

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 196 OF 2013

STATE

-v-

SERUVI RALIVANAWA

Counsel: Ms. Naibe with Mr. Babitu for the State

Mr. Fesaitu for the Accused

Date of Summing Up: 26th May, 2016

Date of Judgment : 30th May, 2016

JUDGMENT

[1] Accused was charged with following count and tried before three assessors.

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SERUVI RALIVANAWA between the 1st of June, 2013 and 30th of June, 2013 at Lautoka in the Western Division, inserted his penis into the vagina of **KELERAYANI DRODRO**, without the consent of the said **KELERAYANI DRODRO**.

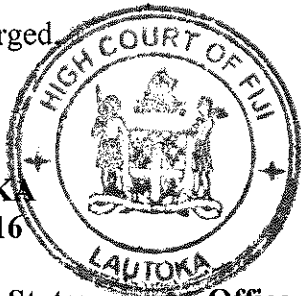
- [2] Two assessors found the accused not guilty.
- [3] I direct myself in accordance with my own Summing Up and review the evidence led in the trial. Having disagreed with the majority opinion, I pronounce my judgment as follows.
- [4] Prosecution called the Complainant, her mother and the investigation officer to prove the charge against the accused.
- [5] The Prosecution based its case substantially on the evidence of the Complainant. Complainant's evidence is consistent and probable in the circumstances of the case. I am satisfied that the evidence she gave is truthful and believable. Prosecution discharged its burden and proved the charge beyond reasonable doubt.
- [6] There is no rule for me to look for corroboration of her evidence. However, I considered all the evidence led in the trial to see whether there are items of evidence to support her evidence.
- [7] Identity of the accused was not disputed by the Defence. Accused admitted that he is closely related to the Complainant. Accused also admitted having had sexual intercourse with the Complainant on the 15th of December, 2010. Only issue to be solved is whether sexual intercourse took place without Complainant's consent.
- [8] Accused claims that the Complainant is his girlfriend and that she consented to sexual intercourse. Complainant denies having consented.
- [9] Contention of the Defence is mainly focused on her failure to make a prompt Complainant to her mother or police. She did not complain the incident till her mother discovered that she was four months pregnant. Contention of the Defence is that she did not complain because she had consented to sexual intercourse. It had also been suggested on behalf of the accused that the fact that Complainant did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made to police was true.

- [10] I am unable to agree with the contention of the Defence. Failure on her part to complain soon after the incident is not necessarily consistent with consensual sexual intercourse. She said that she did not complain because she was scared to complain to her mother that she will get beaten up. Complainant's mother confirmed her position and said that concealment of the incident was due to fear of being beaten up by her brothers. Complainant has given an acceptable and legitimate explanation for her failure to complain at the first available opportunity.
- [11] Complainant described the ordeal she had to undergo during the invasion. Accused had blocked her mouth when she tried to scream. She pushed him in vain. Finally, she succumbed to his power and became unconscious until he finished his task. Although there is no evidence that accused had warned her not to tell anyone about the incident, her trauma and subtle fear psychosis would no doubt have prevented her from complaining in the ensuing months.
- [12] Complainant admitted, under cross examination, that she had informed the accused about her pregnancy even before her mother came to know of it. By not denying that fact she demonstrated her honesty. Defence Counsel contended that the fact that she had informed the accused about her pregnancy when she was three months pregnant clearly indicates that the sexual intercourse took place with her consent. Defence Counsel even wanted me to redirect the assessors on that point as I had not dealt with that factual scenario adequately in my summing up.
- [13] Defence Counsel in his closing address drew the attention of the assessors to that particular piece of evidence. I declined to re-direct as requested since it is a matter of fact that assessors were to decide. Redirection, if given, would have put too much emphasis on that point causing undue disadvantage to the Prosecution. When I declined to re-direct, I knew that I am the ultimate decision maker when it comes to Judgment.
- [14] Time has now come for me to explain my finding on that point. Complainant was seventeen years old when the alleged incident occurred. Accused knew her since she was a young girl. They grew in the same Kese village and attended church together. Both complainant and accused maintained that they are closely related to each other despite

repeated cross examination on the basis that their familial relationship was not that close. In that context, it would have been a hard decision for her to implicate the accused who was destined to father the child she was carrying in her womb.

- [15] An another possibility can be described like this. Complainant had informed him about her pregnancy when she was three months pregnant. Circumstances or reason that prompted her to inform the accused did not come to light in evidence. Whatever may be the reason, she would have known that, with the growth of the fetus, keeping the secret of her pregnancy under the carpet was not possible for too long. Despite that knowledge she continued to suppress her pregnancy from her mother. Why? It is not impossible for one to believe that her fear was based not only on possible reaction from her family but also on the accused's ineffable hidden influence. In light of the direction I gave with regard to late complaints by rape victims, her explanation and her conduct are reasonable and probable in all the circumstances of this case.
- [16] Accused had provided money and food to raise the child even after a serious allegation against him had been made. His conduct cannot be described as a genuine reconciliation effort. Courts view this type of interference with skepticism when a serious charge is hanging over the accused's head. Accused himself admitted that he knew she was still schooling and what he was doing was wrong. Accused's conduct is consistent with his guilty mind. Complainant and her family could have easily accepted his apology, money and food and given up the fight for justice in court if she had been complicit in the wrong. They did not do so. They decided to bring their close relative to book. Complainant's conduct is consistent with her honesty.
- [17] During the course of cross examination, it was suggested to the Complainant that she could have struggled, shouted or otherwise objected to what the accused was doing. In his closing argument Defence Counsel contended that her 'no reaction' was consistent with her consent. According to her version, he had tied her with his hands. When she tried to scream he blocked her mouth. She tried to escape but could not. When he tried to insert his penis into her vagina she pushed him. She became unconscious with 'no reaction'. Obviously, she can't be expected to react after she became unconscious. Her conduct amply demonstrates her dissent to sexual intercourse.

- [18] I watched Complainant giving evidence in court. Her conduct and demeanor in court are consistent with her honesty.
- [19] Version of the defence is unacceptable and unbelievable. Although the Defence had nothing to prove in this case, it failed to create any doubt in the prosecution case.
- [20] According to the accused, they had been in a girlfriend-boyfriend relationship for sometime. This is not the first time they had exchanged their love in this manner. She readily consented to kissing and sexual intercourse.
- [21] For this, they had gone outside the house, near a breadfruit tree in the night. It was not a comfortable and proper place for her to lie down. That is why he took off his *sulu* and spread it on the ground for her to lie down. I can't understand why they would want to go to that place when no one was home except her younger sister who was at sleep. They could have behaved as they wished inside the house if she had consented.
- [22] According to him, it was not the first time she had consented to sexual intercourse with him. First such experience was in the beach during day time. His evidence is not consistent with the stance taken by his Counsel when he subjected the Complainant to cross examination. His Counsel cross examined her on the basis that her first encounter was in a nearby vacant house, not in the beach. Version of the Defence is not consistent.
- [23] I watched accused giving evidence in court. His conduct and demeanor were not consistent with his honesty.
- [24] For the reasons given, I accept the version of the Prosecution and rejected that of the Defence. I reject the majority opinion of the assessors and find the accused guilty of Rape as charged.



AT LAUTOKA
30th May, 2016


Aruna Aluthge
Judge

Solicitors for State:

Solicitors for Accused:

Office of the Director of Public Prosecution for State

Office of the Legal Aid Commission for Accused