

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 148 OF 2013

BETWEEN : STATE

AND : RATU LUKE SOVA

Counsel : Ms. S. Kiran for State
Ms. P. Chand for the Accused

Date of Hearing : 18th of May 2016

Date of Closing Submissions : 19th of May 2016

Date of Summing Up : 19th of May 2016

Date of Judgment : 23rd of May 2016

JUDGMENT

1. The Accused person is being 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;

“Rate Luke Sova on the 20th day of June 2013 at Sigatoka in the Western Division inserted his penis into the vagina of Mereoni Kariniu without her consent”

2. The Accused person pleaded not guilty for this charge, hence the matter proceeded to the hearing. The hearing was conducted on 18th of May 2016. The

person. The Accused person gave evidence but did not call any other witnesses for his defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing submissions, which was followed by the summing up. The three assessors returned with a unanimous verdict of guilt. The assessors' verdicts were not perverse. It was open for them to reach such conclusion based on the evidence presented during the course of this hearing.

3. Having carefully considered the evidence adduced during the hearing, the respective closing submissions of the counsel, the summing up and the verdict of the assessors, I now proceed to pronounce the judgment as follows.
4. The prosecution alleges that the victim met the accused at a carnival on the 20th of June 2013. She was introduced to the accused by one of her friends, namely Seini. The accused was with his friend Osea. After their introduction, four of them left the carnival and went for a walk along the tramline. Having walked for a while, Osea and Seini turned to the other side, leaving the victim and the accused alone. They then sat near a rain tree, where the victim wanted to sit and talk. She stated that she went with the accused to have a date. However, the accused wanted to go into the bush. He then pulled her from her hand and pushed her into the bush near the cemetery. They then sat on a tree trunk, where the accused tried to persuade the victim to have sexual intercourse. She refused it. However, the victim admitted that they kissed each other. She further stated that the accused kissed her in order to persuade her to have a sexual intercourse. She stated that the accused kissed her on her lips and she too kissed him back. She has participated in kissing. However she specifically stated in her evidence that she kept on telling him "no" to the request to have sexual intercourse, though she participated in kissing.

5. In contrast, the accused person denies the allegation. He did not dispute the events leading up to the conversation at the rain tree. He stated that he politely asked the victim to have sexual intercourse at the rain tree, which she agreed. He stated that he asked three times, and she consented for all these three occasions. He then went to the bush and she followed him. They then had sexual intercourse.
6. Accordingly, the main dispute in this incident is whether the victim consented to the accused person to have sexual intercourse with her. If not, whether the accused person, honestly, though mistakenly believed that she was consenting to have sexual intercourse with him.
7. Section 206 (1) of the Crimes Decree states that;

"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent"

8. Accordingly, someone consents only if she agrees by choice and she has the freedom and capacity to make that choice. Consent may be given to one sort of sexual activity but not to another.
9. The victim must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The Fiji Court of Appeal in Balemaira v State [2013] FJCA 40; AAU098.2010 (30 May 2013)

found that the consent is an ongoing state of mind and is not irrevocable once given.

10. Sexual Intercourse is normally a mutually agreed recreational and pleasurable act of two persons. Accordingly, the consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
11. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is important to consider how the victim and the accused behave before and after the alleged sexual intercourse.
12. Lord Lane CJ in R v Pigg [1982] 2 All ER 591) has discussed the issue of recklessness and the mistaken but honest belief of the accused person that the victim was consenting, where his lordship held that;

“so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was a risk she was not or he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.

13. The victim stated in her evidence that she was pulled into the bush by the accused. The accused person claims otherwise. He stated that she came after him into the bush. The victim stated that she forgot to tell the police that she was pulled into the bush by the accused. The cousin of the victim, Kalesi stated in her

evidence that the victim did not tell her that she was pulled into the bush by the accused person.

14. Hon. Chief Justice Gates in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) discussed the applicability of the recent complain in an allegation of rape, where his lordship held that;

"In any case evidence of recent complaint was never capable of corroborating the complainant's account: R v. Whitehead (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v. The State Crim. App. 12 of 1989; Jones v. The Queen [1997] HCA 12; (1997) 191 CLR 439; Vasu v. The State Crim. App. AAU0011/2006S, 24th November 2006".....

