

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 94 OF 2015

STATE

v

EDWIN ALVIN KUMAR

Counsel:

Ms. S. Kiran for State

Ms. S. Vaniqi for Accused

Date of Summing Up:

12th April, 2018

Date of Judgment :

13th April, 2018

JUDGMENT

1. The Accused is charged on the following Information and was tried before three Assessors.

First Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Edwin Alvin Kumar on the 6th day of May, 2015, at Nadi in the Western Division, penetrated the vagina of **Sofiya Begum** without her consent.

Second Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

Edwin Alvin Kimar on the 6th day of May, 2015, at Nadi in the Western Division, indecently assaulted **Sofiya Begum** by licking and sucking the vagina of the said **Sofiya Begum**.

2. After a deliberation of 20 minutes, Assessors returned with a rather awkward mixed opinion. Assessor No. 1 found the Accused not guilty on both counts. Assessor No. 2 found the Accused guilty only on the 2nd count and found him not guilty on the 1st count which is Rape. Assessor No. 3 found the Accused guilty on the first count and found him not guilty on the 2nd count.
3. I adjourned overnight to deliberate on my Judgment. Having reviewed my own summing up and evidence led in the trial I have decided to reject the opinions of Assessors. I proceed to give my reasons as follows.
4. Prosecution called three witnesses and based their case substantially on the evidence of the Complainant. Prosecution relies on evidence of recent complaint, distress and medical evidence to prove consistency of the Complainant.
5. Each element of Rape and Sexual Assault is disputed by the Defence. The Defence case is one of denial. They say that the Accused did not commit any of the alleged sexual acts.
6. Having reviewed all the evidence led in the trial, I am satisfied that the evidence Complainant gave in Court is truthful and believable.

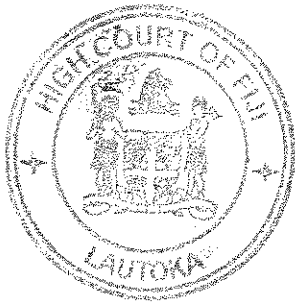
7. There is no dispute as to the identity of the Accused. Accused admits that he is the ex-husband of the Complainant.
8. Prosecution says that the Complainant is consistent and reliable. They rely on recent complaint evidence to prove Complainant's consistency. The Complainant relayed the incident to her mother, Sania, when she returned home and made a prompt complaint to police on the same day. Sania said that she received the complaint of rape from the Complainant when the Accused left the house around 10 a.m.
9. Defence argues that, after the alleged incident, Complainant was awaiting her mother's return home and, if the complaint were true, she could have relayed the incident to her mother soon after her arrival.
10. In her explanation as to why she did not relay the incident to the mother until the Accused had left at 10 a.m., the Complainant said that, upon her mother's return, she (mother) was informed of the presence of the Accused inside the house and when the mother saw the Accused sleeping in the room with the daughters, she got angry and went to the kitchen without talking to her.
11. This explanation for delay is acceptable. According to the evidence of the Complainant, soon after her mother's arrival at around 6 a.m., her mother Sania had asked the Complainant, '*what happened? You cried?*', because her eyes were swollen. Complainant replied, '*yes*' and informed Sania that Edwin is home. Sania in her evidence affirmed the evidence of the Complainant and said that she got angry and started to cook.
12. It appears that there is a reasonable cause for Sania's anger because she had seen the Accused, who had divorced her daughter and deserted his children a year ago, sleeping in the room with children. In these circumstances, the Complainant would have been faced with a dilemma to explain to her mother the reason why her ex-husband is sleeping in the room with daughters. The Complainant apparently took time until the Accused had left home at 10 a.m. and told Sania that she was raped. Sania in turn advised her to report the matter to police. The Complainant went to the police station even without having her breakfast. I accept the recent complaint evidence which in my view bolstered the version of the Prosecution.

13. Prosecution relies on distress evidence. The Complainant said that she started crying after the rape. Sania confirmed that, on her return home, she noticed that the Complainant had cried and her eyes swollen. Upon being questioned the Complainant admitted that she was crying. I am satisfied that the Complainant was in a distressed condition after the alleged incident and that distressed condition was not artificial and was only referable to the alleged sexual offences. Distress evidence also bolstered the version of the Prosecution.
14. Prosecution also relies on medical evidence to prove consistency of the Complainant. They say that doctor's three findings on Sofia's body, namely, bruises on the left breast and chest, the slight laceration on the left chest wall and the swelling on the left forearm are consistent with Complainant's evidence that she was raped and sexually assaulted.
15. When she was referred to the relevant portions of Complainant's evidence by the State Counsel, Doctor Bulatale agreed, that her medical findings are consistent with the version of the Complainant.
16. Defence Counsel argues that those injuries were self-inflicted by the Complainant. However, her version was never put to the doctor when she was under cross examination.
17. Defence Counsel also argues that doctor's findings are inconsistent with Complainant's version that she was raped because the doctor had observed no injuries on genitalia of the Complainant.
18. The doctor said that she would not expect to see injuries on genitalia after a recent sexual activity in a woman who had already given birth twice unless force was used on it because it (vagina) would have been more elastic and accommodative to the male sex organ. In light of this medical opinion it is my opinion that it is possible that the Complainant, having given birth to two children in a relationship with the Accused, would not have received any injuries in her genitalia even in a nonconsensual sexual intercourse with him. It is apposite to reiterate the direction I have given in my summing Up that the Prosecution is under no obligation to prove that the Complainant had received injuries in order to bring about a conviction in a rape case.

19. Defence says that the Complainant's evidence is not consistent with her previous statement to police in respect of the exact place where the alleged sexual assault (licking of her vagina) took place. The Complainant in her explanation said that she could not recall every detail after three years. In view of directions I have given in my Summing Up, I do not consider this so called inconsistency material or significant and sufficient enough to discredit the version of the Prosecution.
20. It was argued that Complainant could have bitten Accused's penis if it were forced in to Complainant's mouth. It was also argued that the alleged 'sit ups' and the sexual postures, (what the Defence Counsel described as '69 position') is not possible without the cooperation of the Complainant.
21. The Complainant agrees that when she had his private part in her mouth, it would have been possible for her to bite down or cause injuries to his penis and stop the rape. She admits that she didn't defend herself by biting his private part.
22. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity respond in variety of different ways. There is no classic or typical response to an unwelcome sexual activity. It is not possible to predict the state of mind of a woman who is being subjected to such an incident and how she would react in such a situation whether the assailant is known to her or not. In her explanation, the Complainant said that she was pushing it (penis) and taking her mouth out from him while he kept on pushing her head. Under these circumstances, I find that the Complainant's conduct in not biting down Accused's penis is not implausible.
23. I observed Complainant's demeanor in court. She is confident and straightforward. I find her to be an honest and reliable witness.
24. The version of the Defence is that the allegation against the Accused is fabricated. Accused said that the allegation was made up to hurt him because the Complainant was jealous of him and was angry that he refused to stay with her permanently at her house in Waimalika. This alleged motive for fabrication cannot be true because they had already decided to live separately and divorced for almost a year when the alleged incident happened. Why would she be jealous of the Accused whom she had divorced a year ago?

25. The Accused said that he came to Complainant's house and had a sleep over on an invitation of the Complainant, because she was scared to spend the night alone with her children. The Complainant and her mother completely rejected this evidence. The Complainant had been living alone in this house with her elderly mother and daughters for a considerable period of time even at times when her marriage with the Accused was still intact. They had separated when the fighting escalated due to their differences. Under these circumstances, it is highly unlikely for her to invite the Accused and seek his protection during night.
26. Defence also called Accused's cousin Imran Khan to support the version of the Defence that Accused and Complainant had done some shopping in Nadi town in the evening of 5th of May, 2015.
27. On this point Accused contradicted his own statement to police. According to his previous statement, he had met the Complainant in Nadi after he had done shopping. Furthermore it is highly impossible for Khan to remember the exact date of such an insignificant event unless something significant happened on that particular day. Khan is Accused's brother-in-law. He said that he does not want the Accused to go to prison. In my opinion he is an interested witness *vis a vis* the Defence case is concerned and therefore not reliable.
28. I watched Accused giving evidence in Court. He is evasive and not straightforward. His version is self-serving. The version of the Defence is not appealing to me. It does not create any doubt in my mind. I reject the evidence of the Defence and accept the version of the Prosecution.
29. The Complainant said that the Accused started licking her vagina from his mouth and tongue. Once the sucking and licking session was over, Accused made her turn and told her to do "sit ups" on his penis. He was holding her hand forcing her to do it. Then he made her lie down on the mattress and started having sex with her. He fucked her. His penis was going inside her vagina. Both offences of Rape and Sexual Assault are made out.
30. I reject the mixed opinion of Assessors.

31. I find the Accused guilty of Rape as charged and Sexual Assault. Accused is convicted on both counts accordingly.
32. That is the judgment of this Court.



Aruna Aluthge

Judge

AT LAUTOKA

13th April, 2018

Solicitors: Office of the Director of Public Prosecution for State
Vaniqi Lawyrs for Defence