

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 63 of 2017

STATE

V

VILIAME MARTIN GABRIEL

Counsel : Mr. S. Babitu for the State.
: Ms. K. Vulimainadave for the Accused.

Dates of Hearing : 11 July, 2019
Closing Speeches : 12 July, 2019
Date of Summing Up : 15 July, 2019
Date of Judgment : 16 July, 2019

JUDGMENT

1. The Director of Public Prosecutions charged the accused by filing the following information:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (a) of the Crimes Act 2009.

Particulars of Offence

VILIAME MARTIN GABRIEL, on the 16th day of October, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **KULAE MARAMARUA**.

COUNT TWO
Statement of Offence

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

Particulars of Offence

VILIAME MARTIN GABRIEL, on the 16th day of October, 2015 at Lautoka in the Western Division penetrated the anus of **KULAE MARAMARUA** with his penis, without her consent.

2. After the prosecution closed its case, this court ruled that the accused had a case to answer for the offence of sexual assault and for the lesser offence of attempt to commit rape instead of rape.
3. The three assessors had returned with the unanimous opinion that the accused was not guilty of the offence of sexual assault but guilty of the offence of attempt to commit rape by a majority of two is to one.
4. I adjourned overnight to consider my judgment and direct myself in accordance with the summing up and the evidence adduced at trial.
5. The prosecution called three (3) witnesses and the accused exercised his right to remain silent and not call any witness.
6. The complainant Kulae Maramarua informed the court that on 15th October, 2015 after work she received a call from her husband Kitione to meet him at the Bowling Club. At the Bowling Club Kitione was drinking with two of his friends.
7. The complainant joined her husband and his friends in drinking, she drank 5 bottles of Tribe beer, from the Bowling Club all went to Hunters Inn, at the Hunters Inn she drank 5 more bottles of Tribe. At around 10 or 11 pm the accused joined them in drinking. After the Hunters Inn closed at about

I am the next day after buying one carton of beer all went to the FSC ground. At the FSC ground the complainant drank another 4 bottles of beer by 6am the beer had finished by this time it was only the complainant, her husband and the accused who were left.

8. From the FSC ground after buying another carton of beer all went to the seawall. By this time it was 7.30am the complainant was really drunk so she stopped drinking, the accused suggested that they go to a nearby Apartment to check the price of the rooms. After inquiring about the price of a room at the Apartment the complainant's husband said it was too expensive since the complainant was feeling sleepy she sat down while her husband went looking for a taxi to take her home.
9. After a while the accused came held her hand and took her to a room, in the room she saw a bed since she was sleepy she laid on the bed. The complainant then felt someone was turning her over since she was lying face down. After the complainant was turned over she felt her undergarment was removed and her vagina being licked for about 2 minutes.
10. The complainant did not do anything since she thought it was her husband so she did not open her eyes after this she was turned over again, this person was trying to penetrate his penis into her anus. The complainant felt a lot of pain as a result of what was being done to her, she woke up and saw the accused so she pushed him away. The complainant did not consent to the accused to penetrate her anus with his penis or to lick her vagina.
11. The complainant saw the accused naked, standing in the room, she was angry and in tears so she asked him where her husband was. The complainant started looking for her undergarment the accused told her it was under the bed, whilst the complainant was telling off the accused, he

wore his pants and went to the reception. The complainant told the accused that whatever he had done to her was a degrading act.

12. The complainant left the room to look for her husband. Shortly after, her husband came in a taxi upon seeing her he started asking questions and he was very angry since he was told by the receptionist that she had already left with the accused. At this time the complainant did not tell her husband what the accused had done to her because her husband was a short tempered man.
13. The incident happened on Friday and on Sunday she told her husband what the accused had done to her a report was lodged with the police on Monday. The complainant was affected by the incident which has become a burden to her. The complainant also stated the accused was trying to insert his penis into her anus but did not penetrate it.
14. The second prosecution witness Kitone Tabacere the husband of the complainant informed the court that on 15th October, 2015 the witness and the complainant and some of his friends including the accused were drinking beer at various places.
15. From the seawall upon the suggestion of the accused the witness and the complainant walked to an Apartment nearby since the complainant was drunk he assisted her to walk. At the Apartment the price for the room was expensive, so he told the accused to stay at the Apartment with the complainant while he looked for a cab for them to go home.
16. When the witness came back in the cab he was surprised to see the complainant and the accused were not there. He asked the receptionist and he was told both had left in a cab. The witness went looking for the complainant and the accused after sometime he received a call on his mobile it was the complainant, she was crying and asking him why he had

left her. When he went to the Apartment he saw the complainant crying and when he asked her why she was crying the complainant did not say anything.

17. From this day the witness noticed the complainant was not her usual self as if something was bothering her, she was not cheerful as before so he started to ask her what was wrong. On Sunday the complainant told Kitione she thought she had gone with him into the room she was lying half naked on the bed, it was when the accused was calling her that she realized it was not Kitione. The witness was unable to recall any other thing the complainant may have told him. The complainant was ashamed of what had happened to her the matter was reported to the police.
18. The final prosecution witness Valerie Galu informed the court that in October, 2015 she was working as an office assistant at a private accommodation three people had come to book a room in the morning of 16th October, 2015. One was a female and the other two were male, they were all drunk. One female and one male went into a room.
19. The defence took the position that the accused did not commit the offences as alleged by the complainant. The accused did not do anything to the complainant that early morning she was so drunk that she was dreaming that the accused had licked her vagina and tried to penetrate her anus. The complainant made a false complaint against the accused after she was confronted by her husband outside the Apartment since she was missing when he had come earlier to pick her.
20. I accept the evidence of the complainant as truthful and reliable. She gave her evidence in a concise and coherent manner and was also able to withstand cross examination and was not discredited as well.

21. I have no doubt in my mind that the complainant told the truth in court. There is no dispute that the accused was in the room with the complainant that early morning. Although the complainant was drunk she was able to recall what had happened to her this court accepts that as soon as the complainant lay on the bed face down, it was the accused who had turned the complainant over, removed her undergarments and then licked her vagina. The complainant had felt what was being done to her suggests to me that although she was drunk she was conscious of what was happening to her. The complainant did not resist because she thought it was her husband. After this, the complainant was again turned over and the accused tried to penetrate her anus she only opened her eyes once she felt pain and upon seeing the accused reacted by pushing him away.
22. When this happened the complainant saw the accused was naked and standing in the room and when she started looking for her undergarment, it was the accused who told her it was under the bed.
23. This court accepts that the complainant had told her husband after a few days about what the accused had done to her. Kitione the husband of the complainant told the court about what the complainant had told him. In my judgment the complainant told Kitione important and relevant information about what she had been through. The failure by the complainant not to tell her husband everything in detail about what the accused had done to her does not affect her credibility. It is only natural for a person who has gone through an unexpected sexual encounter to provide some relevant information to another person about her experience which she did to her husband a few days later.
24. This court accepts that the complainant was drunk but not to the extent that she did not know what had happened to her. The reaction by the complainant after the alleged incidents also supports this, she showed her

anger on the accused and then walked over to the receptionist and spoke to her husband over the phone.

25. There was no evidence to suggest that the effect of the alcohol was such that the complainant had temporarily lost her capacity to choose whether to engage in the sexual activity. The complainant did state in court that she felt what was happening to her which does suggest to me that she was alert to what was happening. Once she came to know it was not her husband she pushed the accused away, was angry on him and was in tears. Kitione also confirmed the complainant was crying over the phone and when he met her at the apartment. I also accept that Kitione Tabacere told the truth in court and his evidence is believable.
26. The defence of denial is implausible that the complainant was dreaming and nothing had happened. This court also rejects the defence assertion that the complainant made a false complaint against the accused to cover up for the situation that she was missing when her husband had come to pick her up from the Apartment.
27. The defence has not been able to create a reasonable doubt in the prosecution case in respect of both counts.
28. This court is satisfied beyond reasonable doubt that on the 16th day of October, 2015 the accused had unlawfully and indecently assaulted the complainant by licking her vagina.
29. This court is also satisfied that on the 16th day of October, 2015 the accused had attempted to penetrate the anus of the complainant with his penis without her consent.
30. The accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time. On the totality of the

evidence what the accused did went beyond mere preparation the conduct of the accused shows his intention to commit the offence of rape.

31. In view of the above, this court overturns the unanimous opinion of the assessors that the accused is not guilty of the offence of sexual assault. As for the offence of attempt to commit rape this court accepts the majority opinion of the assessors that the accused is guilty of this offence.
32. For the above reasons, I find the accused guilty of one count of sexual assault and one count of attempt to commit rape and I convict him accordingly.
33. This is the judgment of the court.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

16 July, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.