

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 425 of 2016

[CRIMINAL JURISDICTION]

STATE

V

MOHAMMED ZUBAIR

Counsel : Ms. S. Serukai for State
Mr. J. Reddy for Accused

Hearing on : 20th - 22nd November 2017

Summing up on : 23rd November 2017

Judgment on : 23rd November 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KKL".)

JUDGMENT

1. The accused was charged with the following offences;

FIRST COUNT

Statement of Offence

RAPE: contrary to section 207(1) and 2(a) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED ZUBAIR on the 13th day of February 2016 in Waila, Nausori, in the Central Division had carnal knowledge of Krishali Kareena Lal without her consent.

SECOND COUNT

Statement of Offence

ATTEMPT TO COMMIT RAPE: contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

MOHAMMED ZUBAIR on the 30th day of April 2016, in Waila Nausori in the Central Division attempted to have carnal knowledge of Krishali Kareena Lal without her consent.

THIRD COUNT

Statement of Offence

INDECENT ASSAULT: contrary to section 212 of the Crimes Act of 2009.

Particulars of Offence

MOHAMMED ZUBAIR on the 30th day of April 2016 at Waila, Nausori in the Central Division unlawfully and indecently assaulted Krishali Kareena Lal.

2. After the conclusion of the prosecution case a finding of not guilty was recorded on the second count as the prosecution conceded that there was no evidence on each and every element of the relevant offence. Therefore, the trial continued only on the first count and the third count.
3. The assessors have returned with the unanimous opinion that the accused is guilty as charged for the first count and the third count.
4. I direct myself in accordance with the summing up delivered to the assessors this morning and the evidence adduced during the trial.
5. The prosecution led the evidence of four witnesses. The accused gave evidence and called four witnesses in his defence.
6. The complainant was 15 years old when she gave evidence and given that her date of birth is 25/07/02, the alleged incidents relevant to the first and the third counts have taken place before her 14th birthday. The complaint to the police

had been made on 16/09/16 and this was after the complainant shared what happened to her with her friend in confidence. This friend who was called by the defence as their first witness persuaded the complainant to inform their form teacher and the actions taken by the form teacher resulted in the matter being reported to the police.

7. There was an issue on whether the date the alleged incident took place was 13/02/16 or 14/02/16. The complainant's evidence was clear that it happened on the day the accused's sister's wedding took place. The complainant said that the date is 13/02/16 but the defence produced the marriage certificate of the accused's sister where it is stated that the date of marriage is 14/02/16. Then the evidence of the third prosecution witness was that the complainant had told her that the first incident took place in December 2015. However, it was pertinent to note that in her evidence, the third prosecution witness also said that according to the complainant the first incident took place when the accused ("Zubair") came to her place because of the cake for the accused's sister's wedding that was kept in their (complainant's) fridge.
8. The wife of the accused admitted that the cake she prepared for the accused's sister's engagement was kept inside the fridge in the complainant's house. According to her evidence considered with all the evidence led in this case, I find that it was established that this cake was there in the fridge in the complainant's house around 6.30am on the day the engagement of the accused's sister was held at the accused's house. The photographs tendered by the defence also confirmed that the complainant was present during the function on the said engagement day and the complainant said that the incident relevant to the first count took place on the same day.
9. Even though the complainant said that 13/02/16 was the date of the incident and also the date of offence in the first count is 13/02/16, the fact that the date of offence as revealed in the evidence is 14/02/16 in my view is not fatal in proving the offence charged on the first count. Given the fact that the

complainant had clearly stated from the beginning that the incident took place on the day of the accused's sister's engagement and the reference to the cake prepared for the said engagement, I also find that no prejudice is caused to the accused in his defence with regard to this variance.

