

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 328 of 2016

STATE

V

KERESONI WAQATAIREWA

Counsel : Ms. Kimberly Semisi for the State
Ms. Talei Kean with Mr. Paula Gade for the Accused

Dates of Trial : 16-17 May & 20-24 May 2019

Summing Up : 27 May 2019

Judgment : 29 May 2019

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "IL".

JUDGMENT

[1] As per the Amended Information, filed in Court by the Director of Public Prosecutions (DPP), the accused Keresoni Waqatairewa is charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, had carnal knowledge of **IL** without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1, had carnal knowledge of **IL** without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, on an occasion other than that mentioned in Count 1 and Count 2, had carnal knowledge of **IL** without her consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

KERESONI WAQATAIREWA, on the 31st day of August 2016, at Nabua in the Central Division, assaulted **IL** causing her actual bodily harm.

- [2] The accused pleaded guilty to Count 4. However, he pleaded not guilty to the remaining three counts.

- [3] Court was satisfied that the accused fully understood the nature of the charge contained in Count 4 and the consequences of his guilty plea for the said count. Court found that the accused pleaded guilty on his own free will and free from any influence.
- [4] The Learned State Counsel submitted that she would not be filing Summary of Facts in respect of Count 4, but would be leading evidence of the complainant to establish the facts.
- [5] The ensuing trial in respect of the remaining three charges was held over a period of 7 days. At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused not guilty of Count 1; and by a majority decision the Assessors found the accused guilty of Counts 2 and 3.
- [6] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [7] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (a) of the Crimes Act No 44 of 2009 (Crimes Act).
- [8] The Assessors were directed that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 31 August 2016);
 - (iii) at Nabua, in the Central Division;
 - (iv) penetrated the complainant's vagina, with his penis;
 - (v) without the consent of the complainant; and
 - (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [9] In order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 31 August 2016), but on an occasion other than that mentioned in Count 1;

- (iii) at Nabua, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[10] Similarly, in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 31 August 2016), but on an occasion other than that mentioned in Counts 1 and 2;
- (iii) at Nabua, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[11] The above individual elements, in relation to counts 1, 2 and 3 were further elaborated upon in my summing up.

[12] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Amended Agreed Facts*" without placing necessary evidence to prove them:

1. The complainant is one IL, 32 years old, security officer of Nabua Muslim League and the accused is one Keresoni Waqatairewa, 36 years old, security officer of Muslim League, Nabua.
2. The accused and the complainant were in a defacto relationship at the time of the alleged offences.
3. The complainant used to reside with the accused at the Nabua Muslim League for 11 years with their four children.
4. At the time of the alleged offences, the accused had carnal knowledge of the complainant.

- [13] Since the prosecution and the defence have consented to treat the above facts as “*Amended Agreed Facts*”, without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.
- [14] The prosecution, in support of their case, called the complainant and Dr. Elvira Ongbit. The prosecution also tendered the following documents as a prosecution exhibits:
- Prosecution Exhibit **PE1** – The Resume of Dr. Elvira Ongbit.
- Prosecution Exhibit **PE2** - The Medical Examination Report of the complainant.
- [15] The defence relied on the evidence of the accused himself.
- [16] In this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused is proved as it has been agreed that ‘The accused is Keresoni Waqatairewa’. The date of incident and the place of incident is also not in dispute. The accused has also admitted that he had carnal knowledge of the complainant. During his evidence he admitted to having consensual sexual intercourse on the three occasions on 31 August 2016.
- [17] Therefore, the main issue for determination is the issue of consent. The prosecution should prove beyond reasonable doubt that the accused penetrated the complainant’s vagina, with his penis, without her consent, on all three occasions. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis on the three occasions, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented.
- [18] The complainant testified that she did not consent to the three acts of sexual intercourse with the accused. The accused denies this and testified that the complainant did consent to the three acts of sexual intercourse.
- [19] The three Assessors have unanimously found the accused not guilty of Count 1. However, in respect of Counts 2 and 3, the Assessors have found the evidence of

prosecution as truthful and reliable, as they have by a majority decision found the accused guilty of the two counts. Therefore, it is clear that they have rejected the version put forward by the accused in respect of the said two counts.

[20] In this case, it is in evidence that on the morning of 31 August 2016, after the complainant had finished her night shift at the CWM Hospital, she had agreed to meet the accused at the Suva Bus Stand to collect her sick sheet from him. As per this agreement, after she finished work, the complainant had changed and walked down to the Suva Bus Stand. She had waited for the accused at the Namadi Bus Stop. The accused had come there and given the sick sheet to her.

