

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 6 of 2018

STATE

V

PENI QARO

Counsel : Ms. R. Uce and Ms. S. Navia for the State.
: Ms. J. Singh for the Accused.

Dates of Hearing : 20, 21, 24 September, 2018
Closing Speeches : 25 September, 2018
Date of Summing Up : 26 September, 2018
Date of Judgment : 28 September, 2018

JUDGMENT

1. The Director of Public Prosecutions charged the accused by filing the following information:

COUNT 1

Statement of Offence

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

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division had carnal knowledge with **UNAISI NAREZIA** without her consent.

COUNT 2

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division assaulted **UNAISI NAREZIA** thereby causing her actual bodily harm.

COUNT 3

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to section 375 (1) (a) and (i) (v) of the Crimes Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division without lawful excuse threatened to injure **UNAISI NAREZIA** with a chair, with intent to cause alarm to the said **UNAISI NAREZIA**.

COUNT 4

Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER:

Contrary to section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

PENI QARO on the 24th of December, 2017 at Sigatoka in the Western Division breached the Domestic Violence Restraining Order number 218/17 of the Sigatoka Magistrate Court dated 5th of December, 2017 by committing the above named offences against **UNAISI NAREZIA**, a protected person.

2. The three assessors had returned with mixed opinion as follows:
 - a). Count One – rape, accused guilty by a majority of 2 is to 1;
 - b). Count Two – assault causing actual bodily harm, accused guilty by majority of 2 is to 1;

- c). Count Three – criminal intimidation, accused guilty by unanimous opinion;
- d).Count Four – breach of domestic violence restraining order, accused guilty by unanimous opinion.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
 4. The prosecution called 5 witnesses and the defence called two witnesses including the accused.
 5. On 24 December, 2017 at about 4am the complainant was sleeping in her house when the accused came shouting trying to open the louvers of the house. To maintain peace of the neighbourhood the complainant opened the door.
 6. The accused came into the house and started swearing at the complainant. The accused was drunk he called the complainant a “bitch” and that she was having an affair. When the accused went to the bathroom the complainant ran out of the house because she was scared. The complainant had run about 10 meters when the accused came and pulled her top and forcefully dragged her into the house.
 7. When inside the house the accused punched her three (3) times on her back. After this the complainant was pulled and dragged on the floor, the accused forcefully removed her panty and inserted his penis into her vagina and had sexual intercourse for about 5 minutes. The complainant could not do anything since she was scared the accused might stand up and punch her again.

8. The complainant did not want to have sexual intercourse with the accused, he was forcing her. After the complainant had her shower the accused started forcing her to go to the Cuvu Police Post.
9. On their way to the Police Post the accused again started swearing and punching the complainant she did not say anything because people were watching by this time it was about 7am. At the Police Post she informed the police officer that the accused had punched and swore at her. In front of the policeman the accused lifted the chair and wanted to throw the chair at the complainant he threatened her that he will kill her. This made the complainant frightened.
10. From Cuvu Police Post the complainant was told to go to Sigatoka Police Station. The accused was kept at the Cuvu Police Post. At Sigatoka Police Station the complainant lodged her complaint thereafter she went for a medical examination at the Sigatoka Hospital. She took with her the medical examination form and after she was seen by the doctor she took the form back to the Police Station.
11. Due to the accused's swearing and threatening behaviour to kill, the complainant was able to get a Domestic Violence Restraining Order (hereinafter referred to as DVRO) issued against the accused. Two weeks prior to this incident the accused had left the complainant.
12. A copy of the DVRO was served on the accused by police officer Akisi. When the accused was arrested and remanded she received messages from people visiting the accused to visit him in Prison. When the complainant went to visit the accused she was asked by the accused to write a letter to withdraw the case and have him bailed out.

13. The accused apologized for his actions, when the complainant went home it took her about one month to think about what to write. After typing the letter the complainant went to see the accused at the Prison with the letter. The complainant was worried about what was written in the letter. The accused had told the complainant to write that she had given false information to the police due to jealousy and that the accused was having an affair and due to peer pressure.
14. The second prosecution witness was Dr. Suzzana Raza. Dr. Raza graduated with an MBBS degree from the Fiji School of Medicine in 2015 she has 3 years' experience as a Medical Practitioner.
15. The doctor confirmed examining the complainant on 24 December, 2017.
16. The professional opinion of the doctor was that her findings were consistent with the history given there was recent soft tissue injury caused by use of blunt force such as a punch.
17. The third prosecution witness Special Constable Rohiteshwar Singh informed the court that on 24 December 2017 he was on duty at the Cuvu Community Police Post. The complainant came with the accused she complained that she had been assaulted and raped by the accused. The witness observed that the complainant was scared.
18. When the accused entered the Police Post, the witness noticed the accused smelt of liquor. In front of the witness the accused threatened the complainant when he comes out of Prison he will kill her. At this time the accused lifted a chair to throw on the complainant. The complainant came and hid behind the witness.

19. The witness told the accused he was not supposed to do that. The accused then left the Police Post in a taxi.
20. The fourth prosecution witness was WPC 4693 Akisi on 19 December, 2017 the witness received an interim Domestic Violence Restraining Order from the Magistrate's Court at Sigatoka. After registering the document in the record's register she went to serve the accused.
21. After serving the accused she went to a Justice of Peace to sign the affidavit of service and then filed it at the Court Registry. The accused had acknowledged receipt of the interim DVRO by signing the affidavit of service. The accused was explained the contents of the order which he understood.
22. The document the witness had served was an interim (non-molestation) DVRO issued by the Magistrate's Court at Sigatoka dated 5 December, 2017.
23. The final witness was Sergeant 2607 Ram Karan he was the investigating officer. Upon arriving at the Police Post the witness was told by Special Constable Rohiteshwar Singh that the couple had left in a taxi for Sigatoka Police Station. At the Sigatoka Police Station the witness met the couple since it was a case of domestic violence the suspect was taken into custody. The witness visited the crime scene, recorded the police statements and analyzed the evidence.
24. The witness as a matter of clarification sought a further statement of the complainant in respect of sexual intercourse whether it was consensual or not. After the clarification the suspect was charged.

25. The accused informed the court on Friday 23rd December, 2017 he was working at Deep Sea Night Club as a Bouncer. He knocked off at 2.00 am on the 24th.
26. Before knocking off the accused saw three (3) missed calls from his wife the complainant he could not answer the call because he was inside the night club which was noisy. The accused called his wife but she did not answer the phone. He thought something must have happened to her since she was alone at home.
27. After a while the accused stopped a minivan and went to Naidovi. He was aware there was a DVRO against him but he went in case there was some emergency. At this time the complainant and the accused were separated, he was living at Sanasana.
28. At Naidovi the accused went to the house of his wife, he knocked on the door and she opened it. He went inside and both had a conversation for a while. After this both had consensual sexual intercourse he did not force or punch her.
29. After having sex the complainant started accusing the accused of having affairs with other women. The argument got heated up and the complainant told him she wanted to report at the Police Post. The accused agreed, after having his bath the accused and the complainant went together to the Police Post.
30. At the Police Post there was one Police Officer by the name of Rohit on duty the accused and the complainant were taken into a room which had a long table. The police officer was seated on top of the table whereas the complainant and the accused were seated on either side of the table facing each other.

31. The complainant was giving her statement to the police officer, after a while the police officer called Sigatoka Police Station and told both the complainant and the accused to go to the Sigatoka Police Station.
32. The accused denied the allegation of rape, in respect of assaulting the complainant the accused stated that if he would have assaulted the complainant, she would have received severe injuries. Furthermore, the accused said in the Police Post he did not lift the chair to hit the complainant but because of his anger he told the complainant if she wanted him to lift the chair and whack her with it. He only said those words but did not do it.
33. The final defence witness was Rosleen Devi Singh she recalled witnessing the affidavit of the complainant which was brought to her house at Naidovi. The witness read the whole document then started questioning the complainant upon asking whether her husband had really raped her, the complainant replied "no".
34. When the witness asked the complainant the reason for making a false allegation against her husband the complainant replied she did it in anger and jealousy but now she wanted to settle down with her husband.
35. The witness only signs a document after she is sure that the deponent understood the contents. The complainant told the witness that she understood everything in the document and regrets whatever she had done.
36. Upon questioning by court whether the complainant had affirmed instead of swearing an oath the witness stated that it was something like affirmation.

DETERMINATION

COUNT ONE

37. In respect of the offence of rape the only dispute is whether the complainant had consented to have sexual intercourse with the accused. In the morning of 24 December, 2017 after the complainant had run out of the house the accused dragged her into the house. In the house the accused punched the complainant three times before having sexual intercourse by forcing her to the floor.
38. The complainant was able to recall clearly what the accused had done to her. She was able to describe the conduct of the accused clearly. The fact that the complainant did not tell Special Constable Singh and Dr. Raza about being raped by the accused does not create any doubt on the reliability of the complainant's evidence.
39. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
40. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. Here the complainant did lodge a complaint at the Sigatoka Police Station on the same day of the alleged offending and gave her police statement which prompted the police to charge the accused. The fact that the police officer had written in the medical examination form the complaint of assault only does not affect the reliability of the complainant's evidence.

