

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 137 of 2015

BETWEEN : STATE

AND : DAYA PRASAD

Counsel : Ms Naibe for the State
Ms S. Khan and Mr Z. Khan for the Accused

Dates of Hearing : 25 and 26 March 2019

Closing Speeches : 26 March 2019

Date of Summing up: 28 March 2019

Date of Judgement : 08 April 2019

JUDGEMENT

1. The Accused is indicted for two counts of indecent assault and three counts of rape. The statements of offences and the particulars of offences are as follows;

First Count

Statement of Offence

Indecent assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 1st day of August, 2014 and the 31st day of August, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

Second Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad between the 27th day of September, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Third Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 10th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fourth Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 18th day of October, 2014 at Nadi in the Western Division, penetrated the vagina of Shayal Shivangini Lata, with his penis, without her consent.

Fifth Count

Statement of Offence

Indecent assault: Contrary to Section 212 (1) of the Crimes Act 44 of 2009.

Particulars of Offence

Daya Prasad on the 20th day of November, 2014 at Nadi in the Western Division, unlawfully and indecently, assaulted Shayal Shivangini Lata.

2. The Prosecution called two witnesses to prove the five counts against the Accused. After the prosecution case was closed the defence made submissions on no case to answer. The submissions of the defence was mainly based on Section 178 of the Criminal Procedure Act which is applicable to trials before the Magistrate's Court. It appeared that the notion of no case to answer was misconceived by the defence. The tests applied in no case to answer in the High Court and the Magistrate's Court are different and the law on this is well settled.
3. Nevertheless, having considered the written submissions made by the defence, the oral submissions by the state and the evidence adduced in this case, it was decided that there is admissible evidence touching on all the elements of the

offences. Therefore, it was held that the Accused has a case to answer in respect of all five counts.

4. The Accused was given his rights pursuant to Section 231(2) of the Criminal procedure Act. The Accused opted to remain silent and it was informed that no witnesses will be called for the defence.
5. Subsequently I have summed up the case to the assessors. After a short deliberation, the assessors unanimously found that the Accused is not guilty to all five counts.
6. The assessors were directed on law and were given directions on how they must assess credibility of witnesses, how to evaluate evidence of recent complaint, proof of penetration and consent, among other things. It appears that the assessors misconceived the directions, or they have failed to properly analyse evidence based on the directions given. I am of the view that the evidence given by the complainant and the evidence of recent complaint were credible and the assessors had sufficient reasons to believe the prosecution witnesses.
7. Having directed myself in accordance with the summing up I will now review the evidence adduced in this case to pronounce my judgement.
8. There were no admitted facts in this case.
9. I will now evaluate the evidence adduced in this case in respect of each count.
10. As far as the identity of the Accused is concerned the prosecution presented undisputed evidence. The complainant said that the Accused's name is Daya and he is her uncle as well as her neighbour. She identified the Accused in court as the person whom she referred to as Daya, her uncle. The second prosecution witness, Shoral Shireen Lata also identified the Accused as her uncle, Daya. Even during the cross examination of the prosecution witnesses the identity of

the Accused was not disputed. Therefore, I am satisfied that the identity of the Accused in respect of all the five counts is well established by the prosecution.

11. According to the evidence given by the complainant, in August 2014 during the second term school holidays she was learning to drive from the Accused. The complainant said that when she was learning to drive the Accused started to touch her thighs over her cloths while driving. She also said that he squeezed her breasts. She said that she didn't like it, but the Accused told her not to tell anyone about it. However according to her evidence, she had reported the incident to her mother. Her mother had not believed her saying the Accused is part of the family.

12. The following were the only specific questions put to the complainant during the cross examination in respect of the first incident of indecent assault;

Q: Witness you mentioned earlier that the Accused had been touching your thighs and breasts?

A: Yes

Q: Witness you mentioned when you took lunch over to his home one day, that is the day he allegedly raped you?

