

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 082 of 2016

[CRIMINAL JURISDICTION]

STATE

V

MICHAEL SHAIENDRA PRATAP

Counsel : Mr. M. Vosawale with Mr. S. Seruvatu for State
Mr. M. Yunus with Ms. A. Prakash for Accused

Dates of Hearing : 23rd - 26th January 2017

Date of Summing up: 27th January 2017

Date of Judgment : 30th January 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as IM)

JUDGMENT

1. The accused is charged with the following offences;

FIRST COUNT

Statement of Offence

RAPE: contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his penis without her consent.

SECOND COUNT

Statement of Offence

RAPE: contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his finger without her consent.

THIRD COUNT

Statement of Offence

RAPE: contrary to section 207(1) and 2(b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, penetrated the vagina of IM with his tongue without her consent.

FOURTH COUNT

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

MICHAEL SHAIENDRA PRATAP on the 22nd day of January 2016, at Suva in the Central Division, unlawfully and indecently assaulted IM by sucking her breast.

2. The assessors have returned with a unanimous opinion that the accused is guilty of first, second and third counts. Assessors found the accused not guilty of the fourth count but found him guilty of the alternative offence of indecent assault.
3. I direct myself in accordance with the summing up delivered to the assessors on 27th January 2017 and the evidence adduced during the trial.
4. I accept the complainant's evidence that she had known the accused for about 4 months prior to the incident due to her encounters with the accused. Her evidence was that on 22/01/16 she first saw the accused standing beside a

container and then the accused grabbed her hand and took her inside the gym and according to her she was there inside the gym with the accused for about one hour. She also said that she spoke to the accused on more than one occasion during the incident. Therefore, this is a case of recognition.

5. She had described the accused as the policemen working at the police store with a green car. Second and third prosecution witnesses testified that the accused was the police officer who had a green car among the police officers who were working at the police store at Nasese. The accused himself admitted that according to his knowledge no other police officer working at the police store had a green car apart from him. This strengthened the evidence on identification of the accused.
6. I accept the evidence of the third prosecution witness that on 22/01/16 he left the police store close to 5.00pm and the accused was still in the office when he left. I accept the evidence of the fourth prosecution witness who is a friend of the accused since childhood that the accused called him around 5.56pm on 22/01/16 and told him that the accused is still in office. Considering all the evidence led in this case, I do not find that the *alibi* evidence presented by the defence is reliable.
7. I find that the inconsistencies in the complainant's evidence highlighted by the defence are insignificant. Main inconsistency highlighted by the defence, that is, the fact that the sequence of events the complainant mentioned in court is different from what is recorded in her statement to the police, does not make the complainant an unreliable witness.
8. I accept the complainant's evidence that the accused penetrated her vagina with his finger, his tongue and then with his penis and then he licked the complainant's breast on 22/01/16 without her consent. Based on her evidence that she was struggling and resisting, I am also satisfied that the accused knew

that the complainant did not consent for him to perform those acts on her. In anyway, the accused was aware of the risk that the complainant who was a school girl may not be consenting for him to penetrate her vagina with his finger, tongue and the penis and then to lick her breast. Having regard to the circumstances known to him it was unjustifiable for him to take the risk and perform the above acts on her.

9. Therefore, I am satisfied beyond reasonable doubt that each rape count is proven beyond reasonable doubt. The opinion of the assessors in respect of the first three counts is not perverse and it was open for them to reach that conclusion based on the evidence led in this case.
10. With regard to the fourth count, the assessors' opinion was that the accused is not guilty of the offence of sexual assault as charged but guilty of the lesser offence of indecent assault.
11. It is pertinent to note that the definition of the offence of sexual assault under section 210(1)(a) of the Crimes Decree is same as the definition of the offence of indecent assault under section 212(1) of the Crimes Decree. Section 210 carries a maximum penalty of 10 years imprisonment and section 212 carries a maximum penalty of 5 years imprisonment. Therefore, it stands to reason that there should be a distinction between the two offences.
12. My direction to the assessors was that for them to convict the accused for sexual assault, they have to be satisfied not only that the act or the force used is indecent but it is also 'sexual' because of its nature and that using of force is in fact 'sexual' in view of the circumstances and/or the purpose in relation to the force used. I have also directed the assessors that in the event they are satisfied beyond reasonable doubt that there was force used which is indecent but have a reasonable doubt as to whether the complainant consented for the act, then

they should consider whether the accused is guilty of the lesser offence of indecent assault.

13. Since the assessors have unanimously found the accused guilty of the three rape counts, there is no doubt that they have concluded that the complainant did not consent for the acts performed by the accused on her on 22/01/16. It follows that the assessors have decided that the force used is not sexual but only indecent.
14. Evidence of the complainant was that the accused licked her nipple while she lay naked and after the accused penetrated her vagina with a finger, with the tongue and with the penis. Given the circumstances of this case, licking of the breast was a continuation of the sexual act performed on the complainant by the accused. Considering the evidence of this case, licking of the complainant's breast was indeed a sexual assault. Therefore, I am unable to agree with the assessors' opinion that the accused is not guilty of the fourth count as charged.
15. In the circumstances, I find the accused guilty of first, second, third and fourth 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 : Legal Aid Commission, Suva.