

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 348 of 2018

[CRIMINAL JURISDICTION]

STATE

V

SHIVA SHIVNESH LAL

Counsel : Ms. K. Semisi for State
Mr. L. Qetaki for Accused

Hearing on : 22 - 25 July 2019

Summing up on : 25 July 2019

Judgment on : 26 July 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SL". No newspaper report or radio broadcast of the proceedings shall reveal the name and address, or include any particulars calculated to lead to the identification of the said complainant.]

JUDGMENT

1. The accused persons are charged with the following offence;

COUNT ONE

Statement of Offence

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

Particulars of Offence

SHIVA SHIVNESH LAL between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had carnal knowledge of **SL**, without her consent.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) (a) of Crimes Act of 2009.

Particulars of Offence

SHIVA SHIVNESH LAL between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had unlawfully and indecently assaulted **SL**, by touching her thighs and kissing her mouth.

2. The assessors have returned with the unanimous opinion that the accused is not guilty of the above offences.
3. I direct myself in accordance with the summing up delivered to the assessors on 25th July 2019 and the evidence adduced during the trial.
4. The prosecution led the evidence of four witnesses. The accused gave evidence in his defence.
5. The complainant in this case is the accused's biological sister. In this case, the evidence given by the complainant does satisfy the elements of the two offences the accused is charged with. However, the issue is whether the complainant was a credible witness and whether the evidence she gave was probable and reliable in order to establish each offence beyond reasonable doubt.

6. The accused admitted that on 30/08/18 he told the complainant to go to the puja and that night he went to the house the complainant was staying and he opened the door by putting his hand through an open window. He also admits that the complainant was alone in the house when he went inside the house. This is consistent with the account given by the complainant. However, the two were at variance with regard to the time the accused came to that house and what happened after the accused came to that house. According to the complainant the accused came to the house around 10.00pm to 11.00pm and the accused said that he went there much later where it was around 2.30am. The accused said that he went there to check on the complainant as per the father's direction.
7. In her evidence the complainant also said that the accused brought 'paracot' and pretended that he would drink it on the following Sunday. The accused also said in his evidence that he told the family members that he will drink 'paracot' because they wanted to hit him.
8. The complainant initially said in her evidence that the incident took place on 29/08/19. But later on she said that it was either 29th or the 30th and she cannot remember the exact date. In her statement to the police, she had stated that the incident took place on the 30th.
9. Given all the evidence in this case and especially the consistency between the evidence of the complainant and the accused regarding certain events that had taken place on the day in question as highlighted above, in my view, the fact that the complainant could not remember the exact date does not affect the reliability of the account given by the complainant.

10. The complainant said that she was close to her stepbrother, PW2. The accused also admitted in his evidence that complainant was close to PW2. The complainant also said that she lived with her aunty and uncle at Nausori for 17 years because her father did not want to look after her after her mother died when she was 08 months old. In view of this evidence, the delay in the complainant making a complaint about this matter where she waited for PW2 to return from Viria is justified.
11. On the other hand, this delay, in my view, also negates the assertion of the defence that the complainant fabricated the allegation simply to get even with the accused. If the complainant's intention was to create an issue for the accused, why did she wait for PW2 to make the first complaint? According to the evidence, the complainant did not go straight to the police. The matter was reported by a family member (complainant's paternal aunt) after the incident that took place involving the accused attempting to drink 'paracot'.
12. I accept the evidence of PW2 where he said that the complainant informed him when he came back from Viria that the accused raped the complainant. PW2's evidence enhances the credibility of the complainant's evidence in relation to the allegation against the accused.
13. I accept the evidence of PW4, the doctor who examined the complainant on 05/09/18. She had observed during her medical examination, a superficial abrasion below the vaginal opening which is an injury that could be inflicted during penile penetration of the vagina. More importantly, PW4 had also observed injuries on the complainant's breasts. According to her, the bruise on the complainant's left breast could have been caused by excessive force applied on that area by a hand or fingers and the abrasion on the right breast could be caused by fingernails. In her (PW4) opinion these injuries may have been sustained during the last 07 days from the date

of examination. The complainant said that her breast got scratched by the accused's fingernails when she pushed the accused while he was trying to grab her breasts. Therefore, the aforementioned medical findings supports the account given by the complainant.

14. Having considered the evidence given by the complainant in the light of the evidence of PW2 and PW4, I find the account given by the complainant to be credible and reliable.
15. The position taken by the defence was that the complainant is of a bad character and she had fabricated the allegations against the accused to get even with him for him reporting to their father about the complainant. According to the accused, their father had requested him to check on the complainant and to put her on the right track and he was doing just that. In essence, the defence asserted that given the complainant's bad character she cannot be trusted. This is what the defence counsel relayed to the assessors during his closing address. I noted that the defence counsel also stressed on what the complainant said during her re-examination about living her life on her own terms.
16. It is pertinent to note that the complainant herself admitted that she was into drinking and smoking since she was 16 years old. She also admitted that she had to lie to the people who looked after her in order for her to indulge in drinking and smoking.
17. However, the fact that the complainant was into drinking and smoking and that she had lied to people who looked after her on other occasions does not itself make her an incredible and an unreliable witness in this case. Given the demeanour and deportment of the complainant when she gave evidence, and the manner she

explained what happened to her, I found her version to be credible and reliable. Moreover, her credibility with regard to the evidence she gave on the allegations against the accused was enhanced based on PW2's evidence and injuries PW4 found on the complainant were consistent with her account.

18. In view of all the evidence led in this case, I do not find the accused's version to be credible.
19. All in all, I find that it was proved beyond reasonable doubt that the accused penetrated the complainant's vagina without her consent, knowing that she was not consenting and that the accused touched the complainant's thighs and her breasts which was an assault that was unlawful, indecent and also sexual.
20. In the circumstances, I am unable to conform to the opinion of the assessors.
21. I find that the prosecution has proved both counts beyond reasonable doubt.
22. I find the accused guilty of the first count and the second count and hereby convict him on both counts as charged.




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Jiten Reddy Lawyers, Nakasi for the Accused**