41. The complainant was able to withstand cross examination and was not discredited. She was referred to her police statement given to the police when facts were fresh in her mind, the inconsistency was not significant which did not adversely affect the credibility and reliability of the complainant's evidence.
42. I accept the evidence of the complainant as truthful and reliable I have no doubts in my mind that the complainant told the truth in court, her demeanour was consistent with her honesty.
43. Even in cross examination the complainant was forthright in her answers and was not evasive. The response by the complainant that the medical examination form had mentioned the allegation of assault only so she told the doctor about assault is believable.
44. I also accept the accused told the complainant what to write in the affidavit since he was desperate to be released on bail and for the complainant to withdraw the complaint which would be in his interest. Due to the difficult circumstances the complainant had found herself in, she was holding on to the document for a month before taking it to the Commissioner for Oaths which was what the accused had asked her to do.
45. The complainant narrated to the Commissioner for oaths Rosleen Singh what the accused had dictated to her.
46. On the other hand the accused did not tell the truth in court his evidence was unreliable and untruthful. In respect of the offence of rape I do not accept the evidence of the accused that he had consensual sexual intercourse with the complainant that early morning. I also do not accept the accused did not assault the complainant prior to having forceful sexual intercourse with the

complainant. The accused whilst giving evidence tried very hard to contain himself, he was also not forthright in his evidence.

47. The defence has not been able to create a reasonable doubt in respect of the offence of rape. This court is satisfied beyond reasonable doubt that the accused on 24 December, 2017 had sexual intercourse with the complainant without her consent.
48. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.

COUNTS TWO TO FOUR

49. In respect of the count of assault causing actual bodily harm I accept the evidence of the complainant that she was assaulted by the accused. The complainant promptly informed police officer Rohitshwar and the doctor. The doctor had seen injuries on the complainant which was consistent with blunt force trauma such as a punch.
50. The accused did not tell the truth when he informed the court that if he would have assaulted the complainant she would have received severe injuries. I accept the evidence of the complainant as truthful and reliable and reject the evidence of the accused as not worthy of belief.
51. This court is satisfied beyond reasonable doubt that on the 24th December, 2017 the accused had assaulted the complainant thereby causing her actual bodily harm.
52. In respect of the count of criminal intimidation the complainant gave a true account of what the accused had done inside the Police Post. Special Constable Rohitshwar Singh had also seen the accused lift a

chair to throw at the complainant. The complainant who was frightened by the behaviour of the accused ran behind this police officer.

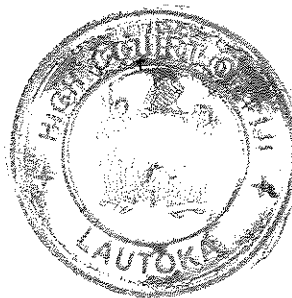
53. The complainant and Special Constable Rohiteshwar Singh gave credible and reliable evidence in respect of the count of criminal intimidation. The accused did not tell the truth when he told the court that he did not lift the chair on his own admission the accused agreed he had threatened the complainant out of anger.
54. This court is satisfied beyond reasonable doubt that on the 24th December, 2017 the accused without lawful excuse threatened to injure Unaisi Naresia with a chair, with intent to cause alarm to the said Unaisi Naresia.
55. For the fourth count of breach of Domestic Violence Restraining Order I accept the evidence of the complainant that she had obtained a Domestic Violence Restraining Order against the accused. The order was served by WPC Akisi to the accused she had explained the order to the accused who understood the contents of the order. The accused also admitted being told about the contents of the order which was a non-molestation order.
56. The accused in his defence did not dispute this allegation. I accept the evidence of the complainant and WPC Akisi that the Domestic Violence Restraining Order was served to the accused who was aware of the non-molestation orders made against him. Despite being aware of the orders the accused had breached the Domestic Violence Restraining Order by committing the offences of rape, assault causing actual bodily harm and criminal intimidation on the complainant who was a protected person.
57. This court is satisfied beyond reasonable doubt that on the 24th December, 2017 the accused breached the Domestic Violence

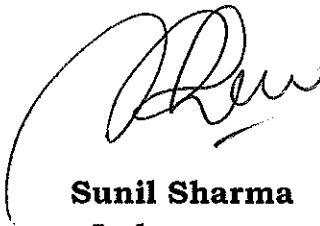
Restraining Order dated 5th December, 2017 by committing the offences of rape, assault causing actual bodily harm and criminal intimidation against the complainant.

58. In respect of all the counts I accept the evidence of all the prosecution witnesses as truthful and reliable, on the other hand I reject the evidence of the accused as untruthful and unreliable.
59. The defence has not been able to create a reasonable doubt in the prosecution case in respect of counts two to four.

CONCLUSION

60. In respect of all the counts I accept the majority and unanimous opinion of the assessors that the accused is guilty for the offence of rape, assault causing actual bodily harm, criminal intimidation and breach of Domestic Violence Restraining Order.
61. In view of the above, I find the accused guilty as charged and I convict him accordingly for all the counts.
62. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka
28 September, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Accused.