

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 286 of 2016**

**STATE**

**V**

**VINEETA DEVI**

**ASHISH PRASAD**

**Counsel** : Mr. Yogesh Prasad with Mr. Setefano Komaibaba and Ms. Sheenal Swastika for the State  
Mr. Mohammed Yunus for the Accused

**Dates of Trial** : 17-19 June 2019

**Summing Up** : 20 June 2019

**Judgment** : 3 July 2019

**[The First Accused, Vineeta Devi, had pleaded guilty to Count One in the Consolidated Information and was sentenced by this Court on 7 August 2018. Therefore, whatever reference is made in this case to an accused would be a reference to the Second Accused, Ashish Prasad, who is charged with Count Two in the Consolidated Information].**

## **JUDGMENT**

**[1]** According to the Information filed by the Director of Public Prosecutions (DPP), the accused, Ashish Prasad, was charged along with Vineeta Devi with the following offences:

### **COUNT ONE**

#### ***Statement of Offence***

**ABORTION:** Contrary to Section 234 (1) and (4) (a) (b) of the Crimes Act 2009.

***Particulars of Offence***

**VINEETA DEVI**, between the 20<sup>th</sup> day of July 2016 to the 23<sup>rd</sup> day of July 2016, at Nausori in the Eastern Division, unlawfully performed an abortion on **PAYAL PRITIKA DEVI**.

**COUNT TWO**

***Statement of Offence***

**ABORTION**: Contrary to Section 234 (1) and (4) (b) of the Crimes Act 2009.

***Particulars of Offence***

**ASHISH PRASAD**, between the 20<sup>th</sup> day of July 2016 to the 23<sup>rd</sup> day of July 2016, at Nausori in the Central Division, committed certain acts with intent to procure the abortion of **PAYAL PRITIKA DEVI**.

- [2] The accused pleaded not guilty to the charge against him and the ensuing trial was held over 3 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the charge of Abortion (Procuring an Abortion) (Count Two).
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Sections 234 (1) and 234 (4) (b) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] In terms of Section 234 (1) of the Crimes Act, *“A person commits an indictable offence if he or she unlawfully performs an abortion”*.
- [7] Section 234 (4) provides that:

*(4) A reference in this section to performing an abortion includes a reference to—*

*(a) attempting to perform an abortion; and*

*(b) doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant.*

**[8]** Accordingly, I directed the Assessors that in order for the prosecution to prove the charge of Abortion against the accused, the prosecution must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) During the specified time period (in this case between the 20 July 2016 to the 23 July 2016);
- (iii) At Nausori, in the Central Division;
- (iv) Committed certain acts;
- (v) With the intention to procure the abortion of the complainant, Payal Pritika Devi.

**[9]** The above individual elements were further elaborated upon in my summing up.

**[10]** The prosecution, in support of their case, called the complainant, Payal Pritika Devi. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit **PE1** - A statement made by the complainant, on 28 August 2016.

**[11]** The accused opted to remain silent.

**[12]** In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:

1. Ashish Prasad is a businessman from Nalele, Taveuni.
2. The complainant in this case is Payal Pritika Devi.
3. The complainant was in a de-facto relationship with Ashish Prasad in the year of 2015.
4. Ashish Prasad was interviewed at Nausori Police Station on 3 August 2016.

- [13] Since the prosecution and the defence have consented to treat the above facts as “*Amitted Facts*” without placing necessary evidence to prove them the above facts are proved beyond reasonable doubt.
- [14] I have summarized the evidence of the complainant, Payal Pritika Devi, who was the sole prosecution witness, in my summing up.
- [15] The complainant was in a de-facto relationship with Ashish Prasad in the year of 2015. She testified that in June 2016, she found out that she was pregnant, with the accused’s baby. Because she was vomiting she went to the hospital and a scan was done. She was told that she was 2 months and 4 days pregnant. The accused had accompanied her to the hospital.
- [16] After finding out that the complainant was pregnant, the accused had told his wife (second wife) about her pregnancy. Then the accused had given the complainant some type of Fijian medicine made from some leaves and asked her to take the medicine saying her vomiting will stop. The witness had drunk the medicine. However, nothing had happened and she continued vomiting.
- [17] The complainant testified that the accused had not been very happy. He had called his wife and told her that the complainant had drunk the medicine (but that nothing had happened). Thereafter, the complainant went to the hospital and got an injection to stop the vomiting.
- [18] The witness testified that on 19 July 2016, she and the accused came to Suva. They had gone to Nausori as the accused had a case in the Nausori Courts. Thereafter, the accused had taken the complainant to his brother, Ajit Singh’s place at Naduru. She testified that they had stayed at Ajit’s place for 3 to 4 days.
- [19] Thereafter, the complainant testified as to how she was taken to Vineeta Devi’s (The First Accused’s) place. This she said was on the first day when the complainant and the accused came to Suva (The complainant said that same night). Vineeta Devi had told the complainant to remove her undergarments, and asked her to lie down and massaged her stomach. While massaging her stomach and pushing her baby bag downwards, Vineeta Devi had been putting cassava sticks into her private part so that her baby bag got damaged. It had been very painful. In addition, the complainant testified that Vineeta had stepped on her back with her feet so that her baby dies. All this had gone on for about an hour.
- [20] Thereafter, the complainant testified to what transpired the next day (20 July 2016). She said she recalled that date. On this day, Vineeta Devi had come to Ajit’s place at Naduru. Ajit, his wife, their two children, Ashish Prasad and the complainant had been present at the time. The complainant said “That’s the day Ashish Prasad gave \$200 to the lady for the massage.” She said she had seen four \$50 notes been given to Vineeta Devi by

the accused. The complainant said this money transaction had taken place between 10.30 a. m. and 12.00 noon on that day.

