

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 371 OF 2016S

STATE

vs

1. APOROSA ROBAIGAU
2. MARIA ROBAIGAU

Counsels : Ms. K. Semisi for State
Mr. A. Qetaki for Accused No. 1
Mr. S. Valenitabua for Accused No. 2

Hearings : 14, 15 and 16 May, 2018

Summing Up : 18 May, 2018

Judgment : 21 May, 2018

JUDGMENT

1. On 18 May 2018, after considering my summing up, the three assessors returned with a unanimous opinion, finding you two guilty of the following counts, in the following information:

First Count

Statement of Offence

RAPE: contrary to Section 207(1) and (2)(a) of the Crimes Act of 2009.

Particulars of Offence

APOROSA ROBAIGAU between the 1st day of August 2016 and the 31st day of August 2016 at Nasinu in the Central Division had carnal knowledge of J.B. without her consent.

Second Count

Statement of Offence

AIDING AND ABETTING THE OFFENCE OF RAPE: Contrary to Section 45 and 207 (1) and (2)(a) of the Crimes Act of 2009.

Particulars of Offence

MARIA ROBAIGAU between the 1st day of August 2016 and the 31st day of August 2016 at Nasinu in the Central Division aided and abetted another person namely, **APOROSA ROBAIGAU** to have carnal knowledge of J.B. without her consent.

Third Count

Statement of Offence

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

Particulars of Offence

APOROSA ROBAIGAU between the 1st day of August 2016 and the 31st day of August 2016 at Nasinu in the Central Division penetrated the vagina of J. B. with his fingers, without her consent.

Fourth Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210(1) (a) of the crime Act of 2009.

Particulars of Offence

APOROSA ROBAIGAU between the 1st day of August 2016 and the 31st day of August 2016 at Nasinu in the Central Division unlawfully and indecently assaulted J.B., by kissing her mouth.

Fifth Count

Statement of Offence

INDECENTLY ANNOYING ANY PERSON: Contrary to Section 213(1)(a) of the Crimes Act of 2009.

Particulars of Offence

APOROSA ROBAIGAU between the 1st day of August 2016 and the 31st day of August 2016 at Nasinu in the Central Division intended to insult the modesty of J.B., by showing his penis to the said J.B.

2. Obviously the three assessors accepted the prosecution's version of events, and the complainant's (PW1) evidence. It also meant, they had rejected you two's sworn denials.
3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, which reads as follows:

- *...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
- (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*

- (4) *When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
- (a) *written down; and*
 - (b) *pronounced in open court.*
- (5) *In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes..."*

4. In Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

"...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors..."

5. In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."

6. I have reviewed the evidence called in the trial and I have directed myself in accordance with the summing up I gave the assessors on 18 May 2018 (last Friday). The assessors' opinion was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my

assessment of the credibility of the witnesses, I am bound to disagree with the unanimous opinion of the three assessors

7. My reasons are as follows.
8. The prosecution's case was based fundamentally on the complainant's (PW1) verbal evidence. In her evidence, PW1 said, the accused showed her his penis, then laid her on a bed, then kissed her mouth, then inserted his fingers in her vagina and then inserted his penis into her vagina. PW1 said, prior to the above actions, she and the accused agreed to have sex for \$20.00. PW1 said, Accused No. 2, encouraged the accused to do the above, first by asking her to come and clean their house, thereby bringing her to Accused No. 1. Later Accused No., 2 closed the door, pull down the house curtains, thereby setting the scene for Accused No. 1 to carry out his plans against PW1. While Accused No. 1 and PW1 were having sexual intercourse, Accused No. 2 was lying on the same bed, and encouraging Accused No. 1 to move up and down on PW1.
9. PW1 said, in her evidence in court that, she was desperate for money at the time. After the sex, PW1 said, she often go to Accused No. 1 for money. Accused No. 1, in his sworn evidence said, he often give PW1 money to buy the family's food. PW1 said, prior to the sex, she did not ask Accused No. 1 for money. During cross examination, PW1 admitted she consented to sexual intercourse with Accused No. 1, at the material time. PW1 said, she told Accused No. 1 she was 14 years old before the sex, and he said nothing. When cross examined by defence, PW1 said, she was forced by Accused No. 1 to have sex in August 2016. She admitted she lied to the police. She admitted, that what she said in court that they consented to sex, was the truth. She said, she was scared to tell the police what she said in court.
10. I have heard the complainant's (PW1) evidence in court, and I have carefully assessed her demeanour. I have heard both accuseds' sworn denials in court, and I have heard their evidence that PW1's family and them were close neighbors for 10 years and knew each other well.
11. After analyzing all the evidence, I have been thrown into a reasonable doubt as to the complainant's allegations against both accuseds from counts no. 1, 2, 3, 4 and 5. This was

because of the complainant's changing position from what she allegedly told the court as to what happened in August 2016 and what she said in court. In court, she told us that she was desperate for money and that's why she consented to sex with Accused No.1 at the material time. Yet a while later, she complained to police that she was raped by Accused No. 1. The complainant's behavior to the police and to the court, had even cast doubt, on whether or not the alternative charge of defilement can ever be accepted. She said, she was allegedly defiled in August 2016, yet she was medically examined on 29 September 2016, which was a month after the alleged incidents. Anything could have happened during the one month gap between the date of the allegation and the date of the medical examination.

12. Furthermore, in the medical report, she told the doctor that she was sexually abused and raped by Accused No. 1, and assisted by his wife, Accused No. 2. Yet she told the court that she consented to sex. This inconsistency affects a person's credibility. Given the above, I am thrown into a reasonable doubt as to the truth or otherwise of PW1's allegations against both Accuseds, and the benefit of that doubt must go to them. I do not accept the three assessors' unanimous guilty opinions. Given the above, I find both accuseds not guilty as charged on all counts, and I acquit them accordingly of all counts.

13. Before I finish, I wish to issue the following caution to rape complainants when complaining about rape, a very serious matter. It is important that you are honest to the police, to the doctors, to the prosecutors and to the court, because your honesty will affect your credibility. The complainant in this case lost her case because she was not forthright and honest with the police, the doctors and the prosecutors, when lodging her complaints.




Salesi Temo
JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for Accused No. 1 : Legal Aid Commission, Suva
Solicitor for Accused No. 2 : Mr. S. Valenitabua, Barrister and Solicitor, Suva.