A: Yes

Q: Before that lunch day he was touching your breasts and your thighs. My question to you is, why did you go to his home with lunch, if you weren't happy with touching going on prior to that day?

A: I told my mum that I won't go, but she told me to go and deliver it.

13. In respect of the second count the complainant testified that on 27 September 2014 she was told by her mother to deliver some food to the Accused's place. She said that she didn't want to go, but her mother forced her to go. The complainant said when she took the food the Accused came outside and asked her to come inside. She said he locked the grill door and forced her to his room.

The Accused had forcefully taken off her clothes, including her panty and bra. He had pushed her on the bed and had come on top of her. She said he tried to kiss her and she had started moving her head. She said that she kept on shouting, but no one could hear her as there was loud music played at the Accused's house. The complainant said that the Accused separated her legs with his legs while holding her hands tightly with his hands.

14. She gave evidence that he inserted his penis into her vagina. She said that she didn't like it. She said that she called for help by shouting, but no one could hear her. She also said that she was blank at that moment and she didn't know for how long he did it. She had been shocked. She said that she did not expect that from her uncle.
15. The complainant said that the Accused forced her to go and have a shower. When she saw blood on her thigh and on the bed sheet she said she was shocked. She also said that it is hard to explain how she felt. The complainant said that the Accused threatened her not to tell anything to anyone and told her; "otherwise it would not be good". The complainant said that she didn't tell her mother as she did not believe her before.
16. The complainant was asked the following questions by the defence relating to the second count;

Q: Before that lunch day he was touching your breast and your thighs. My question to you is, why did you go to his home with lunch, if you weren't happy with touching going on prior to that day?

A: I told my mum that I won't go, but she told me to go and deliver it.

Q: So you voluntarily went over?

A: No.

Q: Someone forced you?

A: My mum forced me to go.

- Q: How did she force you to go?
A: First I refused and then she told me just go and give the food.
Q: She was verbally asking you?
A: Yes.
Q: I put it to you that no such thing happened?
A: It happened.
Q: I put it to you that you are lying to this court?
A: I am not lying.

17. The complainant gave evidence in respect of the incident relating to the third count which happened on 10 October 2014. She said she went to the Accused's place with her mother to make some sweets. Her mother had to go back home leaving the complainant at the Accused's place as her mother needed something. The Accused had then locked the grill and had grabbed her to the sitting room. She said he played a sex movie and told her to watch it. The complainant said that the Accused held her tight and forced her to watch the movie. The Accused had then grabbed her to his room. She said that the Accused took off her clothes and his clothes. She said she didn't like it.
18. The Accused had then placed his mouth on her vagina. The complainant said that he was holding her hands with his hands. The complainant had shouted for help. She said no one could hear her as the music was loud.
19. The complainant said that the Accused then inserted his penis into her vagina. She said that she didn't like it. She said it was painful. She said she tried to push him and she bit his arm. According to the complainant her mother had come after about 2 hours and she had not told her as the mother did not believe her at first. She also said that the Accused told her not to say anything to anyone "otherwise it won't be good".
20. No specific question was put by the defence relating to the third count during the cross examination of the complainant.

21. Regarding the fourth count the complainant said that on 18 October 2014 her mother asked her to take some sweets to Sigatoka with the Accused. When she said that she cannot go, her father had told her to go. She said that she went with the Accused in his van. After dinner when they were returning the Accused had stopped the vehicle on the way. She said that the Accused took a torch and checked around with the torch. Then he had asked her to come to the back of the van. When she refused he had grabbed her. She said that he tried to kiss her, and she had kept on moving her head. She said that she didn't like it. The Accused had taken off her clothes.
22. The complainant said the Accused inserted his penis into her vagina. She said she tried push him. She said he over powered her. She said he held her tight. She said that she tried to shout but there was no one around. She said that the incident happened inside the van.
23. The complainant said that she did not tell anyone about it as she thought no one would believe her.
24. The complainant was cross examined as follows by the defence regarding the fourth count;
- Q: Witness you mentioned earlier about a trip to Sigatoka with some sweets?
- A: Yes.
- Q: I put it to you that it was not the 18th but the 20th when you went to Sigatoka with some sweets?
- A: Its wrong it's on the 18th.
- Q: 18th of what?
- A: October.
- Q: You mentioned earlier that no one was with you on that trip to Sigatoka, is that correct?
- A: Correct.
- Q: Well I put to you that your aunty was with you in the car?
- A: No one was there.