10. Then the question is what took place on day of the accused's sister's engagement that was held in February 2016. As pointed out by the defence, there were a number of inconsistencies in the evidence of the complainant which I have highlighted in my summing up.
11. The most crucial inconsistency concerning the first count in my view was the previous statements made by the complainant to the third prosecution witness to the effect that there was no penetration during the first incident. According to the evidence, the complainant had relayed her story to her form teacher, the third prosecution witness on 16/09/16 not as a formal complaint, but just to relieve her pressure after she was persuaded by her friend. Moreover, the third prosecution witness gives her statement to the police on 28/09/16, about 12 days after having the relevant conversation with the complainant. What the third prosecution witness told the police when she gave her statement was what she perceived when she had the conversation with the complainant 12 days back and what she could remember on the day she gave her statement. Considering all the evidence, I am inclined to hold the view that the inconsistency between the evidence given by the complainant and the evidence of the third prosecution witness concerning the incident relevant to the first count does not affect the credibility and the reliability of the evidence given by the complainant in relation to the first count.
12. According to PE 1, and the evidence of the fourth prosecution witness, the complainant had told her that the accused ("Zuber") tried to insert his penis in her vagina but was unsuccessful. I have serious concerns about the role played by the fourth prosecution witness, the doctor who examined the complainant in this case. Where the complainant was referred to her to examine in relation to

vaginal injuries on a claim that the complainant had been raped, the fourth prosecution witness had overlooked to carry out the most crucial part of the examination of an alleged rape victim, that is, to examine the vagina. In my view, the said witness simply attempted to cover up that mistake by saying "*I am sure it (hymen) was still there but I did not probe further into the vagina*". In my view, she contradicted her own evidence by saying "*we don't check the vagina unless it is not there, unless she is sexually active*" as the complainant was in fact referred based on a complaint of rape. Therefore, I find that the evidence of the fourth prosecution witness given in this case was not reliable. Accordingly, I find that the credibility and the reliability of the evidence given by the complainant in relation to the first count is not affected by what was written by the fourth prosecution witness at D(10) in PE 1.

13. The first defence witness, the friend with whom the complainant came out with her story first, said in her evidence that the complainant did not give details of the first incident. Therefore, in my view, this witness' evidence also does not affect the credibility of the complainant.
14. There were inconsistencies pointed out by the defence between the evidence of the complainant and what was recorded in the statement of the second prosecution witness, the mother of the complainant. The complainant's mother's statement was recorded on 26/09/16 and she was not an eye witness to what happened between the complainant and the accused. As I have stated in relation to the third prosecution witness, her version of what took place between the complainant and the accused is undoubtedly affected by what she perceived when she had the conversation with the complainant and what she could remember when she gave her statement subsequently.
15. The defence also pointed out inconsistencies between the police statement of the complainant and her evidence given in court. It is to be noted that the third defence witness who recorded the complainant's statement spoke to the complainant in Hindustani but wrote the statement in English. Therefore, in my

view, it can be reasonably expected that there would be additions and omissions as a result of the translation. The officer would understand what the complainant says based on her intelligence, experience and knowledge of the language conversed. When she translates to a different language, that translation is affected by the aforementioned factors and this time the knowledge in the language translated to would also have an influence.

16. Even if the statement is given for the witness to read, the witness' understanding on the translation may not be the same. It is not reasonable to expect especially from a child witness to correct when a word like 'beside' is written instead of 'inside'. Further, at the time of signing the statement many factors would dominate the mind of, again especially a child witness, that would prevent her from highlighting any issues in her statement including fear and respect towards the police officer, fear due to the atmosphere in the police station, the psychological trauma due to coming out with the horrific experience, etc.
17. Considering the demeanour and the deportment of the accused when he gave evidence and what he said in his evidence, I do not find him as a credible and reliable witness. In my view the evidence of the fourth defence witness who was close to the accused's family that the accused was with him on 14/02/16 from 5.30am to 10.30am is not reliable. The fifth defence witness, the wife of the accused has a clear interest on the outcome of this case.
18. All in all, I believe the evidence given by the complainant that the accused penetrated her vagina without her consent on the day the engagement of the accused's sister was held, without her consent. Given her evidence, I am also satisfied beyond reasonable doubt that the accused knew that the complainant was not consenting. This evidence proves the elements of the first count beyond reasonable doubt.

19. Moreover, I believe the complainant's evidence that the accused pushed her from her shoulders back into the bathroom, and pulled her tights down when she was coming out of the 'outside bathroom' at the accused's place on 30/04/16. This evidence proves the elements of the third count beyond reasonable doubt.

20. In the circumstances, I agree with the unanimous opinion of the assessors that the accused is guilty of the first count and the third count as charged. The accused is convicted accordingly.



Vinsent S. Perera
JUDGE

Solicitors for the State
Solicitor for the Accused

: Office of the Director of Public Prosecutions, Suva.
: Jiten Reddy Lawyers, Nakasi.