

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 87 OF 2015

BETWEEN : STATE

AND : MARIKA TUBEINAVATU

Counsel : Ms. J. Fatiaki with Mr. T. Tuienuku for State
Mr. M. Fesaitu for the Accused

Date of Hearing : 21st of March 2016

Date of Closing Submissions : 22nd of March 2016

Date of Summing Up : 23rd of March 2016

Date of Judgment : 23rd of March 2016

JUDGEMENT

1. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are that;
2. The accused person pleaded not guilty, hence the matter was set down for hearing on 21st of March 2016. Three witnesses were called by the prosecution. The accused gave evidence on oaths, but did not call any other witnesses for the defence. The learned counsel for the prosecution and the defence, then made their respective closing submissions. I then proceeded with my summing up.

3. The three assessors returned with a unanimous verdict of guilty. The assessors' verdict was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing.
4. Having considered the evidence presented during the hearing, respective closing submissions of the prosecution and the defence, and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
5. Section 207 (2) (a) of the Crimes Decree states that;

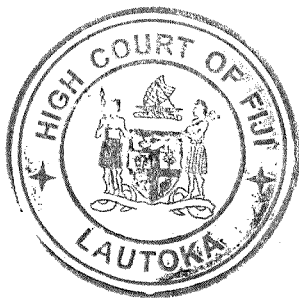
"A person rapes another person if -
 - i) *the person has carnal knowledge with or of the other person without the other person's consent,*
6. The prosecution alleges that the accused penetrated the vagina of the victim with his penis without the consent of the victim on the 7th of August 2014. Accordingly the main elements of the offence that the prosecution is required to prove beyond reasonable doubt are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,
 - iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner
7. The accused has admitted in the admitted fact, that he came on top of Ms. Owen and then pulled her shorts and undergarment to one side. He has further admitted that he then had sexual intercourse with Ms. Owen by inserting his penis into her vagina. Hence, the accused has admitted the physical element of the offence as charged. Wherefore, the main dispute in this matter is whether Ms. Owen consented to have sexual intercourse with the

accused. The prosecution alleges that she did not consent for such an act. On other hand the accused states that he came to her while she was inside her room and asked her whether he can have sex with her, for which she replied “anytime”. He then had a sexual intercourse with her.

8. The victim, Ms. Owen stated in her evidence that she was sick on 7th of August 2014 and stayed at home. She had some pills given to her by the mother of the accused. They made her feel drowsy and tired. She had fallen in sleep in her room when the mother left to town leaving Ms. Owen and the accused alone at the house. She suddenly woke up as she felt that someone was on top of her. She found that it was the accused, who had come on top of her and had inserted his penis into her vagina. She tried to push him away and screamed at him to get off from her. The accused then got off from her and told her not to tell anyone. She then grabbed her sulu and ran outside the house and stayed under a tree until Maikali , the brother of the accused, return home from work. She told Maikali what his brother did to her in the room. Maikali in his evidence stated that Ms. Owen told him that his brother, Marika raped her. Ms. Owen explained in her evidence the reason that she did not directly went to the police and report the matter on 7th of August 2014.
9. In contrary, the accused stated in his evidence that he asked Ms. Owen to have sex, for which she replied “anytime”. He then got on top of her and removed her shorts and undergarment to one side and had sexual intercourse by inserting his penis into her vagina. The accused admitted in his evidence that he was aware that Ms. Owen was sick on that day and had some pills given to her by his mother.
10. I now turn on to consider whether the evidence given by the accused is reliable and truthful. He stated that he asked Ms. Owen to have sex, for which she consented. She then removed her trouser. However, the accused had pulled it back. He then pulled her shorts and undergarment off at one side and inserted his penis into her vagina and had a sexual intercourse with her.
11. If she consented and voluntarily removed her trouser off, there is no reasonable reason for the accused to pull it back. It was highly improbable under the circumstances that was prevailed at that time. They were only alone at the house. Apart from that, it was revealed from the evidence of the accused that he was aware that Ms. Owen was sick and had taken some pills given by his mother. Under such circumstances, it is my opinion that the

evidence of the accused neither reliable and trustworthy to accept nor creates any reasonable doubt about the case of the prosecution.

12. The victim, Ms. Owen stated in her evidence that she felt drowsy and tired after taking the pills given by the mother of the accused. She had fallen into sleep in her room. Under such circumstances, it is possible that she was asleep and unaware when the accused get on top of her and inserted his penis into her vagina. Maikali, the brother of the accused, in his evidence confirmed that Ms. Owen told him about this incident when he came home in the same evening. The evidence of recent complainant has further strengthened the reliability and credibility of the testimony of the victim. Hence, I am inclined to accept the testimony of Ms. Owen as credible and reliable evidence.
13. Accordingly, I find that the prosecution has proved beyond reasonable doubt that Ms. Owen did not give her consent to the accused to have sexual intercourse by inserting his penis into her vagina and the accused knew that she was not contesting for such.
14. In view of the reasons discussed above, I do not find any cogent reason to disregard the unanimous verdict of guilt given by the three assessors. I accordingly find the accused person is guilty for the offence of Rape as charged in the information and convict for the same.



At Lautoka

23rd of March 2016

R. D. R. Thushara Rajasinghe

Judge

Solicitors : **Office of the Director of Public Prosecutions**

Office of Legal Aid Commission