

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION

CRIMINAL CASE NO.: HAC 07 OF 2014

STATE

V

AMI CHAND

Counsel: Mr. A. Datt for the State
Mr. W. Pillay for Accused

Date of Summing Up: 19th June, 2017

Date of Judgment : 20th June, 2017

JUDGMENT

[1] Accused was charged with the following count and tried before three assessors.

Statement of Offence

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

Particulars of Offence

AMI CHAND on the 31st day of December 2013 at Veisaru, Ba in the Western Division, penetrated the vagina of RESHMI MONIKA, with his penis, without her consent.

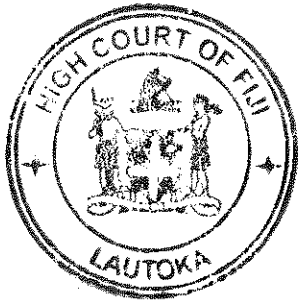
- [2] Assessors unanimously found the Accused guilty of Rape as charged.
- [3] I direct myself in accordance with my own Summing Up and review evidence led in the trial.
- [4] Having concurred with the opinion of Assessors, I pronounce my judgment as follows.
- [5] Identity of the Accused and the fact that Accused penetrated the Complainant on the 31st December, 2013 are not in dispute in this case. Defence ran its case on the basis that Complainant agreed to have sexual intercourse with the Accused. What is in dispute in this case is consent. Prosecution says that the Accused used force and violence and the sexual intercourse took place without Complainant's consent. Defence denies the allegation and says that the sexual intercourse took place with Complainant's consent. Conflict is dramatic and turns on one word against the other.
- [6] Prosecution called three witnesses, the Complainant Reshmi Monika, her husband Prem Chand and daughter Preetika. Prosecution based its case substantially on the evidence of the Complainant.
- [7] I am satisfied that Complainant's evidence is truthful and believable. Prosecution discharged its burden and proved the charge beyond reasonable doubt.
- [8] Complainant had made a complaint to police about the alleged incident six days after the incident. Prosecution says that complaint Complainant made to police is a genuine one.
- [9] Defence on the other hand says that Complainant had consented to sexual intercourse and the Complaint she ultimately made to police six days after the incident is a fabrication. Defence also argues that the facts that she had not shouted in protest; had received no injuries and had made a Statutory Declaration stating that she consented indicate that the sexual intercourse took place with her consent.
- [10] Complainant did not make any complaint about the alleged incident to her husband, Prem Chand, until her daughter Preetika informed Prem Chand about touching of her mother's breast by Accused. Complainant gave number


of reasons why she failed to report the matter promptly at the first available opportunity. She said that she was scared of the Accused who had threatened to press her neck if she were to tell the incident to anybody. She also said that she was scared to tell her husband due to fear that he (her husband) will assault her.

- [11] Complainant under cross examination said that she in fact informed her father even before Preetika informed Prem Chand about the incident. However, in her previous statement to police, she had not stated that she had informed her father. Complainant said that she could not recall everything to tell the police. It is quite understandable and expected that a victim of a rape, after a few days of the incident, would not tell everything to police officers. On the other hand, police officers cannot be expected to question a rape victim in the way a defence counsel would cross examine a witness in Court. The explanation given by Complainant for omission is reasonable and acceptable. Furthermore, I do not consider this omission to be material so as to discredit her version.
- [12] Complainant said that after her father was informed about the incident he was very angry with the Accused. She also said that her father was discussing about this incident with her husband before going to police. Prem Chand and his family had been living under Ami Chand's roof as a licensee of Accused's brother Ganga. They had to relocate themselves after the matter was reported to police. In this context, apart from explanations given by the Complainant for late reporting, they would no doubt have been in a difficult situation in going to police to report the matter against their land lord.
- [13] Complainant's reluctance to complain to her husband is quite understandable. Although her relationship with her husband during the incident was good, there had been occasions where she had been assaulted by her husband during their 10 year- long marriage life.
- [14] I am satisfied about explanations given by the Complainant for late complaint. The fact that the complaint to police was made six days after the incident did not affect the credibility of the Prosecution version.
- [15] Complainant said that she shouted and wanted to shout louder to alert her daughters; but Accused closed her mouth tightly. She also said that she was trying to shout but could not and was scared of the Accused.

- [16] It's a frighteningly common belief—one sadly prevalent in the justice system—and one that some survivors themselves even hold that people who are raped should respond in two ways—fight or flight. I carefully observed the demeanor and deportment of the Complainant. She was a small built, naive and passive woman. Prem Chand described her as a slow housewife who hardly managed her house work on her own. She demonstrated in court how loud she could have shouted. It is quite natural for a woman of her caliber, faced with an unwelcome sexual assault, to suffer from freezing effect. Her inability to shout loudly to alert her daughters who were immersed in a movie and fight with the Accused did not demean the credibility of Complainant's version.
- [17] Complainant said that she suffered injuries and neck and back pains in the struggle. She had received medical treatments from hospital. Prosecution failed to produce a medical report or call the doctor to confirm her version. That did not affect the credibility of her version. No corroboration is required in this case.
- [18] Defence is heavily relying on DE.1 (Statutory Declaration) which the Complainant had signed before Advisory Counselor, Yogesh, to prove that she had consented. Having heard evidence from Prem Chand, Complainant and Yogesh about this Declaration and circumstances under which it was signed, I am convinced that Complainant was made to sign this Declaration under circumstances of coercion, undue influence and misrepresentation of facts.
- [19] Anil Chand had come all the way from New Zealand to help the Accused, his relative-Ami Chand, and made the ignorant Complainant to believe that fighting the case is a cumbersome, time and money consuming fruitless exercise. She had signed the Statutory Declaration without understanding its true content and consequences. Yogesh admitted that he neglected his duty expected of him in his capacity as an Advisory Counselor when he strictly confined himself to the responsibilities of a Justice of Peace. He had attested a statutory declaration to help exonerate a person charged with a rape knowing very well that the person who accompanied the victim to his office (Anil Chand) is a relative of the Accused.

- [20] Complainant had made a second statement to Police in March, 2014 about this Declaration and maintained in Court that she was raped and did not want to withdraw the complaint. She also said that she was forced to sign the Declaration. I do not give any weight to the Statutory Declaration adduced by the Defence.
- [21] There was no motive or obvious reason to fabricate a case against the Accused. Complainant and her husband had gone to police risking their livelihood and lodging.
- [22] Version of the Prosecution is credible and believable. I accept the version of the Prosecution and the unanimous opinion of assessors. I reject the version of the Defence. Prosecution proved the charge beyond reasonable doubt. I find the Accused guilty of Rape as charged and convict him accordingly.
- [23] That is the judgment of this Court.




Aruna Aluthge
Judge

At Lautoka

20th June, 2017

Solicitors: Office of the Director of Public Prosecution for State
Gordon and Company for Accused