

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 06 OF 2013

BETWEEN : STATE

AND : SALMENDRA RATNESH CHAND

Counsel : Mr. A. Singh for State
Ms. P. Chand for the Accused

Date of Hearing : 8th -11th of August 2016

Date of Closing Submissions : 11th of August 2016

Date of Summing Up : 16th of August 2016

Date of Judgment : 23rd of August 2016

JUDGMENT

1. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree, one count of Criminal Intimidation contrary to Section 375 (1) (a) (i) of the Crimes Decree and one count of Theft contrary to Section 291 (1) of the Crimes Decree. The particulars of the offences are that;

The First Count,

“Salmendra Ratnesh Chand on the 8th of December 2012, at Nadi in the Western Division, had carnal knowledge of Taziana Hanif without her consent”

The Second Count

“Salmendra Ratnesh Chand on the 8th of December 2012, at Nadi in the Western Division, without lawful excuse threatened to injure Taziana Hanif with a kitchen knife”

The Third Count

“Salmendra Ratnesh Chand on the 8th of December 2012, at Nadi in the Western Division, dishonestly appropriated an Acer brand Laptop valued at \$ 3,000, a mobile phone valued at \$ 300, a hand bag valued at \$ 150, a diamond ring valued at \$ 800, a makeup kit valued at \$ 400 and a wallet valued at \$ 750 all to the total value of \$ 4,725 the property of Taziana Hanif, with the intention of permanently deprive Taziana Hanif of the said property”

2. The accused pleaded not guilty for these three counts. Hence, the matter proceeded to hearing. The hearing commenced on the 8th of August 2012 and concluded on the 11th of August 2012. The prosecution presented the evidence of four witnesses including the victim. At the conclusion of the prosecution's case, the court found there is no evidence presented against the accused in respect of the count of Theft pursuant to Section 231(1) of the Criminal Procedure Decree. The accused was acquitted from the count of Theft accordingly. The accused gave evidence on oath but did not call any other witnesses for his defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing submissions, it was followed by the summing up.

3. The three assessors returned with unanimous opinion of not guilty for both of the counts. The assessors' opinion 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, the agreed facts tendered by the parties, 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 came to meet the victim at Denarau Island, Nadi on the 8th of December 2012. He then took her to Wailoaloa Beach Resort, where he forcefully had sexual intercourse with the victim without her consent. Thereafter he threatened to injure her with a knife.
6. The accused admitted that he met the victim at Denarau Island on the 8th of December 2012. He claims that they were in a relationship and he came to see her to celebrate her birthday. The victim denies that she was in a relationship with the accused on the 8th of December 2012. According to the victim, she has broken up with him two weeks prior to the 8th of December 2012.
7. The accused did not dispute of having a sexual intercourse with the victim in the room of Wailoaloa Beach Resort. He claims that it was a consensual sexual intercourse. The victim willingly participated in this sexual intercourse. A call came on to her mobile phone while they were having sexual intercourse. The accused answered the phone call and found a man was asking for Taziana. That man claimed that he was the boyfriend of the victim. That called made the accused frustrated. He said that he felt that he was betrayed. He inquired the

victim who this person was and why he claims as her boyfriend. At that time Avnil, a friend of the victim came to the room. The victim then informed him that she wanted to go. He told her that she can go but have to leave behind the tattoo he made on her shoulder.

8. Accordingly, the main dispute in respect of the count of rape is whether the victim gave her consent to the accused to have sexual intercourse in that evening of 8th of December 2012.
9. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is important to consider how the victim and the accused behave before and after the alleged sexual intercourse.
10. A mere fact that the victim went with the accused to a room in a hotel or she had or have a relationship with the accused, does not automatically constitute that she has given her consent to have sexual intercourse with the accused. It is required to consider all the circumstances of this incident. Having considered all the circumstances as a whole, if it leads to an indisputable and inescapable conclusion that she had not given her consent freely and voluntarily to have sexual intercourse with the accused, then it can be concluded that the victim has not given her consent to the accused to insert his penis into her vagina.
11. In that context, the court is first required to consider whether the evidence given by the victim is reliable and credible. The victim had been in a relationship with the accused since 2010. However, the victim in her evidence stated that she broke

up with him two weeks prior to the 8th of December 2012. Hence, she claims that she was no longer dating with him and he was not her boyfriend when she met him and went to Wailoaloa Beach Hotel.

12. In contrast to the claim of the victim, the Receptionist in her evidence stated that the victim told her while they were walking towards the reception area, that she did not like what her boyfriend has done to her. However, the victim in her evidence stated that she told the Receptionist that she was all right and did not tell the truth when the Receptionist asked her if she was okay.
13. The victim has referred the accused as her boyfriend in the statement she made to the police on the 8th of December 2012. The victim in her evidence stated that what she stated in the statement was true and everything took place at the Wailoaloa Beach Resort were still afresh in her mind when she made the statement.
14. The victim in her evidence stated that she told the accused that she wanted to go home. The accused then told her that he was also going to Lautoka and they could go together. On their way, the accused requested her to help him to get some stuff into his room. That was the reason she went to Wailoaloa Beach Reason with him. However, she has not mentioned anything about it in her statement made on the 8th of December 2012.
15. Meanwhile, the accused in his evidence stated that he planned to celebrate the birthday of the victim on the 8th of December 2012. It was the reasons for him to come to Nadi and meet her. They were still dating at that time. He told her that they were going to celebrate her birthday at Wailoaloa Beach Hotel and will

spend the night there. On their way to Wailoaloa Beach Resort, the victim called Avnil and asked him to come to the hotel.

