

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 093 of 2013

STATE

V

- 1. AMITESH ANISH NARAYAN**
- 2. SHAVINDRA SHOMAL DUTT**

Counsel : Ms. R. Uce for the State.
: Mr. M. Anthony for both the Accused.

Date of Hearing : 18 April 2017
Closing Speeches : 19 April 2017
Date of Summing Up : 21 April 2017
Date of Judgment : 24 April 2017

JUDGMENT

[The name of the Complainant is suppressed, the complainant will be referred to as "MR"]

[1] The Director of Public Prosecutions charged both the accused persons by filing the following amended Information:

FIRST COUNT
Statement of Offence

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

Particulars of Offence

AMITESH ANISH NARAYAN, between the 24th day of April 2013 and the 25th day of April 2013, at Nadi in the Western Division, penetrated the vagina of '**MR**' with his penis, without the consent of the said '**MR**'.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009

Particulars of Offence

SHAVINDRA SHOMAL DUTT, between the 24th day of April 2013 and the 25th day of April 2013, at Nadi in the Western Division, penetrated the vagina of '**MR**' with his penis, without the consent of the said '**MR**'.

- [2] The three assessors had returned with a unanimous opinion that both the accused persons were guilty as charged.
- [3] I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
- [4] The prosecution called three witnesses while the accused persons opted to remain silent and not call any witnesses.
- [5] On 24th April, 2013 at about 10.00pm the complainant received a call from the first accused asking her to meet in Nadi Town. She knew the first accused from about three months ago.
- [6] The complainant walked from Kennedy Hotel to Nadi Town at MH Supermarket she met the first accused who was waiting for her with the second accused. The complainant did not know the second accused.

From MH Supermarket all went to Nadi bus stand, at the bus stand the first accused asked the complainant to accompany him to Koroivolu Park where his transport would come and pick him. At Koroivolu Park the first accused started to wrap the complainant at the back and then pushed her as a result she fell to the ground beside the drain. After this the first accused sat on the complainant's thighs and then took off her clothes she was wearing a top and $\frac{3}{4}$ pant.

- [7] The first accused removed his pants, the second accused was standing where the complainant's head was and he held and pulled both her hands over her head. The first accused opened her thighs, his trousers were also open and he was sitting on her. The first accused inserted his penis into her vagina and had sexual intercourse for 10 minutes.
- [8] The complainant was shouting but nobody came to assist her. After the first accused had finished he then held her hands while the second accused removed his $\frac{3}{4}$ pants and came on top of her and had sex with her for five minutes. The complainant tried to push the second accused but couldn't since he was on top of her and the first accused was holding her hands.
- [9] At this time the complainant's sister came and shone her torch light on them. The second accused stood up the zip of his pants was still open. Thereafter the complainant also stood up, the complainant's sister was accompanied by two of her cousins. The complainant said she told everything to her sister of what had happened to her and one of her cousin's then went to the Police Station and brought the Police to Koroivolu Park. When the Police came they questioned the first accused who told them that they were just sitting there and he never did anything. The complainant told the Police that they had sex. The Police Officers then took all of them to the Police Station.

- [10] The complainant further informed the court that she told her sister at the Koroivolu Park the first accused hugged her from the back and she lay down on the ground he then sat on top of her and they had sexual intercourse. At this time no one was at the Park and it was dark.
- [11] The complainant also informed the court that she did not agree to have sex with both the accused persons.
- [12] In cross examination the complainant was referred to inconsistencies between her evidence in court and what she had informed the Police after the alleged incident when everything was fresh in her mind. The complainant agreed that she had signed a police statement but she did not read her statement and it was not read to her.
- [13] The complainant stated that the recording in her police statement that she had sexual intercourse with the first accused who was her boyfriend for the fourth time from January, 2013 to April, 2013 was false.
- [14] The complainant in her explanation said that she did not say the above which was in her police statement to the Police Officer who was writing her statement. To the suggestion how the Police would have come to know about this fact without her telling the Officer the complainant stated that maybe the first accused was asked by the Police Officer and he had told them.
- [15] In respect of the fact that it was written in her police statement that the first accused never ejaculates inside her vagina the complainant informed the court that she forgot what was written in her police statement and maybe the Police Officer wrote it after reading her medical report.

- [16] In further cross examination the complainant said that she never told her sister that she had been raped by the two accused persons, what she did tell her sister was that they were having sex at Koroivolu Park.
- [17] In re-examination the complainant confirmed that when she told her sister they were having sex meant the two accused were going out with her and having sexual intercourse.
- [18] The complainant was contradicted by her sister Tuliana Marama Nisolevu in that Tuliana did not say anything that the second accused was on top of the complainant or that the complainant was naked when she had shone her torch light on the complainant at Koroivolu Park.
- [19] I do not accept the evidence of the complainant as truthful and reliable. The inconsistencies between the complainant's evidence in court and what she told the Police immediately after the alleged incident in her police statement when facts were fresh in her mind are significant. The explanation given by the complainant for the inconsistencies is unacceptable. The facts which the complainant attributed to the Police Officer who was writing her police statement are facts that would only be known to the complainant and nobody else. I also reject the assertion by the complainant that her police statement was not read to her or that she did not read her police statement before signing it.
- [20] I do take into consideration that passage of time can affect one's accuracy of memory and I note that the alleged incident took place some four years ago.
- [21] I observed the demeanour of the complainant in court and it was obvious to me that the complainant did not tell the truth when she stated that

both the accused persons between the 24th day of April, 2013 and 25th day of April, 2013 penetrated her vagina with their penis without her consent. I am satisfied that the complainant's conduct generally in court and her demeanour were not consistent with her honesty. The complainant on some occasions during cross examination was evasive and it appeared to me that she deliberately did not want to answer the questions posed.

[22] The sister of the complainant Tuliana Marama Nisolevu told the court that at the Koroivolu Park she found the complainant with two boys and that the complainant had walked over to her. Tuliana did not mention that she saw the complainant having sex and was naked at the time.

[23] Tuliana further informed the court that the complainant told her at the Police Station that the two boys who were with her had forced her to have sexual intercourse. The complainant, however, gave a different version to the court that she never told her sister that she had been raped, what she did tell her sister was that they were having sex at the Koroivolu Park. It was after hearing this that her sister slapped her and she cried as a result.

[24] I do not accept the evidence of Tuliana Marama Nisolevu as truthful and reliable that at the Police Station the complainant had told her that both the accused persons had forced her to have sexual intercourse.

[25] The final witness for the prosecution was Dr Lice Vaniqi who could not say whether the laceration found in the vaginal wall of the victim was due to consensual or non-consensual sex. The Doctor also admitted that she had not recorded in the Medical Examination Form about dryness in the victim's vagina, as for the discharge noted in the vagina the Doctor was not sure what the discharge was. I find the professional opinion of

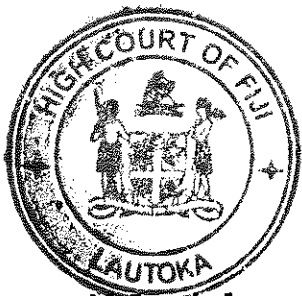
the Doctor inconclusive in respect of her findings that the vaginal examination of the victim showed forceful sexual contact.

[26] For the above reasons I reject the unanimous opinion of the assessors.

[27] I am not satisfied beyond reasonable doubt that between 24th April, 2013 and 25th April, 2013 both the accused persons had penetrated the vagina of the complainant with their penis without her consent.

[28] In view of the above, this court finds both the accused persons not guilty and they are acquitted of the charges.

[29] This is the Judgment of the Court.



At Lautoka

24 April, 2017

Sunil Sharma

Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

M/s. Iqbal Khan & Associates for both the Accused.