25. The complainant testified that the incident relating to the fifth count took place on 20 November 2014. She said that her mother requested the Accused to exchange a packet of milk which they bought from MH Supermarket in Nadi. When her mother requested her to accompany the Accused she had refused. However, the complainant had later gone with the Accused. She said that she had taken her sister, Salochana with her as she was going to work. She said they went and exchanged the milk and dropped her sister. Then her mother had called her and had informed that her other sister Shoral is coming to pick her. She said the van was parked at Nadi Hotel and she was sitting at the back seat.

26. The complainant said that the Accused came and started touching her. She said that the Accused touched her thighs and breasts. She said that he held her hands when she tried to stop him. She said she didn't like it and the Accused continued to touch her thighs and breasts until her sister came. The complainant said that she didn't tell her sister what the Accused did to her as her sister got angry for the clothes that the complainant was wearing. She said that she was wearing what she used to wear at home.

27. The complainant was cross examined in respect of the fifth count as follows;

Q: I am going to go back to the 20th November 2014, you mentioned earlier in court about the expired milk an all, about that day, you recall that?

A: Yes.

Q: Can you tell the court what time of the day it was because I couldn't ascertain that from your evidence?

A: Yes, it was day time, I am not sure about the actual time, but it was day time, during the day.

Q: Morning, afternoon?

A: Morning.

- Q: So, if it was a morning I am assuming there was sunlight out, there was enough light outside?
- A: Yes.
- Q: So, nobody saw you while this was allegedly taking place in the car in daylight?
- A: His vehicle has curtains all around.
- Q: Witness that year, when did your school holidays begin that year?
- A: August second term.
- Q: From what period to what period?
- A: I am not sure about the actual date of the holidays.
- Q: So was it from August to November, the holidays?
- A: No.
- Q: Looking at the 20th of November 2014 it comes to be a Thursday, a school day?
- A: Yes.
- Q: So why were you not at school?
- A: I think it was a holiday or something, but I am not clearly sure about that.
- Q: I put it to you that you are lying, and you are in fact in school?
- A: No
- Q: I put it to you that no such thing happened on that day?
- A: It happened.

28. Apart from the above-mentioned questions put to the complainant specifically about the respective counts, she was asked whether she mentioned in her statement that her mother was having an affair with the Accused. The complainant confirmed the same, and said yes when she was asked whether she felt hurt, angry or betrayed about it. Under cross examination she said that she is not close to her father. Further it was put to the complainant that she is lying as her father and her sister asked the Accused to pay her \$15000. The

complainant refused the suggestion and said it is a lie. She was further cross examined on this as follows;

Q: I put it to you when Daya refused to pay the \$15000 it was only then, months after the alleged incident occurring, that you went and reported the matter to Police in December later that year?

A: We never asked him to pay the money.

29. The complainant explained as to why she did not complain about the alleged incidents. She clearly said that when she complained about the first incident, her mother did not believe her saying he is one of their family members. The complainant said that she thought her mother would believe her when she complained to her mother about the first incident. The complainant said that she was about 16 years when these incidents happened. She also said that after each incident the Accused told her not to tell anyone about what he did to her. She said that he threatened her not to tell anyone and "otherwise it would not be good".

30. As per the evidence given by the complainant she finally complained to her sister sometimes in December 2014. She even explained as to what made her complain about the incidents to her sister. She said that during the time she was staying with her sister the Accused came near that house and she got scared after sighting him. She said that was when she told her sister about it when her sister inquired as to why she looked scared. She also explained that she could not tell her father or the grandfather as she was not close to them.