- [21] The witness testified that on this day too, Vineeta Devi had repeated all that (she had done the day before). She had massaged her stomach, poked the sticks into her private part and stepped on her back.
- [22] The complainant testified that she clearly saw Ashish Prasad give Vineeta Devi the money. "I was there and I saw." She testified as to where exactly she was at the time she saw the accused give the money to Vineeta. Later, the witness drew a rough sketch of the house so as to depict where the transaction took place.
- [23] The accused is totally denying that he gave any money to Vineeta Devi to procure the abortion on the complainant. It has been suggested by the Defence that it is the complainant herself who had wanted the abortion done on her and that she had given the \$200.00 to Vineeta Devi for that purpose. The Defence is also taking up the position that the complainant is not a reliable witness and her evidence cannot be believed as she has contradicted the dates on which the alleged incidents took place.
- [24] I concede that there has been some contradiction with regard to the dates of the alleged incidents as narrated by the complainant.
- [25] In cross examination, the complainant agreed that she and the accused had boarded the boat to Suva at 3.00 p.m. on 19 July 2016 from Taveuni, and arrived at the Suva jetty around 7.00 in the morning on 20 July 2016.
- [26] After reaching Suva, the accused had attended his family case at the Nausori Court. The accused had made the complainant sit at a tailoring shop while he attended court. At the time the accused had also given her some money to do shopping in Nausori town. The accused's court case had finished around mid-day and she and the accused had stayed in Nausori town for one and half hours. Thereafter, they returned to Ajit's place at Naduru.
- [27] The complainant said that around 7.30 p.m. that same day she had been taken to Vineeta Devi's house, while the accused had remained at Ajit's place.
- [28] The defence position is that on 20 July 2016, Ashish Prasad was attending Nausori Court and was not at Ajit's house between 10.30 a.m. and 12.00 noon. Further that at the time the complainant was waiting for the accused at Nausori town. Therefore, the accused states that the money transaction could not have taken place on 20 July 2016, as alleged by the complainant.

[29] However, in cross examination the complainant clarified as follows:

*“I was in town the day we came to Suva when Ashish Prasad went to attend his Court. And on the same evening, I was taken to that lady’s place for the stomach massage. On the next day, the lady came and she was given the money and Ashish Prasad told her that he was going to attend Court and they have planned to return to Taveuni. Ashish Prasad’s wife came to meet her at Ajit’s place that she is returning with Ashish to Taveuni. And then I was shouting and crying and I was taken to Vineeta Devi’s place.”*

[30] From this clarification it is clear that the complainant and the accused arrived in Suva on 20 July 2016. That same evening she had been taken to Vineeta Devi’s house. It is on the next day, which was the 21 July 2016 that Vineeta Devi came to meet her at Ajit’s place. That is the day on which the money had been given to Vineeta Devi by the accused.

[31] In any event, Section 182 (3) of the Criminal Procedure Act provides that:

*“(3) Variance between the charge and the evidence produced in support of it with respect to —*

*(a) the date or time at which the alleged offence was committed; or*

*(b) the description, value or ownership of any property or thing the subject of the charge —*

*is not material and the charge need not be amended for such variation.”*

[32] I am aware that this is a provision that is directly applicable to proceedings in the Magistrate’s Courts. However, in the absence of any similar provisions for proceedings in the High Court, this provision maybe made applicable for proceedings before the High Court as well.

[33] It is also important to note that the term "Information" has been defined to mean “a written charge preferred by the State against an accused person for the purpose of the trial of the person in the High Court”. And the term “charge” has been defined to mean “An official notification to a person that the person is accused of committing an offence and that the person is required to appear in the designated court to answer the charge”.

[34] The Assessors have found the evidence of prosecution as truthful and reliable as they have by a unanimous decision found the accused guilty of the charge. Therefore, it is clear that they have rejected the version put forward by the accused.

[35] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinions of the Assessors in respect of the charge.

[36] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Abortion, contrary to Section 234 (1) and (4) (b) of the Crimes Act, with which the accused is charged.

[37] In the circumstances, I find the accused guilty of the charge of Abortion.

[38] Accordingly, I convict the accused of Abortion, as charged.



A handwritten signature in black ink, appearing to read "Riyaz Hamza".

**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 3<sup>rd</sup> Day of July 2019

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Nausori.**  
**Solicitors for the Accused** : **Messrs M. Y. Law, Barristers & Solicitors, Ba.**