16. The victim had made another statement to the police on the 10th of December 2012, in which she has referred the accused as her friend. There is no evidence adduced by the prosecution, explaining the reasons for making two different statements to the police by the victim. The victim in her evidence explained that she was still scared and shocked when she made her statement on the 8th of December 2012 and that was the reason for referring the accused as her boyfriend in her statement. However, the Doctor who conducted the medical examination of the victim on the same date found the victim was calm during the medical examination. The medical examination has conducted before she made her statement to the police on the 8th of December 2012.
17. The above inconsistent nature of the evidence given by the victim and her statement made to the police regarding her relationship with the accused and the purpose of going to Wailoaloa Beach Resort is vital for the determination of the main dispute of this case. In the absence of any conclusive explanation, it is my opinion that the inconsistent nature of her evidence regarding the nature of her relationship with the accused and the purpose of going to the Resort has adversely affected the credibility and reliability of the evidence given by the victim. Hence, I find there is a reasonable doubt whether she was still dating with the accused and went to the Resort to celebrate her birthday with him on the 8th of December 2012.
18. I now turn onto the issue of this alleged sexual intercourse. The victim claims that the accused forcefully threw her to the bed and then started to kiss her. He bit

and punched on her left side of the upper chest when she tried to turn her head towards right side. He then bit and punched on her right side of the upper chest when she tried to turn her head towards left side making injuries on the both sides of her upper chest. The accused then pulled down her top. She was wearing a halter neck top on that day. The accused then pulled down her short with the undergarment. He then lifted her legs up and inserted his erected penis into her vagina. He had this sexual intercourse less than a minute. When she was shouting and begging him to stop, he stopped it. She then got up and put her top back. She tied it around her neck.

19. The version of the accused on this alleged sexual intercourse is different. According to the accused, the victim willingly participate in the sexual intercourse. While defrosting the chicken at the sink, she started to modeling in front of him. He then took her to the bed and they started to kiss each other. The victim then told him that they were wasting time doing this and started to undress her. He too undressed himself. They then have sexual intercourse. While they were having sexual intercourse, her mobile phone started to ring. The caller ID appeared as "stranger". When he told her about it, she asked him to ignore it. However, the caller kept on calling. The accused then answered the phone call. A male person asked for Taziana. He introduced himself as her boyfriend. With that call, they stopped the sexual intercourse. He inquired her who this person was and why he was claiming as her boyfriend. The accused explained in his evidence how she got bite marks and reddish marks around her chest.
20. The Doctor in her evidence stated that she only found one punctured wound and hematoma on the right side of her chest. There were no injuries as such on her left side of the chest as claimed by the victim. The doctor has not found any

injuries around her neck. The victim in her evidence stated that she was dressed in an halter neck top. It is a top with two straps to be tied around the neck. If the accused forcefully pulled it down, there is a probability where the knot tied behind the back of the neck with two straps causing injuries on her neck or the breaking of the straps. The doctor during the medical examination of the victim neither found any injuries around the neck nor any damages to the clothes she was wearing at that time. Moreover, the doctor in her evidence stated that she did not find any laceration, abrasion or any form of injuries in the vaginal area of the victim. In view of these reasons, there is a reasonable doubt on the credibility and reliability of the victim's version of this incident. Hence, I hold there is a reasonable doubt whether the accused and the victim had a consensual sexual intercourse and the said call of the stranger came on to the phone of the victim while they were having the consensual sexual intercourse.

21. I now draw my attention to the credibility of the evidence given by Avnil Deo. He stated in his evidence that the accused called him and informed him the room number. The victim did not know how he found the room number. However, she did not state in her evidence that the accused called and informed him the room number. According to the Receptionist, Avnil came to the reception and asked the room 411. The Receptionist then directed him to the room. The accused in his evidence stated that the victim called Avnil and informed him the hotel and the room number. In view of these reasons, there is a reasonable doubt whether Avnil knew the room number before he reached to the Resort. Moreover there is reasonable doubt whether the victim and the accused planned the birthday celebration together and Avnil joined them later as claimed by the accused.

22. The victim in her evidence stated that the accused came and held her hand from behind when she told him that she wanted to go. He then pushed her towards the wall of the room, saying that he will remove the tattoo he made on her shoulder. She has not seen the position of the knife, but saw the knife in his hand. Avnil Deo in his evidence did not say the accused pushed her towards the wall. He only said the accused held her hand and pointed the knife on her tattoo and threatened her that he will remove it. The accused denies the allegation. However, he admitted in his evidence that he told the victim that he wanted back the tattoo he made on her shoulder. He then pointed it when she came to him and asked what did he mean of it. In view of the contradictory nature of the evidence of the victim and Avnil, I find there is a reasonable doubt whether the accused actually threatened the victim with a knife that he will remove the tattoo printed on her shoulder.
23. Having considered the reasons discussed above, it is my opinion that there is a reasonable doubt on the credibility and reliability of the evidence given by the victim and Avnil Deo. Therefore, I do not accept the evidence given by the victim and Avnil as credible and reliable evidence. Hence, I find the prosecution has failed to prove beyond reasonable doubt that the accused is guilty for these two counts as charged in the information.
24. Accordingly, I do not find any cogent reasons to disregard the unanimous verdict of not guilty given by the three assessors.
25. In conclusion, I hold that the accused is not guilty for the offences of Rape and Criminal Intimidation as charged in the information and acquit him accordingly.

26. Thirty (30) days to appeal to the Fiji Court of Appeal.

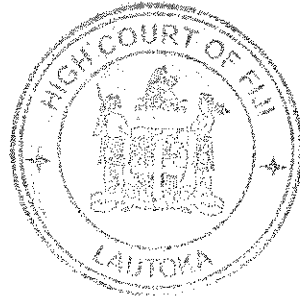


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

23rd of August 2016



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