

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 51 of 2019

STATE

V

SHALENDRA MANI

Counsel : Ms. S. Naibe for the State.
: Ms. P. Reddy for the Accused.

Dates of Hearing : 22, 23, 26 October, 2020
Closing Speeches : 27 October, 2020
Date of Summing Up : 28 October, 2020
Date of Judgment : 30 October, 2020

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "S.L")

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

FIRST COUNT
(Representative Count)
Statement of Offence

INDECENT ASSAULT: Contrary to section 212 of the Crimes Act 2009.

Particulars of Offence

SHALENDRA MANI between the 1st day of January and 31st day of December, 2012 at Nadi, in the Western Division, indecently and unlawfully assaulted “S.L”, by kissing her lips and touching her thighs.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SHALENDRA MANI on the 3rd day of March, 2019 at Nadi in the Western Division, assaulted “S.L.”, causing her actual bodily harm.

THIRD COUNT

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

SHALENDRA MANI on the 3rd day of March, 2019 at Nadi in the Western Division, attempted to have carnal knowledge of “S.L.”, without her consent.

ALTERNATIVE COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

SHALENDRA MANI on the 3rd day of March, 2019 at Nadi in the Western Division, unlawfully and indecently assaulted “S.L.” by licking her vagina.

2. After the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the first count of indecent assault, second count of assault causing actual bodily harm and the final count of sexual assault only. The accused was acquitted of the offence of attempted rape.
3. The three assessors returned with a unanimous opinion that the accused was guilty of indecent assault, not guilty of assault causing actual bodily harm and a mixed opinion by a majority of two is to one that the accused was not guilty of sexual assault.
4. I adjourned to consider my judgment I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called two witnesses and the defence called the accused.
6. The complainant informed the court that in the year 2019, she was residing at Koroniqava Road, Nasoso, Nadi with her mother and 2 brothers. The accused is her step-father and in the year 2019 the accused was not living with them.
7. On 1st March, 2019 the complainant woke up at 9am and went to have her shower she was alone since her mother had gone to work and her brothers were at school. When the complainant came into the house after having her shower she had not closed the door of the house and went into her bedroom. She had her towel wrapped around her, in the bedroom she opened the drawer to take out her clothes.
8. When taking out her clothes she heard footsteps as she turned around she saw the accused in her bedroom. He came and grabbed her, covered her mouth and then pushed her on the bed whereby she fell on her chest facing downwards.

9. When the accused turned the complainant his knuckles (finger joints) hit her nose which started bleeding. The accused was also covering her mouth with his hand so she was unable to shout, with the other hand the accused was trying to put her legs apart and then he started to lick her vagina for a long time by this time she was on the edge of the bed and the accused was on top of her as soon as he removed his hand from her mouth, she shouted.
10. At this time the accused ran away after a while the complainant's grandmother came and took her to her house. The complainant was uncomfortable and scared she informed her mother and then she reported the matter to the police and went to the hospital.
11. When the accused's knuckles had hit her lips, it started bleeding and at the neighbour's house she had used ice to stop the bleeding. The complainant could not remember what the accused was wearing on this day she was only wrapping her towel and not wearing anything the accused had licked her vagina for about 10 to 15 minutes.
12. When the accused was doing all this, the complainant tried to push him but she couldn't because the accused was forcing himself on her she even could not shout because the accused had grabbed her mouth tightly.
13. The complainant also recalled on 10th November, 2012 her mother had gone to Ba. The accused came into her bedroom in the night drunk and started to touch her thighs, kissed her and ran out of the bedroom. After half an hour he came and apologized for what he had done and told her not to tell her mum. The complainant told her mum when she came home.
14. When the accused touched her thighs and kissed her she was really frightened. For 10 years the complainant lived with the accused, their relationship was not good.
15. The final prosecution witness Dr. Sainimili Bulatale informed the court that in 2019, she was based at the Namaka Health Centre. On 1st March 2019 she had examined the complainant.

16. The specific medical findings of the doctor were as follows:
 - a) Slight laceration on the upper lip. The witness explained laceration meant a break in the skin but she did not see any bleeding;
 - b) chest and abdomen were normal; and
 - c) There were no other injuries seen on the limb that is the upper limbs and the legs.
17. When the witness undertook vaginal examination, she noted the hymen was intact. There was no bleeding but there was a normal discharge and there was no sign of rape. The witness had also illustrated the injuries in appendix 1 of the medical examination form.
18. In the professional opinion of the witness, the injury sustained by the complainant was due to force applied and the injury was probably sustained less than 12 hours ago.
19. The accused informed the court that in the year 2012 he was living at Nasoso, Nadi with his wife who is the mother of the complainant, the complainant and his two sons. He got married in year 2008 and they were all living together till 2010. The house was his, and the bathroom was situated outside about one meter away from the house.
20. According to the accused although the complainant was staying with them she was not close to him, she did not speak to him most of the time she used to stay alone in her bedroom or be talking on the phone. The accused said that he used to go to the temple for prayers which the complainant did not like since she followed Islam.
21. The accused denied the allegations that in 2012 he had touched the thigh and kissed the complainant on her lips. He further stated that he cannot do such a thing to anyone.

