

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 37 OF 2013

BETWEEN : STATE

AND : SAMISONI BAUKARI

Counsel : Mr. Niudamu. J for State
Mr. M. Fesaitu for the Accused

Date of Hearing : 5th of July 2016
Date of Closing Submissions : 6th of July 2016
Date of Summing Up : 6th of July 2016
Date of Judgment : 8th of July 2016

JUDGMENT

1. 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;

"Samisoni Baukari, between the 14th day of February 2013 and 15th day of February 2013, at Lautoka in the Western Division inserted his penis into the vagina of Kinisimere Vakayavu without her consent"
2. The Accused pleaded not guilty for this offence. Hence the matter was set down for hearing on the 5th of July 2016. The prosecution adduced the evidence of three witnesses including the victim, in order to prove the charge against the accused person. The accused person, neither gave evidence on oath nor called

any other witnesses for his defence. Subsequently, the learned counsel for the defence and the prosecution made their respective closing submissions, followed by the summing up.

3. The three assessors returned with unanimous verdict of not guilty. The assessors' verdict was not perverse. It was open for them to reach such conclusion on the evidence presented during the hearing.
4. Having carefully considered the evidence adduced during the hearing, respective closing submissions of the counsel, the opinion of the three assessors and the summing up, I now proceed to pronounce the judgment as follows.
5. The prosecution alleges that the accused person came to the victim while she was sleeping and started to hug her in the early morning of 15th of February 2013. She woke up and found that it was her uncle of her husband, the accused person who was hugging her. He then asked her not to tell her husband about this. He then forcefully removed her cloths and had sexual intercourse with her without her consent. She tried to push him away, but failed as he was heavy. She then requested him that she wanted to go to the toilet. She waited in the toilet for a while, and then came out. She found that the accused was still waiting for her. He then told her to get back to home and he will sleep in the living room. Once she went back to her room, the accused came again and started to kiss her from her back. She then went out of the house and ran away to the house of Jone. She told Jone about this incident. Jone accompanied her back home. She told her husband about this incident when he came home on the following morning.

6. Meanwhile, the accused denies this allegation and claims that the victim consented to have sexual intercourse with him on that night of 14th of February 2013. The accused admits that he had a sexual intercourse with the victim, but claims it was with her consent. Hence, the main dispute in this matter is whether the victim gave her consent to the accused to have this alleged sexual intercourse with her.
7. The learned counsel for the defence extensively cross examined the victim and suggested that she consented to have this alleged sexual intercourse and in fact willingly participated in it. The victim continuously refused the proposition of the learned counsel for the defence. Neither she accepted nor adopted the proposition made by the learned counsel during the cross examination. The victim was firm and straight in her answers specially during the cross examination.
8. The Fiji Court of Appeal in Fraser v State [2012] FJCA 91; AAU24.2010 (30 November 2012) held that;

"No matter how astutely leading questions may be asked by Counsel cross-examining prosecution witnesses, the material in the leading questions does not become evidence unless adopted or accepted by the witness".

9. In view of the above judicial precedent, I find that there is no evidence before me that the victim consented for this alleged sexual intercourse and willingly participated in it, apart from the exculpatory answers given by the accused person in his caution interview. The prosecution tendered the caution interview of the accused person as an agreed fact.

10. It has been revealed during the cross examination of the victim that she had mentioned in the statement made to the police that the accused pressed her thighs. However, in her evidence in court, she said that the accused person punched on her thighs.
11. Moreover, the victim in her cross examination admitted that the accused performed oral sex before he inserted his penis into her vagina. During the evidence-in-chief, she did not mention that the accused performed oral sex. The victim answered negatively, when she was asked by the learned counsel for the defence whether she felt the tongue of the accused person rubbing her vagina. She in the re-examination then stated that the accused only touched her vagina.
12. Accordingly, the learned counsel for the accused person suggested that the evidence of the victim is not reliable and credible due to the above mentioned inconsistencies in her evidence.
13. I do not find that the inconsistent nature of the evidence of the victim with the statement made to the police in respect of punching on her thighs has affected the credibility of the evidence. Both versions confirm that the accused had inserted some form of force on her thighs. I find this a trivial contradiction, which does not go to the root of the main dispute under consideration in this matter.
14. I now proceed to examine whether the inconstancy of the evidence of the victim in respect of the accused performing oral sex has rendered the whole of her evidence unreliable and untrustworthy.
15. The maxim "*falsus in uno falsus in omnibus*" (He who speaks falsely on one point will speak falsely upon all) is a principle that can be found in the common law

jurisdictions from time immemorial. However, the maxim is not an absolute rule applicable without exception in every case where a witness is found to have given false evidence on a material point. The application and scope of the maxim has been limited and modified by many common law jurisdictions over the years.