31. That was the evidence given by the complainant in respect of the elements of the five counts. I will now consider the evidence given by the sister of the complainant. She was called by the prosecution as a witness of recent complaint.

32. Commenting on the principle of recent complaint Justice Shameem noted the following in State v Volavola [2003] FJHC 72;HAA0106].2002S (9 April 2003);

“However, evidence of recent complaint is intended to strengthen (and not corroborate) her evidence. Lack of recent complaint should not be taken to show that her evidence is manifestly unreliable”.

“However, her silence could easily have been consistent with her shame at the incident, connected with cultural taboos in relation to discussing sexual matters with elders. To say that an absence of recent complaint confirms consent is an error of both fact and law. On the facts of this case, there was nothing to suggest that her silence meant consent to the sexual intercourse”.

33. In *Senikarawa v State* [2006] FJCA 25; AAU0005.2004S (24 March 2006) the Court of Appeal observed;

“Evidence of recent complaint may be adduced to show the consistency of the conduct of the complainant and to negative consent. *Kory White v. R* [1999] AC 210 requires that both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint. If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial”.

34. Shoral Shireen Lata, the sister of the complainant gave evidence that in the month of December 2014 the complainant told her about what happened to her. She said that when her mother came to talk about reconciliation with her father, she saw the Accused was driving around her place in his van. The witness said after her mother left she noticed that the complainant was a bit upset. She said that the complainant didn't want to have dinner and she didn't talk much. The complainant had been residing at her sister's place at that time. According to the evidence given by the witness, the complainant had been scared that the

Accused will come back as he found her house. Upon seeing that the complainant was crying the witness had asked her for the reason. The witness, Shoral Shireen Lata gave evidence on what she was told by the complainant. She gave evidence as to the terms of the incidents relayed to her by the complainant. She confirmed that the complainant told her about the Accused and what he did to the complainant.

35. Under cross examination the witness said that her father believed the complainant and he came to report the matter. When she was asked whether she knew that her mother was having an affair with the Accused, the witness said that she is not sure as she never witnessed it. She denied that they demanded money from the Accused.
36. In this case the complainant said that she complained about the first incident to her mother. Secondly, she complained about all the incidents to her sister. The first incident had taken place in August 2014 and the last incident had happened on 20 November 2014. It appears that within a short period, close to one month since the last incident, she had complained to her sister about the incidents. The defence could not challenge the evidence of recent complaint and the sister's evidence strengthened the complainant's evidence.
37. I am of the view that the complainant's explanation for the delay in complaining and the retraction caused by her mother's response is acceptable and probable. I am satisfied of the explanations given by the complainant.
38. I have considered the issue of consent in respect of the offence of rape in count 2, 3 and 4.
39. Section 206(1) of the Crimes Act defines consent for sexual offences as follows;

"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.”

40. Further Section 206(2) reads as follows;

“Without limiting subsection (1), a person’s consent to an act is not freely and voluntarily given if it is obtained-

- a) By force; or
- b) By threat or intimidation; or
- c) By fear of bodily harm; or
- d) By exercise of authority; or
- e) By false and fraudulent representations about the nature and purpose of the act; or
- f) By mistaken belief induced by the accused person that the accused person was the person’s sexual partner.”

41. I have considered whether the complainant had consented in respect of the second, third and fourth counts as there are repetition of sexual acts. However, the complainant clearly said how she reacted to the alleged acts of the Accused. In respect of the second count the complainant said that the Accused had forcefully taken off her clothes, including her panty and bra. He had pushed her on the bed and had come on top of her. She said he tried to kiss her and she had started moving her head. She said that she kept on shouting, but no one could hear her as there was loud music played at the Accused’s house.

