

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 174 of 2013

STATE

V

PAULA SOLI

Counsel : Ms. S. Naibe and Ms. R. Uce for the State
: Ms. V. Narara and Ms. N Sharma for the Accused

Dates of Hearing : 21, 22 March, 2017
Date of Ruling : 24 March, 2017

RULING

NO CASE TO ANSWER

[The name of the complainant is suppressed, the complainant will be referred to as "SL"]

[1] At the conclusion of the prosecution case the accused makes an application for no case to answer in terms of section 231 (1) of the Criminal Procedure Act. The relevant section states:

"When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a

finding of not guilty if it considers that there is no evidence that the accused person (or anyone of several accused) committed the offence.”

- [2] In respect of the phrase “no evidence” mentioned in section 231 (1) of the Criminal Procedure Act Goundar J. in *State v Ratu Inoke Takiveikata* criminal case no. HAC 5 of 2004 (28 February, 2011) at paragraph 3 said:

“The phrase ‘no evidence’ has been interpreted to mean that there is no evidence on an essential element of the charged offence (Sisa Kalisoqo v State, Criminal Appeal No. 52 of 1984). If there is some evidence on the essential elements of the charged offence the application for a no case to answer cannot succeed. The credibility, reliability and weight are matters for the assessors and not for the trial judge to consider at a no case to answer stage”

- [3] The Director of Public Prosecutions preferred the following Information against the accused:

FIRST COUNT
Statement of Offence

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

Particulars of Offence

PAULA SOLI, on the 10th May, 2013, at Yasawa in the Western Division, inserted his penis into the vagina of “**SL**”, without her consent.

- [4] The court is grateful to both counsel for their written and oral submissions at short notice which has been very helpful.
- [5] The elements of the offence of rape are:
- (1) The accused;
 - (2) penetrated the vagina of the complainant “**SL**” with his penis;
 - (3) without her consent;

- (4) The accused knew or believed the complainant “**SL**” was not consenting or did not care if she was not consenting.
- [6] The learned counsel for the accused submitted that there was no evidence of any penetration before the court. According to counsel the complainant informed the court that the accused was about to insert his penis into her vagina but she pushed him away.
- [7] The learned counsel for the State in opposing the application stated that the complainant had stated in her evidence that she felt pain in both her thighs and vagina and she felt his penis. The State submits that there is some relevant and admissible evidence in respect of all the elements of the offence of rape therefore the accused had a case to answer.
- [8] Since an important issue had been raised before the court in the interest of justice the relevant excerpt via audio recording was played in court.

The following question by State counsel and answers given by the complainant is reproduced:

- “Q: *Now when this happened when he took off your Sulu, shorts and panty how did you feel like what was your reaction to that?*
- A: *I felt pain and I was afraid.*
- Q: *Now Ms. Siteri Loki you stated that Paula then took off his shorts what else did he do?*
- A: *He was about to insert his penis into my vagina.*
- Q: *Now Ms. Siteri Loki please be specific now what do you mean he was about to insert his penis into your vagina?*
- A: *When I felt pain my lord I pushed him away.*
- Q: *Now you said that you felt pain, now where did you feel the pain?*
- A: *Both my thighs.*
- Q: *Was there any other place that was painful?*
- A: *I felt pain in my vagina.*
- Q: *Now when he was about to insert his penis into your vagina, did you feel his penis?*
- A: *I did my lord yes.*

Q: *And when you felt this where was his penis?*
 A: *It was outside my lord.*
 Q: *Now what do you mean by outside?*
 A: *He put it outside.*
 Q: *Ms. Siteri, be specific, outside where?*
 A: *Outside his pants, shorts my lord.*
 Q: *What else happened after that?*
 A: *After he did that I pushed him away and I ran.*
 Q: *When Paula did this to you how did you feel when Paula did this thing to you?*
 A: *I felt pain my lord."*

[9] Considering the above in its totality it is clear to me that the complainant's evidence does not suggest there was an act of penetration or even the slightest of penetration of the complainant's vagina by the penis of the accused.

[10] In view of the above I find that there is no evidence to satisfy one of the essential elements of the offence of rape. I am therefore satisfied that the accused has no case to answer for the offence of rape.

[11] I now direct my mind to see if there is any evidence which would enable this court to consider a lesser or alternative offence to the offence of rape.

[12] Section 162 (f) of the Criminal Procedure Act states:

"(1) where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after due process for-

...

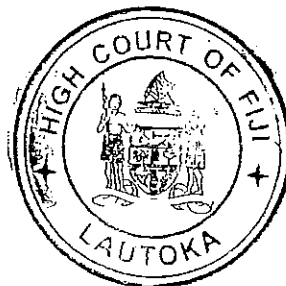
(f) any sexual offence where the charge has been for rape..."

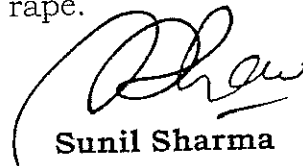
[13] The following elements make up the offence for attempted rape:

- (a) The accused;
- (b) attempted to penetrate the complainant's vagina with his penis;
- (c) without her consent.

[14] The complainant in her evidence informed the court that the accused forcefully made her lie down on the grass by pulling her backpack. She felt pain and was afraid when the accused took off her sulu, shorts and panty. After taking off his shorts the accused was about to insert his penis into her vagina she felt pain on both her thighs and her vagina. The complainant felt his penis and also saw the penis of the accused was outside his shorts. She pushed the accused and ran away. The complainant did not consent to what the accused had done to her.

[15] I am satisfied that there is prima facie evidence against the accused for the offence of attempted rape. I therefore rule that the accused has a case to answer for the offence of attempted rape.




Sunil Sharma
Judge

At Lautoka
24 March, 2017

Solicitors

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused