

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 146 of 2016

BETWEEN : STATE

AND : RISHI LAL

Counsel : Mr Tueneku for the State
Mr A. Dayal for the Accused

Dates of Hearing : 29, 30 April and 01 May 2019

Closing Speeches : 01 May 2019

Date of Summing up: 02 May 2019

Date of Judgment : 09 May 2019

JUDGMENT

1. The Accused is indicted for one count of rape contrary to section 207(1) and section 207(2)(a) of the Crimes Act No 44 of 2009. The particulars of the offence are as follows;

“Rishi Lal between the 4th day of December, 2015 and the 5th day of December 2015 at Namau, Ba in the Western Division, had

carnal knowledge of Rovina Lata without the said Rovina Lata's consent".

2. The Accused pleaded not guilty to the Information filed by the Director of Public Prosecutions. The prosecution called four witnesses and after the closure of the prosecution case the Accused gave evidence. No other witnesses were called for the defence.
3. Subsequently, I have summed up the case to the assessors and after about 20 minutes of deliberation the assessors unanimously found the Accused guilty for the offence of rape.
4. I have directed the assessors on law and they were given directions on how they must assess credibility of witnesses, how to evaluate evidence and directions on proof of the elements of the offence, among other things.
5. Having directed myself in accordance with the summing up I will now review the evidence adduced in this case to pronounce my judgement.
6. The only contested ingredient in this trial was the issue of consent. The Accused admitted that he had sexual intercourse with the complainant on 4 December 2015 at her house in Namau, Ba. His argument was that he had sexual intercourse with the complainant with her consent.
7. I will now consider whether the prosecution proved beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis without her consent.
8. The complainant had been at home with her two children aged 9 and 4 years on the day of the alleged incident. The Accused had come to her place in the evening around 6pm to 7 pm. He had then started having grog while sitting at the door of the complainant's sitting room. The alleged offence had taken place around midnight after the Accused finished drinking grog.

9. The complainant, Rovina Lata said that she fell off to sleep on the mattress with her two children. When she woke up around midnight the Accused had finished his grog and she had asked him to leave as she wanted to close the door and sleep. The complainant said that the Accused then told her that she did not keep her promise. When she had asked him about the promise the Accused had held her hand and had dragged her. She said that she told him to leave. She said then the Accused held her hand and told her "come *are yaaar*". She said the Accused took her to her mother in law's room. The complainant further said that the Accused pushed her to the bed and made her sit on the bed. She said that she did not wake up her kids as she thought that they would be afraid.
10. However, she later admitted during the cross examination that he did not push her forcefully, but he did it in such a way to make her to sit on the bed. Further she admitted that she said in her police statement that the Accused made her lie on the bed and she did not mention anything about pushing.
11. The complainant said that the Accused took off his clothes and pulled her skirt up. She said that she tried to stop him with her hands. She also said that when she tried to stand up the Accused pushed her down with his body. She said that she kept on saying no. The complainant said then the Accused had sex with her. She said that the Accused inserted his penis into her vagina. She said that she tried to stop him and said no to him. She said that the Accused did not listen to her and he kept on doing it.
12. The complainant said that she could not shout as she thought her children will be afraid. She said that her neighbours house is far away and they would not have heard her shouting. She also said that she was scared that her children could be hurt. The complainant said that after the alleged incident the Accused went outside and started smoking. However, she did not say as to how she saw him smoking when he went outside. Then she said that she heard him leaving

on horseback. During the cross examination she admitted that she had a bath after the incident and went to sleep.

13. According to the complainant after about one month she had visited her brother on 06 January 2016 and had reported the matter to her brothers and the sister in law. However, they did not give evidence in this case. Later she had reported the matter to the Police.

14. The complainant said that her husband was away for three to four days at the time the alleged incident occurred. However, during cross examination, she said that the Accused was waiting for her husband. When she was asked whether she told the Accused that her husband is not coming home, she said that she told him that. She said that she mentioned it in her statement. She was further cross examined on this point as follows;

Q: Now witness when you gave this Police statement did the Police officer writing your statement read out back to you?

A: They did read, they have read a little bit then I stopped them.

Q: Why did you stop them?

A: I asked them to read it later then after that I didn't ask.

15. Under cross examination the complainant admitted that the Accused told her the words "*Are yaar chalo*" in Hindi. When she was asked as to why she did not mention that in her statement she responded as follows;

" One Fijian officer took my statement, lady police officer. She took my statement. May be she didn't understand. May be she didn't understand the meaning of "*Are yaar*".

16. When she was asked as to why she has not stated to the Police about the Accused dragging her, she said "I was scared I thought that when I will go to the Station I will report all this to the Police officers. At that time, I was not in a real state of mind and I also thought that I would give them full information

of what has happened, and I was also thinking all this while I want to commit suicide”.

17. The complainant also said that she gave herself to him as she was scared. She said that she stopped him. She said that the only thing she did not do was yelling as she did not want to wake up the children and scare them. When the complainant was asked as to why she could not run away she responded as follows;

Q: Now witness when my client was getting undressed, why didn't you run away?

A: I tried to run away just because it was dark outside, I didn't know where to run to.

Q: Witness you could have run anywhere in the dark and hid yourself, would you agree?

A: I was told that it is a haunted place and there is a slope nearby if I would have run I would have just fallen down and there are no trees where I could have gone and hid myself. And I am also thinking what if somebody else outside and if I could have run he could have caught me.

18. During the cross examination the complainant admitted that she has stated in her statement that she reported the incident to the Women Crisis Centre on 07 December 2015. She further responded as follows;

Q: Now witness could you tell the court why after visiting Women Crisis Centre on 07th December 2015 regarding the alleged incident why you did not report to the Police until 11th January 2016?

A: I wanted to speak to my parents and I wanted to hear what they wanted to say then after talking to them I wanted to go to Police.

Q: Witness didn't the Women Crisis Centre officers advice you to go to the Police right away?

A: I don't recall whether they had asked me to go and report or not. The statement which I had given to the Police they have not written full statement.

Q: Now witness I put it to you that you did not make the complaint that's my instruction from my client, that you only make the complaint when your family pressured you to make the complaint against my client? Yes or no witness?

A: My parents have told me to go and report to the Police and when the Police officers approached to my brother's place then my brother told them that they don't know anything about that.

19. The complainant was asked the same question again whether she made the complaint due to the pressure from the family as she did not answer the question properly. Then she responded "yes". Then she was asked again;

Q: And your family members who had pressured you were your husband?

A: Yes, he said that I will accompany you to the Police Station.

20. Also, it did not transpire during the examination in chief that she reported the incident to her parents. At the end of the cross examination the complainant said in contrary to what she said previously that she first complained about the incident to her husband when he returned home on the following Monday. Husband of the complainant contradicted her evidence by saying that she only reported about the incident to him at her brothers place after about one month on the day before she reported it to the Police. He denied that the complainant told him about the incident when he returned home on Monday.

21. Apart from the lateness of making the complaint, she contradicted herself by later saying that she complained to her husband and to the Women Crisis Centre at the first available opportunity. I am of the opinion that the complainants attempt to cover up the lateness has diminished the credibility of her evidence.

22. Although the complainant gave evidence that she had suicidal thoughts after the incident and she reported the incident to the Women Crisis Centre, the witness from Women Crisis Centre, who had been counselling the complainant even prior to the alleged incident did not confirm her evidence. Instead Poonam Kumari said that although the complainant came for counselling on 8 December 2015 she never complained about the alleged incident. She said that the complainant only told her that the Accused came to her place and insisted to have sex with her. The witness also said that the complainant did not want to go to the Police station on 8 December 2015. The witness did not confirm that the complainant had suicidal thoughts during that time.
23. It is very clear that corroboration is not required in sexual offences. However, when the other witnesses contradict the evidence given by the complainant the court must evaluate such evidence cautiously. In this case not only the complainant gave inconsistent evidence, but the other witnesses contradicted her evidence on salient points as well.
24. I have observed the demeanour of the complainant when she gave evidence. The complainant was smiling when she gave evidence about penetration. She did not look very confident and convincing when she gave evidence. At times she answered questions without much thought and just for the sake of responding with some answer. Further I have observed that at times she gave evasive answers. She was not forthright in giving evidence. Under cross examination she gave inconsistent and contradictory answers.
25. The Accused is indicted for a very serious offence. It is the duty of the prosecution to prove the offence against the Accused beyond reasonable doubt. The only contested issue in this case was consent. The Accused gave evidence that the complainant consented to have sexual intercourse. Therefore, the court must be satisfied beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis without her consent.

26. Undoubtedly it is not safe to convict a person on inconsistent and unreliable evidence. The credibility of the complainant is questionable as she gave inconsistent and contradictory evidence. Therefore, a reasonable doubt is created regarding the element of consent. I am not satisfied that the prosecution proved the offence against the Accused beyond reasonable doubt.
27. Although I have given directions on legal principles and how to evaluate evidence, the assessors seem to have neglected those directions in arriving at their opinions. In view of the strength of the evidence presented in this case I have sufficient reasons to disagree with the unanimous opinion of the assessors.
28. In the circumstances I decide that the prosecution failed to prove beyond reasonable doubt that the Accused is guilty of the offence of rape.
29. Accordingly, I acquit the Accused.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Mr A. Dayal