

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 21 OF 2013

BETWEEN : STATE

AND : A.B.

Counsel : Mr. J. Niudamu for State
Mr. Iqbal Khan for the Accused

Date of Hearing : 17th of August 2016, 15th and 17th of November
2016

Date of Closing Submissions : 17th of November 2016

Date of Summing Up : 21st of November 2016

Date of Judgment : 22nd of November 2016

JUDGEMENT

1. The name of the victim and the accused are suppressed.
2. The accused is being charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are that;

"BA, on the 26th day of January 2013, in the Western Division had penetrated the vagina of AB with his penis without her consent.

3. The hearing of this matter commenced on the 17th of August 2016 and concluded on the 17th of November 2016. The prosecution called two witnesses including the victim. Subsequent to the prosecution's case, the accused gave evidence on oath for his defence. The learned counsel for the prosecution and the defence then made their respective closing submissions. I then proceeded with the summing up. The three assessors returned with unanimous opinion of guilt. The assessors' opinion was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing
4. The prosecution alleges that the accused forcefully had a sexual intercourse with the victim on the 26th of January 2013. The accused is the step father of the victim. The accused asked her to come and press his back in the early morning of the 26th of January 2013. Her mother and other siblings had gone to the flea market and she was alone with the accused at home. After she pressed his back, she tried to go out of the room. At that time the accused had got off from the bed and stopped her. He had then started to kiss her. He then dragged her to the bed and had sexual intercourse with her without her consent.
5. The defence denies the allegation and claims to be false. The accused stated that the victim together with her boyfriend had conspired to make this false allegation as he always disapproved their relationship.
6. The accused in his evidence explained about the relationship of the victim and her boyfriend. He had always insisted the boyfriend to marry her. However, the boyfriend had been refusing the request. He found the boyfriend hiding under the victim's bed in August 2012. That was nearly five months before this alleged incident took place. He further stated that the victim had to be hospitalised in

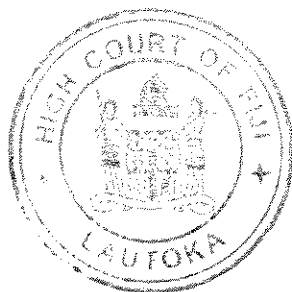
January 2012 due to a serious medical condition. He alleged that the medical condition that the victim had suffered was due to the abortion she had done before. The boyfriend in his evidence admitted that he made the victim pregnant and she later got it aborted. According to the evidence of the boyfriend, the victim did the abortion in 2011. The accused stated that the victim was hospitalised in January 2012.

7. The accused in his evidence did not dispute the fact that he asked her to come and massage his back while he was in his room in the morning of 26th of January 2013. He was alone with the victim as all other members of the house had gone to the flea market. Massaging of his back was a normal activity for them.
8. The victim in her evidence explained the reasons for the inconsistent nature of her statement made to the police and the evidence given in court in regard to her claim that the accused threatened her not to shout. She said that she was still shocked about the incident when she gave her statement to the police. She explained in her evidence that she was comfortable and felt safer in telling her boyfriend about this incident and that was the reason why she contacted her boyfriend to inform this incident without informing the neighbours.
9. The medical report of the victim that was tendered as an agreed fact does not reveal any significant findings. The victim in her evidence stated that she was not physically injured due to this incident. She in her evidence stated that she only tried to push the accused away. She did not say that he forcefully penetrated his penis into her vagina. She was weak, shocked and scared at that time. No evidence was presented that the victim struggled with the accused at the time of this incident took place.

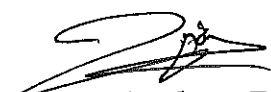
10. Moreover, the medical report states that there is no sign of trauma at the vaginal area. The doctor has not given any professional opinion. In conclusion, the doctor has stated that the findings of the clinical examination are not consistent with the history given by the victim. The prosecution did not call the doctor to give evidence.
11. In view of the evidence given by the victim, it was revealed that she did not struggle with the accused and also did not try to escape when this incident took place. According to her evidence, she was shocked, weak and scared. She only asked him to stop and let her go. No evidence of forceful and traumatic penetration was presented. The victim stated in her evidence that that accused inserted his penis into her vagina and had sexual intercourse for about five minutes. She only cried and requested him to stop and let her go. Hence, there cannot be any trauma on the vaginal area as there was no evidence of any forceful or traumatic penetration.
12. I observed the demeanor of the victim while she was giving evidence. She was straight forward and forthright in explaining this incident. I noted that she asked the court what was the relevancy of questioning about her boyfriend when she was cross examined. I do not find it as an evasiveness.
13. I do not accept the allegation that the victim and her boyfriend had conspired this allegation against the accused. The conduct of the victim and her boyfriend neither support such a proposition nor create any reasonable doubt about such a conspiracy. The evidence does not reveal that the accused had actually objected this affair. He had only requested the boyfriend to marry her. There is no evidence that the accused had been obstructing or objecting to the relationship of

the victim and the boyfriend apart from the incident that took place in August 2012. The boyfriend in his evidence said that the accused never spoke to him. The accused in his evidence did not specify whether he called the boyfriend asking him to marry her.

14. In view of these reasons, I accept the evidence of the victim as truthful and credible. Therefore, I do not find any cogent reason to disagree with the unanimous opinion of the three assessors.
15. In conclusion, I hold that the prosecution has proven the accused is guilty for the offence of Rape as charged in the information beyond reasonable doubt. Therefore, I find him guilty for this offence of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree and convict him accordingly.



At Lautoka
22nd November, 2016


R. D. R. Thushara Rajasinghe
Judge

Solicitors : Office of Director of Public Prosecution
Messrs Iqbal Khan & Associates