16. Perhaps one of the most archaic remarks on the application of "*falsus in uno falsus in omnibus*" has been expounded by Lord Ellenborough CJ in **King v Teal and Others (103 Eng Reports 1022, pg 1024)**, in which his lordship found that;

"A person may be proved on his own shewing, or by other evidence, to have forsworn himself as to a particular fact; it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide"

17. The Fiji Court of Appeal in **Mohammed Jabar v The State (Criminal Appeal No AAU 026 of 2012), (27th of May 2016)** in discussing the principle of "divisibility of credibility" has found that the direction given by the trial judge in his summing up directing the assessor that they can accept part of a witness's testimony and reject the other part as a witness may tell the truth about one matter and lie about another matter is in agreement with the principle of divisibility of credibility.
18. Accordingly, if the court found a witness has given false evidence on a particular point, still the court could consider the remaining portion as reliable and

credible. In order to do so, the court must consider all the evidence adduced during the hearing.

19. The Privy Council in Attorney- General of Hong Kong v Wong Muk Ping (1987) 2 W.L.R. 1033) has discussed the applicable approach in determining the credibility of evidence when the court encounters with conflict of testimony of a witness. Lord Bridge of Harwich in Wong Muk Ping (supra) held that;

“There may, of course, be extreme cases where a witness under cross examination is driven to admit that his evidence-in-chief was false. Such triumphs for the cross examiner are frequently seen in fictional courtroom dramas than in real life. But in such an extreme case, if it should happen, there would no longer be any question of credibility. Evidence which a witness first gives and then admits to have been false is no longer his sworn testimony and, if a criminal prosecution depends on it, the judge should direct an acquittal. But apart from such extremes, any tribunal of fact confronted with a conflict of testimony must evaluate the credibility of evidence in deciding whether the party who bears the burden of proof has discharged it. It is a commonplace of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability”.

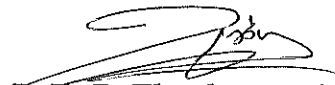
20. It appears that the evidence of the victim with respect of the performing of oral sex on her is not consistent and in conflict with her testimony given in the cross

examination and in the re-examination. She did not mention about it in her evidence-in-chief. However during the cross examination, she admitted that the accused performed oral sex. She then in the re-examination stated that the accused only touched her vagina. Hence, as expounded by Lord Bridge of Harwich in **Wong Muk Ping (supra)**, the court must evaluate the evidence of the victim with the other evidence adduced by the prosecution in order to determine the credibility and reliability of her evidence.

21. Mr. Jone Nawaqa, in his evidence stated that he saw the victim was sitting in his living room when he woke up around 3a.m. in the early morning of 15th of February 2013. She has told him that she was afraid to go back to her house. The victim has then told him that the boy came and raped her while she was sleeping. Jone then accompanied her back to home. He left her after she went inside the house and locked the door of her room.
22. The accused in his caution interview has stated that the victim went outside after they had this alleged sexual intercourse. He told her to come back as it was middle of the night. But she went away. Later in the night the accused heard that she came with another boy and was talking outside. He then heard that she closed the door of the bedroom.
23. Accordingly, it appears that the answers given by the accused person in his caution interview strengthens the credibility of the testimony of Jone. Hence, I accept the evidence given by Jone as truthful and credible. Accordingly, I find that the evidence of the victim to the effect that she ran away from the accused and went to Jone's house has been further confirmed.

24. As stated above, the accused has not disputed that the victim went away in the night and later came back with a boy. The victim in her evidence stated that she told Jone about this alleged incident while she was accompanied by him back to home. Jone in his evidence confirmed it. The victim then told her husband about this incident when he came home on the following morning. The evidence of Jone and the husband of the victim confirm that the victim told them about this alleged incident in the early morning of 15th of February 2013. Hence, the evidence of recent complaint has amplified the credibility of the evidence of the victim.
25. The accused person in his caution interview has stated that the victim did not speak to him when he approached her and asked her to have sexual intercourse in the room. Having considered the answers given by the accused in his caution interview, I do not find that the victim has given verbal consent, when accused asked her to have sexual intercourse and touched her in the room. Accused only states that he found the victim had already removed her cloths when he asked her to have sexual intercourse.
26. Having considered all the other evidence adduced in this hearing, I find the evidence of the victim in respect of this alleged sexual intercourse, where she alleges that the accused person inserted his penis into her vagina without her consent is credible and reliable. I accordingly accept her evidence as truth. I further find that the exculpatory answers given by the accused person in his caution interview is not true, hence I refuse them. Moreover, it is my opinion that the said exculpatory answers in the caution interview have not created any reasonable doubt in the case of the prosecution.

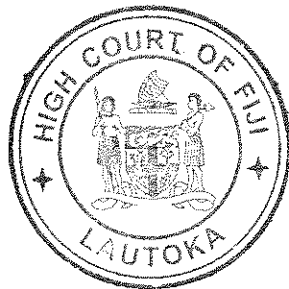
27. Accordingly it is my opinion that the prosecution has proven guilty of the accused for this offence beyond reasonable doubt. Hence, I find there is a cogent reason to disagree with the unanimous opinion of not guilty given by the three assessors. Hence, I disregard the opinion of the three assessors.
28. In conclusion, I find the accused is guilty for this offence of rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree and convict him for the same accordingly.


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

8th of July 2016



Solicitors : Office of the Director of Public Prosecutions
Office of the Legal Aid Commission