

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 281 of 2018

STATE

vs.

MOHAMMED YUNUSH

Counsel: Mr. M. Vosawale with Ms. S. Sharma for the State
Mr. D. Sharma with Mr. S. Deo for the Accused

Date of Hearing: 12th, 13th, 14th, 15th, 16th, 19th, 20th, 22nd August 2019

Date of Closing Submissions: 23rd August 2019

Date of Summing Up: 29th August 2019

Date of Judgment: 02nd September 2019

JUDGMENT

- I. The accused is charged with two counts of rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act, three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and two counts of the Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act. These offences have been charged in the information under the counts 3, 4, 5, 6, 7, 9, and 10. The particulars of the offences are that:

COUNT THREE

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasimu, in the Central Division, penetrated the mouth of **MAHMUN NISHA** with his penis, without her consent.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasimu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her lick his thighs and genitals.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasimu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her lick his anus.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than **COUNT 6** penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.

COUNT NINE

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in **COUNT 7** penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.

COUNT TEN

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in **COUNT 3** penetrated the mouth of **MAHMUN NISHA** with his penis, without her consent.

2. The trial commenced on the 12th of August 2019 and concluded on the 22nd of August 2019. The prosecution called three witnesses including the complainant. The accused gave evidence for the defence and also called three more witnesses for the defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing addresses. I then delivered my summing up.
3. The three assessors returned with split opinions. Two assessors found the accused guilty of all of the seven counts as charged in the information, while one assessor found the accused not guilty of all of the seven counts as charged.
4. Having carefully taken into consideration the evidence presented by the parties, the respective closing addresses of the counsel, the summing up and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
5. The prosecution alleges that the accused came to the complainant's house on the 28th of June 2018, pretending that he was not well and wanted to stay in the night. He has told the complainant that he would go back to Nadi on the following morning. The accused had come to her room while she was sleeping in there. He then forcefully dragged her into his room and physically assaulted by slapping, strangulating her neck, pinching, snatching and scratching her body. He has then threatened her and forced her to lick his thighs, genitals and anus. The accused had then forced her to perform oral sex on him. He had then inserted his penis into her vagina and had sexual intercourse with her without her consent. The prosecution alleges that the accused had penetrated into the vagina of the complainant three times during the course of the events that have allegedly unfolded on the night of the 28th of June 2018. Having done the said sexual intercourses with the complainant, he had then forced her to perform oral sex on him again in the living room.
6. In contrary, the defence claims that the accused never engaged in such sexual and physical assaults on the complainant. According to the accused he had come to her house in order to discuss a settlement for the property matter that the complainant has involved with her brother-in-law. The accused was the intermediary between the complainant and her brother-

in-law. He wanted to discuss the property issue with the complainant and her children because the children are also the beneficiaries of the property. However, the complainant had lured him into her house under the pretext that her children would come soon to discuss the matter. When the accused came to her home, the complainant had made certain sexual advancement by touching and then masturbating his penis. When the accused refused or try to elude her sexual advancement, the complainant had threatened him that if she would scream and made it public that he was with her in the night alone, his reputation would be gone. Afterwards, the complainant had started to masturbate his penis. The accused had told her that he has an erectile dysfunction, the complainant had then started to perform oral sex on him, saying that she could make any man erected. However, the accused had not achieved an erection. Thereafter he had gone to the bathroom to get himself cleaned. Once he finished his cleaning, he found that he was locked inside the bathroom.

7. According to the evidence, the accused has not denied his presence at the house of the complainant during the time material to this incident. Therefore, the identity of the accused is not a disputed issue during the hearing.
8. I first take my attention to the evidence of the defence. The defence's case is mainly founded on two issues. The first issue is that the accused has been suffering from erectile dysfunction, hence, he was not in a position to achieve and maintain an erection of his penis sufficient to engage in sexual intercourse. Therefore, the allegation made by the complainant is a false allegation. The second ground of the defence is that the motivation of the complainant.
9. Before I proceed further, it would be prudent to discuss the onus of the defence in an adversarial trial as of this. The defence is not required to prove his innocence or anything during the hearing. If he wishes to provide a defence, he is not required to prove it beyond reasonable doubt.
10. Lord Reading CJ in **Abramovitch (1914) 84 L.J.K.B 397** has discussed the appropriate approach in determining the evidence of the defence, where Reading CJ held that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases: it always remains on the prosecution".

11. According to Section 207 of the Crimes Act, a slightest penetration of the penis is sufficient to prove the element of penetration. Therefore, it is not necessary to prove that the penis was erected when the alleged penetration was made. However, in this case, the complainant alleged that it was a forceful, hard and painful penetration into her vagina with the penis of the accused. The nature of the allegation made by the complainant is not a slightest or momentarily penetration. Therefore, it is the onus of the prosecution to prove beyond reasonable doubt that the accused made a forceful, hard and painful penetration into the vagina of the complainant with his penis.
12. According to the evidence of Doctor Misimisi, the thyroid stimulating hormone of the accused has been elevated towards hypothyroidism. Moreover the testosterone level of the accused is lower than the normal reading of his age. Doctor Misimisi then explained that due to those conditions, the accused is not able to achieve and maintain erection of his penis sufficiently in order to engage in sexual intercourse. He said the accused has been suffering from this erectile dysfunction for the last four years. Doctor Misimisi explained that his findings and the opinion of the health condition of the accused are based on the physical examination of the accused, history provided by the accused and the laboratory tests results.
13. Accused in his evidence said that he has been suffering from diabetic over the last ten years. The complainant admitted that she made a statement to the police regarding this matter on the 1st of July 2018. She has said in that statement that *"He let me suck it for long and his penis was still weak."* When the complainant was questioned about that statement by the

learned counsel for the defence, the complainant said that the penis of the accused was not that weak. Moreover, the complainant said in her evidence that during these alleged three incidents of penetration into her vagina with the penis of the accused, the penis of the accused was bit erected. It was not that hard, but was erected.

14. This inconsistent nature of the evidence of complainant in relation to the erection of the penis of the accused, creates a reasonable doubt about the allegation made by the complainant that the accused made forceful, hard and painful penetration into her vagina with his penis. Therefore, it creates a reasonable doubt about whether the claim of the accused that he has been suffering from erectile dysfunction is reasonably true or not.
15. The accused further claims that the complainant made this allegation in order to get revenge from him for taking the side of her brother-in-law in the issue of the property at the Kennedy Avenue. The accused was the main witness who gave evidence against the complainant in that civil litigation in the High Court of Lautoka.
16. The accused claims in his evidence that he went to the house of the complainant because he wanted to meet and discuss the settlement for the property with the complainant and her two children. He wanted to talk to the children because they are also beneficiaries of the property. The accused said that the complainant approached him through one Father John in order to make a settlement to the property issue after the judgment of the High Court of Lautoka. As a consequence of that approach, the accused met the complainant at the McDonald Restaurant in Suva on the 12th of May 2018 in order to discuss about the property issue. The accused had then went to meet the complainant and her children at her place on the 28th of June 2018.
17. The complainant initially denied that she talked to Father John about the property issue. However, she then admitted that Father John had told her to contact the accused to discuss the property issue. Moreover, the complainant said in her evidence that the accused used the mobile phone of Father John to call her most of the time. The complainant further admitted that she met the accused at the McDonald Restaurant on the 12th of May 2018. However,

she said that the conversation was not on the issue of the property at Kennedy Avenue, but about the purchase of certain farming equipment of her by the accused. During the evidence in chief, the complainant said the accused used to call her very often either via his own mobile phone or via the phone of Father John. When she was asked about the nature of those conversations, the complainant said that he talked about the children and also a land which she owns in Sigatoka as the accused wanted to buy it. The complainant did not talk about any farming equipment at that time.

18. The above discussed inconsistent nature of the evidence given by the complainant creates a reasonable doubt whether the accused actually went to the house of the complainant in order to meet and discuss the property issue with her and the children.
19. Be that as it may, I now take my attention to determine the credibility, reliability, probability and truthfulness of the evidence given by the complainant. I first turn onto the alleged incident.
20. The complainant alleges that she was physically assaulted by the accused during the course of the events that took place on the night of 28th of June 2018. According to the evidence of the complainant, the accused had slapped her face hard on several times. He had then placed his hands on her neck and threatened her. He then snatched her. However the complainant did not specifically explain which part of her body was snatched by the accused. The accused then scratched her arms, thighs and the stomach. She further alleged that the accused pinched her stomach and chest. The accused had tried to strangulate her.
21. The complainant was medically examined by a Doctor at the CWM Hospital nearly three hours after the alleged incident. She had not taken any shower before she presented herself to the medical examination. According to the medical examination report which was tendered by the parties as an admitted document, the Doctor has not found any injuries or bruises, laceration or any marks on her neck and face. Apart from multiple linear bruises on her right arms, forearm and also on the thighs, a linear bruises on the stomach, a linear bruises below the right side of her breast, and several patchy bruises on the left side of the neck and

chest, the Doctor has not found any marks or bruises on her neck, stomach, face, cheeks, wrist or waist. I observed that the complainant has a pale fair complexion. The learned counsel for the prosecution reaffirmed the forcefulness and hardness of those physical assault allegedly done to the complainant during the re - examination. The absence of such findings of marks and bruises in the medical examination report creates a reasonable doubt about the allegation that the complainant made about these physical assaults.

