

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 161 OF 2015

STATE

v

HARUN SHAMIM ALI

Counsel: Ms S. Navia with Ms. R. Uce for State
Mr Iqbal Khan with Ms S. Khan for Accused

Date of Summing Up: 4th February, 2019

Date of Judgment : 12th February, 2019

JUDGMENT

1. The accused was charged with rape on following information and tried before three assessors.

FIRST COUNT

Statement of Offence

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

Particulars of Offence

HARUN SHAMIM ALI on the 26th day of September 2014 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

HARUN SHAMIM ALI on the 25th day of December 2014 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

HARUN SHAMIM ALI on the 02nd day of May 2015 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent

2. At the ensuing trial, the Prosecution called three witnesses, the complainant, her daughter Fiza Nisha and doctor Vaniqi. At the close of Prosecution's case, the accused was put to his defence and the Defence called the accused and his wife, Sophia.
3. After a short deliberation of fifteen minutes, the assessors unanimously found the accused not guilty of Rape on each count as charged.
4. I reviewed evidence led in trial to see if the opinion of the assessors is supported by evidence led in trial.
5. There is no dispute that the accused and the complainant were in a relationship. The accused denies sexual intercourse with the complainant on the 26th of September, 2014, and on the 2nd of May, 2015. However, he admits the sexual intercourse with the complainant on the 25th of December, 2014, but denies that it happened without her consent. Therefore, the Prosecution has to prove all the elements of the offence of Rape in respect of the 1st and the 3rd counts and, in respect of the 2nd count, it has to prove only the 3rd and 4th elements of the offence of Rape.

6. Prosecution says that the complainant told the truth in court when she said that the accused had forceful sexual intercourse with her without her consent on all three occasions. To support its version, Prosecution relies on evidence of complainant's subsequent conduct, the medical evidence of doctor Vaniqi and the evidence of her daughter Fiza to prove complainant's consistency.

7. The resolution of the dispute depends on whether the court can accept the complainant as a truthful and reliable witness. I carefully analysed the evidence adduced by the Prosecution and the Defence to reach the following conclusion.

8. The complainant had not made a prompt complaint about the first two alleged rape incidents to anybody. She had complained about those incidents only when she went to the police station after the third alleged incident and recorded her statement on the 4th May, 2015. However she had failed to tell the police about the first two incidents in greater detail and had made only passing references. Quite surprisingly, nearly four years after those alleged incidents, she gave a vivid detailed account in court of what happened on the first two occasions.

9. The complainant admitted that she did not complain to her neighbours about the 2014 Christmas day attack when she ran to them. The argument of the Defence is that the complainant had ample opportunity to complain about the first two incidents, but she had never complained to anyone because no such incidents ever happened.

10. The complainant in her explanation said that the accused was no stranger to her and he was living together in a relationship with her for two years. She said that she tolerated everything happened during that relationship and did not want to complain. She said that the relationship came to an end on 16th April, 2015, and after the 2nd May incident, she made a complaint to police for her own safety when the accused, after finishing the sexual intercourse, said that *"he will continue doing this if he still gets married and if he comes from overseas, he will come back to her"*.
11. In light of the directions I had given in my summing up, it is not unusual for a woman in Fiji, who is in a *de-facto* relationship, to tolerate and not to complain at the first available opportunity about a forceful sexual intercourse. However, upon consideration of all the evidence led in this trial and by observing the demenour of the complainant, the assessors were not unjustified in rejecting the explanation she has given.
12. I would like to deal with the last incident first. According to her own explanation, the complainant has made up her mind to complain when she feared of her safety. That was after hearing from the accused that *'he will continue doing this if he still gets married and if he comes from overseas, he will come back to her'*. This statement is alleged to have been made by the accused after the alleged sexual intercourse. It is possible that she had consented before the alleged sexual intercourse and, after hearing the said utterances from the accused, she had made up her mind to complain.
13. According to the version of the complainant, the accused had entered her house early in the morning around 1 a.m. That was on the 2nd of May, 2015, from the main door when it was opened by the complainant. The door was opened after receiving

a call from the accused. It is not disputed that the accused had retained a key of the house even after leaving the house upon the breakdown of the relationship. Under these circumstances, the accused could have entered the house even without informing the complainant, if he really wanted. The complainant's explanation was that she had locked the door from inside before going to sleep. If that is the case, a question arises as to why she opened the door after midnight to a person, with whom she had severed all the relationships on the 16th April, 2015. This was never explained by the complainant.

14. The evidence of the complainant is that she was lifted by the accused in his arms and carried in to her room when her daughter Fiza was still awake. This was supported by Fiza in her evidence. The complainant admitted that she did not cry, scream or yell when she was being carried to the room and also at the time of the alleged sexual attack. The complainant's explanation is that she did not want to let her daughter know of what she was going through.
15. This explanation is not unacceptable in view of the directions I had given in my summing up. However, in the circumstances of this case, complainant's conduct is not inconsistent with a consensual sexual intercourse.
16. Fiza in her evidence said that she heard her mother saying "leave me". Assessors rejected Fiza's evidence. The rejection of Fiza's evidence can be supported in many ways. Firstly, she is the daughter of the complainant, and in the circumstances of this case, an interested witness *vis a vis* the complainant. Secondly, Fiza had recorded her statement on the 8th of May, 2015, five days after the alleged incident. The complainant in her first statement had not mentioned that her daughters were

present at the material time. It is only in her second statement made on 20th June, 2015, that she had told police that her daughters were present. Under these circumstances, the possibility of Fiza's evidence being fabricated on complainant's instructions cannot be ruled out.

