

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 033 of 2013

STATE

v.

JOSEFA TUKANA

Counsel: Ms. M. Khan for State
Ms. L. Raisua for Accused

Dates of Hearing: 18th April 2016

Date of Summing Up: 19th April 2016

Date of Judgment: 20th April 2016

JUDGMENT

[Name of the victim is suppressed. The victim will be referred to as [S.R.]

1. The accused is charged with one count of Rape.

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

JOSEFA TUKANA on the 25th day of November 2012, at the University of the South Pacific, in Suva, in the Central

Division, had carnal knowledge of 'S.R.', without her consent.

2. After trial the 3 assessors unanimously opined that the accused is not guilty of the charge. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at the trial.
3. It is an agreed fact that the accused penetrated his penis into the complainant's vagina on the 25th November 2012. Therefore the remaining element that the prosecution has to prove beyond reasonable doubt is the element of consent. Whether the complainant consented to have sexual intercourse and whether the accused knew or believed that she was consenting or did not care if she was not consenting.
4. It is not in dispute that the complainant entered the USP from the main gate to see her boyfriend with her cousin Paulina. She was permitted to enter by the security officers at the gate when the accused was also present. It is also an undisputed fact that the accused went to the complainant's boyfriend's room at around 9pm, at that time the complainant was having sex with her boyfriend alone in the room and that they were undressed. The accused told them that the visiting hours have passed and asked complainant to follow him to the main gate. It is also an undisputed fact that the complainant kept on pleading with the accused to let her go back to her boyfriend and that the accused refused.

5. The evidence of the complainant was that when she was following the accused, he told her that he would show her a short cut if she wanted to come to see her boyfriend. Her evidence was that the accused took her to a vacant building and forcefully removed her clothes, removed his pants and raped her. She said that she struggled. She said that she did not shout as no one would have heard at that time. Accused had raped her and gone. Then she had gone to her boyfriend and also to her cousin Paulina and had told them the incident. Paulina also testified that at about 10pm, when she was with her friend Brian, the complainant knocked at the door and told her about the incident. Paulina said that the complainant was crying, she looked scared, and was breathing heavily.

6. The evidence of the accused was that the complainant forced him to have sex with her. In his evidence he said that the complainant was following him to the main gate and when they were close to the main gate he diverted to do his routine checks as a security officer. He said that he expected the complainant to go to the main gate. According to the accused, complainant had followed him and undressed herself and had told him "let's have sex, if not I will shout". Complainant had layed on the table saying that, and had pulled him and hugged him. He said that he did not want to lay on her. He said that he had sexual intercourse for about 2 minutes with her.

7. The complainant had been undressed with the boyfriend in his room when the accused came and asked her to get dressed, leave the room and to follow him. It is also not in dispute that the accused diverted his route instead of going to the main gate, although he says that it was for his routine checks. The evidence was that the accused had no official duty to look after the dormitory area that the complainant's boyfriend William stayed. However, he says that the other security officer who allowed the complainant in, wanted him to go and get the complainant and Paulina back.
8. It is quite natural that the complainant wanted to go back to her boyfriend. It is highly improbable that the complainant offering sex to the security officer for her to get back to the boyfriend.
9. If she forced herself on the accused and if she offered sex to the accused she wouldn't have gone back to her cousin Paulina and tell her about the incident because it was only between the accused and the complainant and no one would have seen or known it. Paulina gave clear evidence as to how the complainant looked like when she came to her. She had been crying, looked scared and had been breathing heavily.
10. I observed the demeanour and the deportment of the complainant when she testified in court. She was consistent and confident. I find no reason

to disbelieve her evidence that the accused forcefully had sexual intercourse with her.

11. It is obvious that the accused took advantage of the vulnerability of the complainant at that point in time who was 16 years old then. That is why he diverted to a different route telling the complainant that he would show a short cut so that he could take the complainant to a more isolated place.
12. The complainant did not complaint to the police the same night and on her way home next morning. She said that she was worried about William as he would be in danger too. She did not complaint to the security for the same reasons. In the circumstances it is obvious that they were scared when they were also at fault when they entered the University and remained in the dormitory out of visiting hours.
13. I find that the evidence of the accused that the complainant offered sex, and that she forced him to have sex with her was far from the truth. I believe the complainant when she said that it was without her consent that the accused inserted his penis into her vagina. I find the complainant a credible witness and I accept her evidence without any reservation. I find that the unanimous opinion of the assessors that the accused is not guilty is perverse. I am satisfied that the prosecution has proved all the elements of the offence of rape as charged beyond reasonable doubt.

14. In the above premise I overturn the unanimous opinion of the assessors that the accused is not guilty and find the accused guilty of the offence of Rape as charged and convict him accordingly.



Priyantha Fernando
Judge

At Suva

20th April 2016

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for Accused.