[21] Although the complainant had said that she can take the sick sheet by herself, the accused had suggested that they go together to the Grid Security Office at Namadi to hand over the sick sheet. So they had left for Namadi together by bus. This was around 8.00 in the morning.

[22] After reaching the Grid Security Office at Namadi, the accused was standing outside whilst the complainant went inside to hand over the sick sheet.

[23] The accused was still standing outside when the complainant came back after handing over the sick sheet at the office. She had then told the accused that she was going back to Samabula. However, the accused had said that they go together, follow the short cut to the Nabua Muslim League, and separate from there. Although, the complainant had been telling the accused that she wanted to leave from there, the accused had kept insisting that they follow the short cut and the complainant had complied.

[24] Therefore, the complainant had followed the accused along the short cut leading towards the Nabua Muslim League. On reaching the road that leads to their house, the complainant had again said that she wants to go to Samabula so that she could rest since she was to do the night shift that day as well. However, the accused kept on saying for them to go to the house. The complainant said "I remained standing and I kept on telling him that I do not want to go home. He kept on insisting that we go home.....He then pulled my hand and we went home."

- [25] Thereafter, they had reached home. The accused had opened the door and they entered inside the house. When they went inside the house, the complainant had kept telling the accused that she had to go to Samabula. However, the accused had asked her to wait.
- [26] Thereafter, the complainant testified as to how she had sexual intercourse with the accused on the three occasions. The complainant testified that she did not consent to the three acts of sexual intercourse with the accused. The accused denies this and testified that the complainant did consent to the three acts of sexual intercourse.
- [27] There is a reasonable doubt as to whether the complainant consented to the first act of sexual intercourse. This doubt is created from the very fact that the complainant agreed to meet the accused at the Suva Bus stand that morning and even agreed to go along with him to the Grid Security Office to hand over her sick sheet. After handing over the sick she could very well have gone to Samabula as she wanted to do. However, she agreed to follow the accused along the short cut to the Nabua Muslim League, and separate from there. Even at this point in time, on reaching the road that leads to their house, the complainant could have left the accused. However, she went along with accused to their house. The first act of sexual intercourse took place thereafter.
- [28] Therefore, I agree with the unanimous opinion of the Assessors in finding the accused not guilty of Count 1.
- [29] After the first time the accused had intercourse with the complainant, the complainant testified that she had been wanting to leave. However, the accused had insisted that she remains. She couldn't leave as she was naked. The accused had refused to give her clothes back to her. The accused had left the clothes besides the mattress, where they were lying down. About 30 minutes later, the accused had wanted to have sexual intercourse with her once again. However, she had refused. Notwithstanding, the complainant testified that the accused had forced himself on her and had sexual intercourse.
- [30] Even at this point in time the complainant had wanted to leave the house. However, the accused had still insisted that she remains. She still couldn't leave the house as she was naked. Sometime later, the accused had wanted to have sexual intercourse with her for

a third time. The complainant had again refused. Notwithstanding, the complainant testified that the accused had forced himself on her and had sexual intercourse.

[31] From the testimony of the complainant it is evident that the accused had kept the complainant in virtual captivity in their home after he had indulged in sexual intercourse with her the first time. Therefore, Court is of the view that the complainant was not in a position to give her consent freely and voluntarily.

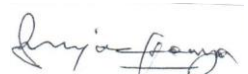
[32] In the circumstances, I agree with the majority opinion of the Assessors in finding the accused guilty of Counts 2 and 3. In my view, the Assessor's opinion, by a majority decision, was justified. It was open for the Assessors to find the accused guilty on the available evidence in respect of Counts 2 and 3. I concur with the majority opinion of the Assessors in respect of those charges.

[33] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences set out in Counts 2 and 3 with which the accused is charged.

[34] In the circumstances, I find the accused Keresoni Waqatairewa not guilty of Count 1; but guilty of Counts 2 and 3 as charged.

[35] As to Count 4, the accused has already pleaded guilty. Evidence has been led by the prosecution as to how the accused cut the complainant's hair in patches and also hit her left knee with a rolling pin. Therefore, Court finds his guilty plea to be unequivocal. Accordingly, I find the accused guilty on his own plea and I convict him on Count 4 as charged.

[36] Accordingly, I acquit the accused of Count 1; but convict him of Counts 2, 3 and 4.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

Dated this 29th Day of May 2019

Solicitors for the State : **Office of the Director of Public Prosecutions, Suva.**
Solicitors for the Accused : **Office of the Legal Aid Commission, Suva.**