42. In respect of the third count she said that the Accused grabbed her to his room. She said that the Accused took off her clothes and his clothes. She said she didn’t like it. The Accused had then placed his mouth on her vagina. The complainant said that he was holding her hands with his hands. The complainant had shouted for help. She said no one could hear her as the music was loud. The complainant said that the Accused then inserted his penis into her vagina. She said that she didn’t like it. She said it was painful. She said she tried to push him and she bit his arm.

43. The prosecution led evidence on consent regarding the fourth count as well. The complainant said that the Accused asked her to come to the back of the van. When she refused he had grabbed her. She said that he tried to kiss her, and she had kept on moving her head. She said that she didn't like it. The Accused had taken off her clothes. The complainant said the Accused inserted his penis into her vagina. She said she tried push him. She said he over powered her. She said he held her tight. She said that she tried to shout but there was no one around. She said that the incident happened inside the van.
44. The prosecution evidence certainly reflects resistance by the complainant during the incidents relating to the second, third and fourth incidents. The complainant gave unchallenged evidence of threats and intimidation to her. Obviously, the Accused was in a position of authority given the relationship between them. It is clearly discernible that the prosecution adduced sufficient evidence to establish that the complainant did not consent to the alleged acts of rape and the Accused had reasons to know or to believe that the complainant was not consenting.
45. The evidence given by the complainant regarding the issue of consent in respect of the second, third and fourth counts was not challenged by the defence. Although I have given directions to the assessors on the issue of consent it does not appear that the assessors have analyzed the evidence within the parameters of those directions.
46. I have considered the element of penetration in respect of the second, third and fourth counts. I am satisfied that the prosecution adduced specific evidence on penetration. The complainant clearly gave evidence that the Accused penetrated her vagina with his penis during the three incidents relating to the second, third and the fourth counts. The defence did not challenge the evidence on penetration at any stage.

47. In respect of the first and the fifth counts of indecent assault the complainant gave very specific and clear evidence. I have no doubt that the alleged acts in respect of the first and the fifth counts amount to unlawful and indecent acts. The complainant gave reliable evidence and her evidence regarding the first and fifth counts could not be challenged by the defence.

48. At the beginning of the trial the State made an application for a screen to be placed between the Accused and the complainant. The State Counsel made submissions that the complainant finds it difficult to testify in court given the circumstances and the relationship with the Accused. The defence counsel informed court that as long as it is not a hindrance for the court to observe the demeanour of the complainant they do not have any objection. Accordingly, a screen was placed in such a way for the court, the counsel of both parties and the assessors to observe the demenaour of the complainant without any obstruction.

49. I have observed the demenaour of the complainant. The complainant gave evidence to every question put to her in a very confident and a convincing manner. She was not evasive, and her answers were forthright. She gave specific evidence in respect of each count. She explained everything, and her explanations and reasons were cogent, acceptable and probable. she was consistent throughout her evidence. There were no inconsistencies or contradictions in her evidence. The defence could not discredit the complainant or challenge her evidence. Her evidence remained unchallenged throughout the trial. I am satisfied that the complainant's evidence is credible and reliable. Therefore, I have no reasons to disbelieve the evidence given by the complainant and I do not see it is unsafe to act upon her evidence.

50. I accept the complainant's evidence given in respect of all five counts. I am satisfied that she gave admissible and relevant evidence in respect of each element of indecent assault in count one and count five. Further I am satisfied

that she gave admissible and relevant evidence in respect of each element of rape in count two, three and four.

51. I decide that the prosecution proved all five counts against the Accused beyond reasonable doubt.

52. In the circumstances I am not inclined to concur with the unanimous opinion of the assessors. I reject the opinions of the assessors as I am of the view that their opinions are perverse and not founded on the directions given in the summing up and the evidence adduced in this case.

53. I find the Accused guilty to the first, second, third, fourth and the fifth counts as per the Information.

54. Accordingly, I convict the Accused for all five counts.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Messrs Iqbal Khan & Associates