

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 166 of 2017

STATE

V

KAMAL KAPOOR

Counsel : Mr. A. Kumar with Mr. S. Seruvatu for the State.
: Mr. M. Yunus with Ms. S. Shafique for the
Accused.

Dates of Hearing : 18, 19, 22 and 23 June, 2020
Closing Speeches : 24 June, 2020
Date of Summing Up : 25 June, 2020
Date of Judgment : 26 June, 2020

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "A.N")

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

Statement of Offence

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

Particulars of Offence

KAMAL KAPOOR, on the 13th day of July, 2017 at Yalalevu, Ba in the Western Division, penetrated the mouth of “**A.N**” with his penis, without the said “**A.N’s**” consent.

2. The three assessors returned with a unanimous opinion that the accused was guilty of the offence of rape as charged.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called four witnesses whereas the defence called three witnesses including the accused.
5. On 13th July, 2017 the complainant was working as a Cleaner at the construction site of the new hospital near Clopcott Street in Ba.
6. During lunch time the complainant was in her room alone resting when the accused called on her mobile phone asking her to come and clean his office. The accused was a Foreman at her workplace, when the complainant was in the office of the accused she was told to clean the tables, as she turned around the accused locked the room door.
7. At this time the accused asked the complainant to have sex with him when she refused he then told the complainant to suck his penis, at this time he pushed his pants down and told her to suck his penis when the complainant refused he forcefully pushed her down from her head and then forcefully pushed his penis inside her mouth.
8. When the accused forcefully pushed her down she did not do anything he made her sit on her knees and then he forced her to suck his penis she

refused to do so the accused told her if she did not suck his penis he will terminate her from her employment. The accused was forceful in what he was doing the complainant tried to struggle with him but she couldn't. The accused also ejaculated inside her mouth he made her suck his penis for at least two minutes she tried to close her mouth but couldn't do it since the accused was forcefully penetrating her mouth.

9. After ejaculating inside her mouth, the accused pulled out his penis and then wiped it with a tissue. The complainant also pulled out a tissue to clean her mouth, she was vomiting and she did not like what had happened to her. The accused pulled up his pants and opened the door after covering her mouth with a tissue the complainant left the office and went to her room.
10. The complainant was crying in her room, shortly after her friends Milinia, Lavenia and Miriama came and saw her crying upon their questioning the complainant told them what the accused had done to her.
11. Miriama and Lavenia told the court that the complainant was talking in Hindi. Miriama understood Hindi but Lavenia said she did not understand Hindi that well. However, both these witnesses were able to clearly narrate what the complainant had told them and they were also able to explain it in the English language. Both these witnesses had observed that the complainant was crying.
12. WDC Shiwani had also observed that the complainant was crying in the charge room when she came to report the incident at the Ba Police Station so she took the complainant into another room and calmed her down. Shiwani had also taken the complainant to the hospital on the way the complainant was quiet. Shiwani was not present when the complainant was examined by the doctor.

13. On the other hand, the accused said that he was having an intimate relationship with the complainant on some occasions he used to give her money. The accused had no authority to terminate the employment of the complainant who was working for the construction company.
14. The accused had called the complainant into his office when she came they had hugged and kissed each other after a while the accused had opened his pants. The complainant sat on her knees and started sucking the penis of the accused whilst he was standing.
15. According to the accused the complainant had agreed to suck his penis and she had continued doing this for about 3 to 4 minutes. The accused ejaculated into the complainant's mouth since she was continuously sucking his penis.
16. The complainant had consented to suck the accused penis, she did not shout or resist or bite his penis, she had opened her mouth to allow the penis to go inside her mouth. The complainant also did not squeeze his testicles which she had the opportunity to do.
17. The accused also stated that it was professional to date an employee of the Contractor. The accused agreed that when he was questioned by the police about the allegation he had totally denied it. When suggested that he had lied to the police the accused stated it was a white lie since it was an incorrect allegation that he had forced the complainant and if he had not said it never happened he could have lost his family.
18. The accused also stated that it was a white lie that he did not tell the police that the complainant had consented to the act because he wanted to save his family and the complainant's reputation. The accused denied committing the offence as alleged and also he had not tried to get the matter settled after the report was lodged by the complainant.

19. Dr. Shahid was not able to make a finding whether or not the complainant had been sexually assaulted since he did not see any injuries on the complainant. The history related by the patient and the doctor's medical finding did not match.
20. The general impression of the doctor was that it was quite strange for a victim of sexual assault to be laughing in front of him. The doctor did not have any discussions with WDC Shiwani before or after the medical examination of the complainant or in the presence of the complainant. WDC Shiwani and a staff nurse were present during the medical examination.
21. According to the doctor based on the history given he could not rule out sexual assault but upon his professional opinion and clinical examination he could not find any evidence of whether the sexual assault had taken place or not.
22. On 13th July Pauliasi Maraiwai was having lunch near the office of the accused with his friends when he saw the complainant go into the accused office and after a while she came out. This witness had a conversation with the complainant after she came out of the accused office. According to the witness the complainant was normal and he did not see any sign of problem. The witness did not hear any screaming from the accused office during the lunch break.
23. The witness stated that he knew the accused from about 2 years prior to 2017 when he had started working for the Yangin Company. The accused was the Project Officer and they used to meet each other every day. The accused cared about the construction workers and the witness had a professional relationship with the accused who was also a close friend.

24. Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. I have no doubt in my mind that the complainant told the truth in court. She gave a clear and coherent account of what the accused had done to her. Her demeanour was consistent with her honesty. The complainant was able to withstand vigorous cross examination and was not discredited. The defence did not suggest any motivation on the part of the complainant to implicate the accused.
25. The only issue before the court was whether the complainant had consented or not. The assertion by the defence that the complainant did not resist or shout or allowed the accused to penetrate his penis into her mouth is misconceived. On the evidence before the court the complainant was faced with an unexpected encounter by the accused she tried to push the accused but was not successful the accused had exerted force which rendered her resistance futile. The complainant was also prompt in telling her friends about what the accused had done to her and thereafter to the police.
26. The evidence before the court leads me to the inescapable conclusion that the complainant had not consented to what the accused had done to her.
27. There were some inconsistencies between the police statement of the complainant and her evidence in court. The inconsistencies were not significant but a natural occurrence due to passage of time which did not adversely affect the reliability of the complainant's evidence.
28. I also accept the evidence of Miriama and Lavenia these two witnesses were also believable. I have no doubt that these two witnesses told the truth that they understood Hindi language and were able to narrate what the complainant had told them. Although Lavenia said she did not understand Hindi well she was able to say the Hindi words clearly and translate the


same into English. This shows this witness understood and spoke Hindi and was able to translate as well.

29. Both these witnesses were forthright and believable even though Lavenia was referred to some inconsistencies between her police statement and her evidence they were minor contradictions which did not adversely affect her credibility. I also accept the observation of these witnesses that the complainant was crying when they saw her in the room.
30. WDC Shiwani also gave a credible account of her observations of the complainant in the charge room and also on their way to the hospital. I also accept that she was not present when the doctor was examining the complainant.
31. I accept the evidence of all the prosecution witness as reliable and credible.
32. On the other hand, the accused did not tell the truth in court the narration by the accused of what had happened in his office is unbelievable and untenable on the totality of the evidence.
33. The accused took advantage of his position due to the fact that he knew the complainant's employer as a Ministry of Health representative based at the construction site and the fact that it was through him the complainant had obtained employment at the construction site. Although the accused was not in a position to sack the complainant I accept that he had threatened the complainant with termination when she was refusing his advances.
34. I do not accept that the accused had told a white lie to the police when he denied the allegation during his caution interview on the basis that he wanted to save his family.

35. I also do not accept the accused did not tell the police the complainant had consented because he wanted to save his family and the complainant's reputation is untruthful and misleading. It was obvious that the accused had carefully thought out these answers not to save anyone but himself. The accused struck me as a person who had carefully crafted the above response during cross examination to divert attention away from himself towards his family and the complainant. I reject the assertion by the accused that his lie was a white lie as not worthy of belief.
36. The doctor's observations that the complainant was laughing at the time of her medical examination is also not plausible on the totality of the evidence. It was obvious that the doctor had misinterpreted the impression he got from the complainant during her medical examination. Furthermore, I do not accept the evidence of the doctor that WDC Shiwani and a staff nurse were present at the time of the medical examination.
37. The Fiji Police Medical Examination Form of the complainant (defence exhibit no. 1) which was completed by the doctor does not mention that anybody was present other than the complainant and the doctor. This in my view creates a doubt on the observations made by the doctor.
38. I also reject the evidence of Pauliasi as unbelievable he is a close friend of the accused it was obvious that he was not telling the truth in court his demeanour was such that he was not serious, time and again he was smiling whilst giving evidence. It was obvious to me that this witness was trying his best to save a close friend. The evidence of this witness is not worthy of belief as well. I accept the evidence of the complainant, Miriama and Lavenia that Pauliasi and his group were not around during lunch hour on the day of the alleged incident.
39. The defence has not been able to create a reasonable doubt in the prosecution case.

40. This court is satisfied beyond reasonable doubt that the accused on 13th July, 2017 had penetrated the month of "A.N" with his penis without her consent.
41. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.
42. In view of the above, I accept the unanimous opinion of the assessors that the accused is guilty of one count of rape as charged.
43. I find the accused guilty as charged and I convict him accordingly.




Sunil Sharma
Judge

At Lautoka
26 June, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. M.Y. Law, Ba for the Accused.