22. Moreover, the complainant said that the accused started to slap on her backside when he penetrated into her vagina with his penis from her back. The accused had then asked her to say "love you", which she said. According to the complainant, she said that "I love you" to the accused because he was slapping on her backside. However, there is no bruises or marks found by the doctor on her backside during the medical examination. When the complainant was asked about it, she changed her position and said that he slapped on her back lightly. If the accused slapped on her backside lightly, why did she then obey to the request of the accused to say "I love you". Furthermore, the complainant said the accused asked her to make a sound of "ha ha ha" when he penetrated into her vagina with his penis from behind, which she did as he asked. The complainant explained that she made that sound because it made the accused to get his feelings. These evidence creates a reasonable doubt whether the complainant willingly took part in the sexual intercourse if such a sexual intercourse took place as alleged by the complainant.
23. According to the medical examination report, the Doctor has noted multiple liner bruises on her right arm, forearm and thighs. Moreover, a liner bruises on her stomach and a liner bruises at the below of the right breast. According to the complainant, the accused had scratched her arms, thighs and stomach when he pull her on the bed and removed her clothes. There is no evidence of any physical resistance by the complainant. She was dragged into the room and then pulled on to the bed. The complainant had only cried, yelled and scream asking him let her go. She had submitted to him because she was afraid and scared of him. Under such circumstances, what was the reason for the accused to scratch her body when there were no physical resistance from the complainant, thus creating a reasonable doubt about the probability of the incident of scratching of her body.

24. According to the medical report, there is no vaginal injuries or bruises found by the doctor during the medical examination. As explained by the complainant, the accused made forceful, hard and painful penetration into her vagina with his penis on the three occasions. If such a forceful and hard penetrations were made into her vagina, there is a possibility of causing some bruises or laceration in or around her vaginal area. The prosecution did not call the Doctor or provide any expert medical evidence to rule out this reasonable doubt.
25. I now draw my attention to the incidents that allegedly took place after this alleged incident. The complainant ran out of the house to save her life after she locked the accused inside the bathroom. She was afraid that the accused might break the door and come out. She was desperate to get help and call the police. The complainant said that she could not shout as she was having asthma issue, but called for help, calling "help, help, help", but no one came for her help. If she was calling for help and had difficulties in shouting louder for help, she should have easily gone to her landlady who lives just next to her flat in the same compound. Both the accused and the complainant in their respective evidence admitted that the landlady was present in her house when the accused came to her place at 6.30 pm. Moreover, the complainant said there is another tenant lived in the other flat in the compound. The complainant did not provide any explanation why she did not go and alert them if she was in such a fear and desperate situation looking for help. Neither the counsel for the prosecution asked the complainant to provide such an explanation. Moreover, she had not called her daughter who was living in Suva. Once again there is no explanation for that as well. Instead, she had called Virisila who is a church member. The complainant said that she had to disconnect the call that she made to 919 as she forgot the name of the street. However, Virisila in her evidence said that the complainant called and asked her to come to Vesida Place with the police. According to the evidence of the complainant, these two calls to 919 and to Virisila were made within few minutes time.
26. According to the record of the telephone history of the complainant for the month of June 2018, she had not communicated with this Virisila apart from the three calls that she made on the 28th and 29th of June 2018. If the complainant found Virisila more comfortable to be with her during such a horrendous experience as she claimed, ahead of her own daughter

who also lives in Suva, why did she then just left Virisila and the helping party at home and went to the police station with the police alone. The learned counsel for the prosecution did not ask the complainant to explain those issues, at least during the re-examination of the complainant.

27. The next issue is that the record of the outgoing call history of the complainant for the month of June 2018. There is no record of making any call to 917, 919 and to the Fiji Women Crisis Centre on the night of 28th of June 2018 from the mobile phone of the complainant. The complainant insistently claimed that she called to 917, 919 and Fiji Women Crisis Centre.
28. Having considered the above discussed reasons, there is a reasonable doubt about the reliability, credibility and probability of the evidence given by the complainant, thus making a reasonable doubt about the truthfulness of her evidence. I accordingly find the evidence of the complainant is not reliable, credible, and probable. Hence, I refuse to accept her evidence as truthful evidence.
29. I find that the prosecution did not provide any evidence about the alleged broken bed and the baby oil that the accused allegedly used on the vagina of the complainant.
30. In view of the above findings, I am of the view that the prosecution has failed to prove beyond reasonable doubt that the accused guilty of these seven offences as charged in the information. Therefore, I have cogent reasons to disagree with the majority opinion of the assessors. However, I concur with the minority opinion of the assessor that the accused not guilty of these offences.
31. In conclusion, I find the accused not guilty of all of these seven counts as charged under the counts 3, 4, 5, 6, 7, 9, and 10 in the information and acquit him from the same accordingly.

32. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva

02nd September 2019

Solicitors

Office of the Director of Public Prosecutions for the State.
R. Patel Lawyers for the Accused.