17. The doctor's medical evidence is also not inconsistent with a consensual sexual intercourse. Doctor said that the complainant appeared scared. This can be due to the complainant being produced to a doctor by police in an early morning. The doctor agreed that marks on complainant's face and the breast may have been caused by 'love bites' in a long time consensual sexual relationship. The complainant has also used the term 'love bites'. Doctor also did not rule out the possibility of the injury on the vaginal wall having been caused by rigorous consensual sex. The doctor admitted that in coming to her conclusion, she relied on the history provided by the complainant in addition to her own examination.

18. The rejection by the assessors of complainant's evidence that she did not consent to sexual intercourse on the Christmas day of 2014 can also be supported. According to complainant's evidence, she had run to her neighbour's house to escape an attempted anal sexual attack which had caused her pain. Before this attempt, the accused had been penetrating her vagina few times. The fact that she had managed to escape and run to neighbour's house shows that she has had a degree of freedom to escape even during the vaginal penetration. The complainant did not satisfactorily explain why she did not run during vaginal penetration and ran only when the accused tried to penetrate her anus. Under these circumstances, it is possible for the assessors to find that the complainant had run to neighbour's house only because she did not like an anal penetration and /or the pain it was causing.

19. Furthermore, the complainant had never complained to her neighbours about the incident. It is possible that she did not complain against her partner due to cultural taboos existing in our society. However, in the circumstances of this case, her conduct is inconsistent with that of a rape victim. The complainant clearly said that after running to the neighbour's house, she was awaiting her neighbors to prepare the Christmas *lovo* to which she also had contributed. When she returned home after one hour with her portion of *lovo*, the accused was still there. She offered *lovo* to the accused whom she says was her rapist. This conduct is not expected of a rape victim in the circumstances of this case and fair enough not to be believed by the assessors. I reproduce below the relevant portion of her testimony:

Q: *When did you come back from your neighbor's house?*

A: *That day it was Christmas Day preparation, so I was waiting there for the food, because we contributed for the food.*

Q: *And then what happened, when did you go back to your house?*

A: *I waited there for one hour, but he didn't went (sic), he stayed there for a while.*

Q: *Now listen to my question Reshmun, when did you go back to your house?*

A: *After 1 hour.*

Q: *By this time he had left?*

A: *He didn't.*

Crt: *He was still there?*

Q: *And then what did you do?*

A: *I brought the food, I offered him the food.*

Q: *And on that day, did he ever leave?*

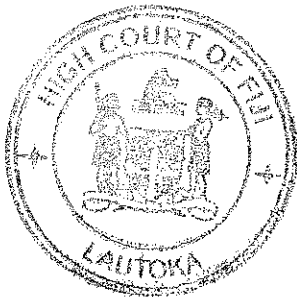
A: *He left in the evening.*

20. I observed the demeanour of the complainant. She was evasive when she was confronted with some of the text and *viber* messages. She admitted having sent some messages from her telephone and then denied sending them. She admitted that she was sending messages to the accused asking him to pick her and seeking his help to get her driving licence renewed even after she severed all the relationships on the 16th April, 2015.
21. The complainant testified that she clearly remembers the dates on which she was raped and also the dates she had consensual sexual intercourse with the accused. She admitted even giving a further statement to police in the run up to the trial on the 28th January, 2019, stating that, on two occasions in April 2015, she had consensual sexual intercourse with the accused.
22. It is possible for a woman to specifically remember the dates which she was raped, specially when those incidents were associated with something memorable, for example, a rape happened on a Christmas day. However, it is hardly believable that, after nearly four years, the complainant could remember the dates she has had consensual sexual intercourse with the accused.
23. The version of the Defence that the complainant eventually complained to police on the 2nd of May 2015 in a vindictive motive to sabotage accused's marriage (that was

to take place on 22nd May, 2015) was not satisfactorily disproved by the Prosecution. The Defence's version that the complainant was angry that the accused decided to marry Sophia was also not satisfactorily disproved.

24. Although the complainant denied that she had such a motive and that she came to know about the marriage only when the wedding pictures were posted on Facebook on 22nd May 2015, a reasonable inference can be drawn from the proved messages that she had a prior knowledge that the accused was going to marry Sophia. In view of this evidence, it is possible for the assessors to reasonably believe that this is a concocted story aimed at sabotaging the marriage and punishing the accused.
25. Having carefully considered all evidence and observed complainant's demeanour, it was open for the assessors to reject the version of the prosecution.
26. The version of the accused is also not appealing to me. The Tanoa Hotel incident is not plausible because the Defence Counsel never put this story either to Nisha or Fiza when they took stand. Accused's evidence that the relationship eventually became sour and broke down after the Tanoa Hotel incident and that he stopped seeing the complainant from July 2014 is not consistent with his own admission that he came to complainant's house on the 1st May, 2015 and had consensual sexual intercourse with the complainant. In view of these inconsistencies, the assessors had reasons to reject the version of the Defence.

27. However, in light of the direction in my summing-up that *even if you don't believe the version of the Defence, Prosecution must still prove the charges beyond reasonable doubt*, I am not inclined to disturb the unanimous opinion of assessors because the Prosecution had failed to discharge its burden to the requisite standard.
28. The evidence is sufficient to create a reasonable doubt in the minds of assessors as to the credibility of the complainant's evidence that she did not consent to sexual intercourse on each occasion. The benefit of that doubt should be given to the accused.
29. I accept the unanimous opinion of the assessors and acquit the accused on all counts.
30. The accused is acquitted and discharged.



Aruna Aluthge

Judge

AT LAUTOKA

12th February, 2019

Solicitors: Office of the Director of Public Prosecution for State

Iqbal Khan & Associates for Accused