The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant"

15. His lordship in **Raj v States (supra)** has further discussed the nature and scope of the recent complain, where his lordship found that;

"The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence"

Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence"

16. In view of the above judicial precedent, the victim is not necessarily required to inform the first person to whom she complains, the complete version of the account of the event took place. It is sufficient to relate the material and relevant information of alleged sexual conduct of the accused person. It is natural, that perhaps sometimes victims of such sexual assault might not be able to correctly recall or remember the exact events of the incident in their recent complaint due to the trauma or the shock caused by the alleged incident.
17. In this instant case, the victim has told her cousin on the following day that she met the accused at the carnival and then went for a walk. She has further told her that the accused forced her to have sexual intercourse with him. She has made her statement to the police on 22nd of June 2013, that was two days after the incident. Her cousin stated in her evidence that she found the victim was in shocked on the following morning.
18. Moreover, the Doctor in her medical report has stated two different versions of the alleged incident, one under the heading of background information and other one under the heading of history as related by the victim. The victim in her evidence firmly stated that she did not inform such details to the doctor. The victim was medical examined by the doctor on the following day of the incident, that was on 21st of June 2013. The prosecution tendered the medical report as an agreed fact. Having considered the two different versions as stated in the

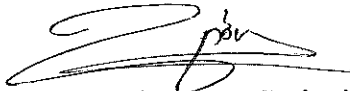
the victim, the statement made by the victim to the police and the medical report, with the evidence of the victim have not discredited the reliability and credibility of the evidence of the victim. In considering the event that took place during this alleged incident, I find that the failure of the victim to state that the accused person pushed her into the bush is not materially significant.

20. Apart from that, the victim stated in her evidence that she met her cousin when she was returning home on that night. She was angry and talked to her. However, the cousin in her evidence denied that she met the victim on the same night, but only saw her on the following day. I do not find that this inconsistency has fundamentally relevant to the issue of consent. Hence I find this inconsistency of the evidence between the victim and the cousin has not discredited the evidence of the victim.
21. I noticed that the victim appeared frustrated and irritated during her cross examination, when she was asked by the learned counsel of the accused person, whether she made up this allegation in order to save her from more trouble. The victim reiterated her position and confirmed that the accused actually did it and she did not agree to him. Subsequent to that question, the learned counsel for the defence suggested her whether she was afraid to tell the cousin that she had consensual sexual intercourse. For which the victim answered "yes that I did was afraid". I find that this question has two parts. I do not find the victim intended to divert from her previous answer and agreeing to the proposition of the defence that she had consensual sexual intercourse with the accused. Hence, I do not find that the answer to the said question discredited the evidence of the victim.

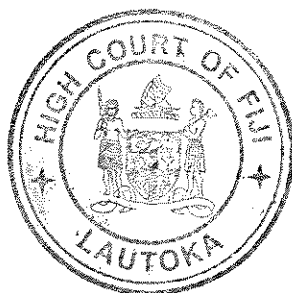
22. I observed the manner and the demeanor of the victim when she gave evidence. She was straight and confident of what she was telling. She was not evasive. She admitted that she too participated in kissing. However she maintained her position that she still did not consent to have sexual intercourse with the accused person. If she wanted to make up the story in favour of her, she would have denied of taking part in kissing with the accused person. I find that she was honest by disclosing that she took part in kissing but did not consent to have sexual intercourse with the accused person.
23. She was a sixteen years old young teenager at that time. She met the accused on first time at the carnival. The accused was also a teenager and close to her age. She was introduced to him by her friend Seini. She said that she walked with him and other two friends as she wanted to go for a date with him. It is a natural and probable behavior of a girl at her age.
24. Having considered the reasons discussed above, I find the evidence given by the victim is reliable, probable and trustworthy. Hence I accept her evidence that she did not give her consent to the accused person to insert his penis into her vagina.
25. I now turn onto the defence case, in order to determine whether the defence has created any doubt of the case of the prosecution or whether the accused person honestly, but mistakenly believed that the victim was consenting.
26. As I discussed above, one can consent to certain sexual activities but not for certain other activities. The mere fact that the victim came with the accused to a remote place and participated in kissing each other, do not automatically constitute that her consent to accompany him to the said place and kiss him

extended to have sexual intercourse as well. It appears that the accused was aware of it as he has asked the victim three times to have sexual intercourse. According to the evidence given by the accused person, it seems that the accused was aware that she was not sure of her consent when he asked her first time. He admitted in his evidence that he had to convince her to have sexual intercourse. Accordingly, I am satisfied that the accused was aware of the possibility that she might not consenting. Regardless of that he continued with his act. Hence, I do not find the existence of any reasonable doubt whether the victim finally gave her consent. I accordingly find that the defence has not created any reasonable doubt about the case of the prosecution.

27. Having considered the reasons discussed above, I do not find any cogent reason to disagree with the unanimous verdict of guilt of the three assessors. Hence, I find that accused person is guilty for the offence of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree and convict him for the same accordingly.


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
23rd of May 2016



Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission