

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 143 of 2013

STATE

V

JOSEPH SHYAM NARAYAN

Counsel : Ms. D. Kumar with Mr. S. Shah for the State
Mr. S. Kumar for the Accused

Dates of Hearing : 12th July – 15th July 2016

Date of Summing Up: 15th July 2016

Date of Judgment : 18th July 2016

(Name of the complainant is suppressed. Accordingly, the complainant will be referred to as SS)

JUDGMENT

1. The accused is charged for the following offences;

FIRST COUNT

Statement of offence

Sexual Assault: Contrary to section 210 (1)(a) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

JOSEPH SHYAM NARAYAN between the 1st and 28th day of February 2013 at Nasinu in the Central Division unlawfully and indecently assaulted SS.

SECOND COUNT

Statement of offence

Rape: Contrary to section 207 (1) and section 207 (2)(b) of the Crimes Decree, No. 44 of 2009.

Particulars of offence

JOSEPH SHYAM NARAYAN on the 13th day of March 2013 at Nasinu in the Central Division penetrated the vagina of SS with his tongue without her consent.


2. The assessors have returned with a unanimous opinion that the accused is guilty of both the above counts.
3. I direct myself in accordance with the summing up delivered to the assessors on 15th July 2016 and the evidence adduced during the trial.
4. I accept the evidence of the complainant. Considering the circumstances of this case, it is acceptable for the complainant to take some time to find the courage to complain to someone as she said in her evidence. I accept the evidence of the second prosecution witness, the form teacher to whom the complainant made her first complain about the incidents. I find that the complainant had made a prompt complaint which sufficiently describes the allegations against the accused to the second prosecution witness. Therefore, the credibility of the complainant's evidence is strengthened in view of the complaint she made to the second prosecution witness.
5. The demeanor and the deportment of the accused did not suggest that he gave truthful evidence. The manner in which he responded during cross-examination to most of the questions pertaining to the allegations saying that he was not there seemed rather artificial. The second defence witness first said that he remembers 11/03/13 because he heard that the accused was arrested. Then he said that the accused was there in the taxi base between 4.00pm to 8.00pm on 11/03/13 and did not go for hires which took more than 5minutes. The defence witnesses including the said second witness did not present themselves as credible witnesses.
6. I am mindful that the accused bears no burden to prove that he was elsewhere and it is sufficient to simply raise that defence and the prosecution should prove beyond reasonable doubt that the accused committed the offence thereby disproving the fact that the accused was elsewhere.
7. It is an agreed fact that the accused is the complainant's stepfather. When the complainant gave her evidence, she said that Joseph Shyam Narayan is her stepfather. The prosecution questioned her (and the third prosecution witness) about one 'Joseph' and did not get the

complainant to identify the accused. Thereby, prosecution paved the way for the defence counsel to take up the position in his closing address that the identity of the accused was not established by the prosecution. However, considering the manner in which the prosecution witnesses were cross examined and the evidence of the defence witnesses including the accused, there seemed to be no misunderstanding or dispute that the 'Joseph' which the witnesses referred to is no other person but the accused.

8. I believe the complainant's evidence that during the month of February in 2013, the accused caught her smoking inside the bathroom when he forcefully opened the door while she was naked and about to have a bath and then he touched her vagina. This act is sexual in nature which is unlawful and indecent. I cannot accept the defence evidence that the accused could not have committed this crime due to his daily routine as a taxi driver.
9. Therefore, I am satisfied that the prosecution has proved the elements of the first count beyond reasonable doubt.
10. I accept the evidence of the complainant that the accused penetrated her vagina with his tongue on or about the 11th March 2013. According to the complainant, this incident took place on the day after the 11th March 2013. She recalled another incident which the accused is not charged for which she said that took place on 11th March. Her evidence was that since the day the accused caught her smoking, she was subjected to various sexual assaults by the accused. Considering the circumstances, I do not find the complainant's evidence of the incident relevant to the second count unreliable simply because she did not come out with the exact date mentioned in the second count.
11. However, I considered it necessary to examine whether this caused any prejudice to the accused in his defence. The crux of the allegation pertaining to the second count is that the accused penetrated the complainant's vagina with his tongue. The accused knew that this is the allegation he is required to defend in respect of the second count. His defence was that he was not there at home at the time the offence was alleged to have been committed. The accused or his witnesses who gave evidence on his *alibi* did not testify on what exactly took place on 11/03/13 based on any proper record. The evidence was about the accused's daily routine as a taxi driver in general. After considering all relevant circumstances, I find that there was no prejudice caused to the accused in defending the charge in the second count due to the variance between the evidence and the particulars in the second count with regard to the date of offence.

12. I am satisfied beyond reasonable doubt that the complainant did not freely and/or voluntarily consent for the accused to penetrate her vagina with the accused's tongue. The accused knew that the complainant was not freely and voluntarily consenting for him to penetrate the complainant's vagina as he was in fact using the secret he knew of the complainant in order to prevent any form of substantial physical resistance from her.
13. Therefore, I am satisfied that the prosecution has proved the elements of the second count beyond reasonable doubt.
14. After I delivered the summing up and adjourned for the assessors to deliberate on their opinion, I was informed that the accused had approached one of the assessors just before the summing up and requested him to return a verdict in his favour. Therefore, I reconvened the court and further reminded the assessors that their opinion should only be based on the evidence led inside the court room and they should disregard whatever had taken place outside the courtroom. I further inquired from the assessors whether they could still give an opinion with an open mind. Each assessor answered in the affirmative. The prosecution and the defence had no objections for the trial to proceed with the same assessors.
15. I am convinced that the unanimous opinion of the assessors in finding the accused guilty of both counts was not perverse and it was open for them to reach that conclusion based on the evidence adduced.
16. In the circumstances, I concur with the unanimous opinion of the assessors.
17. I find the accused guilty of both counts as charged and convict him accordingly.




Vinsent S. Perera
JUDGE

Solicitors for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Sunil Kumar Esq, Nausori.**