence of the appellant for the defence. Other than that there is no other evidence. These events have to be coupled with the consistent evidence of the appellant as against Emma's evidence which seems shaky. In the light of the above circumstances, could one believe Emma when she states that she was raped? It is very important for the prosecution to prove the truth of their only witness. None of the above matters were placed before the Assessors, for their consideration. All these matters, if properly considered, would have been favourable to the appellant. If Assessors were properly directed, the verdict would have been favourable to the appellant, and the proper verdict, a verdict of "not guilty" for rape.”

9. According to the evidence given by the complainant, she went into the room on her own volition, though she was nervous. Once they entered into the room, the

complainant had sat on the small bed. The accused sat on a chair beside her bed. He then tried to kiss her, which she avoided by ducking her face and said no to the accused. He then went to the double bed and asked her to come to his bed. When she refused to do so, the accused had told her not to worry and nothing will happen. She then went to his bed.

10. After the first sexual intercourse, she had an opportunity to flee from the room, when the accused went into the bathroom to get a shower. She did not do such as she felt ashamed and embarrassed to walk out from a hotel in the day time. However, she had no issue when she entered into the hotel with a man she barely knew in the day time. The complainant further said that she actually did not know that she was raped by the accused on that day, until she was told by her coach that she was raped. She had related this matter to her coach few days after this incident. However, she had met a friend who is a doctor to get her help to obtain emergency pills to prevent getting pregnant on the same day. Obviously she had to tell her friend that she had unprotected sexual intercourse with a man in order to get this friend's assistance to obtain emergency pills. If she related this matter to a Doctor as she claimed, the Doctor would have definitely advised her that she was actually raped by a man. Neither the doctor nor the coach were called to give evidence.
11. The complainant was twenty five years old at that time. She has represented Fiji in international level in sports. Obviously she has travelled overseas in order to take part in those international sports event. That exposure has undoubtedly provided her more experience and maturity not only in sports, but also in life. It is improbable to belief that a person who has such exposure and experience was not aware that she was raped on that day. Could it possible that the complainant still go to the same bed of the man, few minutes earlier who had tried to kiss her, believing that he would not make any sexual advancement towards her. Why did not she feel ashamed and embarrassed to walk into a hotel in day time with a man whom she met only on the same day, if she claims that she felt embarrassed and ashamed to walk out from a hotel in day time?
12. In view of these reasons, it is unsafe to accept the evidence given by the complainant as true and credible. I find number of reasonable doubts in her evidence given in the court.

I accordingly hold that prosecution has failed to prove beyond reasonable doubt that the complainant had not given her consent to the accused to have these two alleged sexual intercourse.

13. I accordingly find cogent reasons to disregard the majority opinion of not guilty given by the assessors in respect of the first count of Rape. Moreover, I do not find any cogent reasons to disregard the majority opinion of not guilty given by the assessors for the second count of Rape and third count of Sexual Assault.
14. In conclusion, I hold that the accused is not guilty for each of these two counts of Rape, contrary to Section 207(1) and (2) (a) of the Crimes Act and one count of Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act and acquit him from the same accordingly.
15. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
5th October 2017

Solicitor
Office of the Director of Public Prosecutions for the State