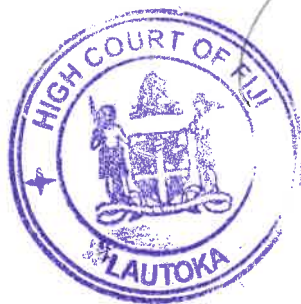
22. In respect of the letter of apology mentioned by the complainant the accused stated that he does not know anything about that letter and he had at no time written any letter to the complainant. Furthermore, when the purported letter was shown to the accused he stated that the signature was identical to his but he did not sign.
23. After 2012 the accused relationship with the complainant was normal, everything was okay. On 1st of March, 2019 the accused did not assault the complainant as alleged. At around 9.30am on this day the accused was at the house of his mother which was joined to the house in which the complainant lived.
24. He was watching TV when he received a call to do carpentry work so he went in the house of the complainant into the kitchen to get the steel plastering tool. In the kitchen when he picked the tool and as he turned he saw the complainant in her bedroom.
25. The bedroom door was open as soon as the complainant saw the accused she started shouting and ran to the neighbour's house. The accused could not find his tool so he got ready and went to Nadi town. The complainant was wearing a towel after having her shower she went out of the house wrapped in a towel.
26. The accused did not lick the vagina of the complainant as alleged, he did not even touch her that day. The accused denied all the allegations made against him.
27. He agreed that in the year 2012 the complainant was about 10 to 11 years old when it was put to the accused that during the cross examination of the complainant his counsel had put to the complainant that the tools were in the complainant's bedroom the accused stated that some tools were in her bedroom but the plastering tool was in the kitchen. The accused also stated he did not know the complainant was in her bedroom at the time.

28. The accused had entered the house from the front door of the house, the complainant's bedroom door was open, he did not see the complainant wrapped in a towel it was only when she shouted and ran out of the house that he saw the complainant.
29. The accused maintained that he did not enter the complainant's bedroom he explained after he had entered the house he went and picked his tool from the kitchen, as he turned the complainant shouted and ran out of the house. The accused denied committing the offences alleged by the complainant.
30. Taking into consideration the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a coherent account of what the accused had done to her in 2012 and 2019 respectively.
31. In respect of the 2012 incident, I accept that the complainant was about 10 to 11 years of age and the fact that the complainant remained in the house with the accused was because she had nowhere else to go. I also accept that the complainant had told her mother about what the accused had done to her. Thereafter, the accused did not do anything to the complainant until seven years later in 2019.
32. I accept that the complainant was scared of the accused at the time considering the age of the complainant and the circumstances that prevailed particularly it being night time and there was no adult at home other than the accused the complainant cannot be expected to shout or yell.
33. I also accept that the accused had expressed his apology to the complainant in writing I reject the denial of the accused that the signature in the letter was not his. I accept what the accused did to the complainant was indecent.

35. In respect of assault causing actual bodily harm I accept that when the accused turned the complainant around when she was on her chest on the bed to face him, his knuckles had hit the complainant's nose and lips resulting in slight laceration on her upper lips. I reject the defence contention that the injury was caused by other causes and not as narrated by the complainant.
36. When the accused was interviewed by the police, he had told the police that he had punched the complainant and run away. Although the complainant did not say anything about being punched the use of force on the part of the accused is apparent. I accept the accused told the police the truth and had voluntarily answered Q.36 of his caution interview. The complainant's evidence is also supported by the opinion of the doctor that the injury was sustained by the complainant was due to the use of force. It was not suggested to the complainant in cross examination that the injury sustained by her was either self-inflicted or by other causes.
37. In respect of the last count of sexual assault I accept that the complainant was sexually assaulted in the manner she told the court. The physique of the complainant who was shorter than the accused, she was on the edge of the bed with the accused on top of her in my view made it possible for the accused to lick the vagina of the complainant while covering her mouth tightly with his hand.
38. Moreover, the complainant was able to withstand cross examination and she was not discredited I have no doubt in my mind that the complainant told the truth in court. The demeanour of the complainant was consistent with her honesty.

39. On the other hand, I do not accept the accused told the truth whilst giving evidence he did not strike me as a person who was honest. He was not consistent in his evidence, he was more or less contradicting the defence theory or suggestions that were put to the complainant by his counsel.
40. It was obvious to me that the accused was making up his evidence as he went along not realising that he was moving away from his defence theory.
41. The demeanour of the accused was not consistent with his honesty his denial is untenable on the totality of the evidence. The defence has not been to create any reasonable doubt in the prosecution case in respect of all the counts.
42. This court is satisfied beyond reasonable doubt that the accused on 10th November, 2012 had indecently and unlawfully assaulted the complainant by kissing her lips and touching her thighs.
43. This court is satisfied beyond reasonable doubt that the accused on 1st March, 2019 had assaulted the complainant causing her actual bodily harm.
44. This court is also satisfied beyond reasonable doubt that the accused on 1st March, 2019 had unlawfully and indecently assaulted the complainant by licking her vagina.
45. I agree with the unanimous opinion of the assessors that the accused is guilty of one count of indecent assault, I overturn the unanimous opinion of the assessors that the accused is not guilty of the second count of assault causing actual bodily harm and I accept the minority opinion of the assessors that the accused is guilty of the final count of sexual assault.

46. In view of the above, this court finds the accused guilty of one count of indecent assault, one count of assault causing actual bodily harm and one count of sexual assault as charged and he is convicted accordingly. Furthermore, the accused stands acquitted for the offence of attempted rape.
47. Finally, I have noticed that the information mentions 3rd March, 2019 as the date for the offences of assault causing actual bodily harm and sexual assault but the evidence by the complainant was of 1st March, 2019. In my judgment the variance between the charges and the evidence was not material and it did not cause any prejudice or mislead the defence. Section 182 (3) of the Criminal Procedure Act is relevant in this regard the defence also did not take any issue of this variance.
48. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

30 October, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.