

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 23 of 2018**

**STATE**

**V**

**ZOHEB ALI**

**Counsel** : Ms. Dharshani Rao for the State  
Ms. Karen Boseiwaqa with Ms. Margarita Bosetimoala for the Accused

**Dates of Trial** : 23 - 25 September 2019

**Summing Up** : 26 September 2019

**Judgment** : 30 September 2019

***The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "OI".***

## **JUDGMENT**

**[1]** The accused, Zoheb Ali, was charged with the following offence:

### *Statement of Offence*

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

### *Particulars of Offence*

**ZOHEB ALI**, on 7 March 2018, at Seaqaqa, Labasa, in the Northern Division, penetrated the anus of **OI**, with his penis, without his consent.

- [2] The accused pleaded not guilty to the charge 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 not guilty of the charge of Rape.
- [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 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
  - (ii) On the specified date (in this case between 7 March 2018);
  - (iii) At Seaqaqa, Labasa, in the Northern Division;
  - (iv) Penetrated the anus of the complainant OI with his penis;
  - (v) Without the consent of the complainant; and
  - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting.
- [7] Each of the above elements was further elaborated upon in my summing up.
- [8] I informed the Assessors that in this case it has been agreed by the prosecution and defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, that they must treat those facts as proved beyond reasonable doubt. The fact that the accused, Zoheb Ali is also known as Patrick and that he was known to the complainant has been agreed. It is also agreed that on 7 March 2018, sometimes late in the evening, the complainant and the accused met near the Valelawa Primary School Compound. It is further agreed that after meeting, the accused and the complainant walked to Voloca Shopping Centre and that they left the shop together.

[9] In support of their case, the prosecution called the complainant, OI, his uncle, Taito Saqacala, and a school teacher, Tokasa Raiwalui.

[10] The accused exercised his right to remain silent.

[11] The complainant testified to the incident which took place on the 7 March 2018. He said that he and the accused walked to Voloca Shopping Centre and that they left the shop together. While the complainant was taking the lead, the accused then ran from behind and swung him and bit his neck. The complainant said: *“He got hold of me. He got on top of me and he swung me and he bit my neck”*.

[12] The complainant had fallen down the slope. He said he had slipped down towards the mango tree. He was lying down facing upwards. Afterwards the accused had come and kicked him once on his ribs. The complainant said that he had been afraid and had tried to stand up but he couldn't. The accused had said *“Kneel down if not I will kill you.”* The complainant had knelt down.

[13] Thereafter, the complainant testified as follows:

*“He spat on his hand, and he pulled his zip down and he put his penis out and he started to wet his penis with the saliva in his hand. And he pulled my trousers down and he got hold of both my hands from the back and he started to put his penis into my anus [the witness used the itaukei term boci for penis]”*.

*“After he ejaculated afterwards he pulled up his trousers afterwards he went up the slope. Afterwards I put on my clothes and crawled up the slope. Afterwards I broke a stick from the road side. After I came to a place which was a bit flat, I used the stick to support me in walking”*.

[14] The complainant said that he needed support in walking because he was unable to walk properly as all his body was paining. He said: *“Because when he got hold of me and threw me down the slope, from there he kicked me. And I tried to stand up but I couldn't because all my body was numb”*.

[15] The complainant further testified that the accused tried to lift him up to the mango tree. The accused had told him that he couldn't do it very well and told him to go up to


the mango tree where he can do it very well. Thereafter, the accused had pulled him up and taken him to the mango tree and had sex with him. The complainant said thus: *“He got hold of me on to the mango tree and he started to insert his penis into my anus. After that he ejaculated and he went”*.


- [16] The complainant then testified as to how he had walked back home. On reaching home he had not told anyone about the incident. He said he was scared to tell anyone. He had his dinner, took a bath and then did his homework.
- [17] The accused is totally denying the allegation of Rape against him. He only admits to giving a bite on the complainant’s neck and that too on the insistence of the complainant.
- [18] The defence suggested to the complainant that he had failed to inform the police about what the accused had done to him while the complainant was lying down near the mango tree. He had also failed to inform the police that the accused had kicked him on his ribs while he was lying near the mango tree. The complainant agreed that the above two matters are not found in his police statement. He said that he had forgotten to tell this to the police.
- [19] The Defence also highlighted the following inconsistency in the complainant’s evidence vis a vis his Police Statement:

*“In his testimony in Court the witness said that he was lying down when Patrick had pulled his trousers. However, in his statement to the police it is stated thus: “So, I was still standing, Patrick pulled down my ¾ pants ...”*

- [20] The complainant had made his statement to the police on 14 March 2018. This was merely 7 days after the alleged incident, when the entire incident would have been fresh in his mind. I find that absolutely no mention has been made in the police statement about the incident that the complainant alleges happened while he was lying on the ground, close to the mango tree. It is strange that the complainant had forgotten to inform this significant fact to the police. The complainant’s explanation that he forgot to tell the police is also unacceptable.

- [21] Having considered the totality of the evidence in this case, I am the opinion that the prosecution evidence is not entirely credible and reliable.
- [22] It is clear that the Assessors too have not believed the evidence of the prosecution as entirely truthful and reliable, as they have by a unanimous decision found the accused not guilty of the charge.
- [23] In my view, the unanimous opinion of the Assessor's is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinion of the Assessors.
- [24] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charge of Rape against the accused beyond reasonable doubt.
- [25] In the circumstances, I find the accused not guilty of the charge of Rape and accordingly I acquit him of the said charge.

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



AT LABASA

Dated this 30<sup>th</sup> Day of September 2019

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Labasa**  
**Solicitors for the Accused** : **Office of the Legal Aid Commission, Labasa**