

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 249 of 2016

STATE

v.

VILIVE VIALA

Counsel: Ms. U. Tamanikaiyaroi for State
Ms. T. Kean with Ms. S. Hazelman for Accused

Hearing: 29th, 30th August 2017

Summing Up: 31st August 2017

Judgment: 01st September 2017

JUDGMENT

1. The Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act and one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree
2009

Particulars of Offence

VILIVE VIALA on the 31st day of March 2016 at Kadavu, in the Southern Division penetrated the anus of **VINITA DEVI NAIR** with his penis, without her consent.

COUNT TWO

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Decree 2009.

Particulars of Offence

VILIVE VIALA on the 31st day of March 2016 at Kadavu, in the Southern Division assaulted **VINITA DEVI NAIR** and thereby caused the said **VINITA DEVI NAIR** actual bodily harm.

2. Consequent to the plea of not guilty of the accused, the matter was proceeded to hearing. The hearing commenced on the 29th of August 2017 and concluded on the 30th of August 2017. The Prosecution called one witness that is, the victim of this alleged incident. The Defence opted not to give evidence. Subsequently, the learned counsel for the Prosecution and the Defence made their respective closing addresses. I then delivered my summing up.
3. The three assessors in their respective opinions unanimously found the accused is not guilty for each of the two counts.
4. Having carefully considered the evidence adduced in the hearing, the respective closing addresses of the learned counsel, the summing up and the unanimous opinion of not guilty given by the three assessors, I now proceed to pronounce the judgment as follows.
5. The Prosecution alleges that the accused, being the husband of the victim requested to have sex with her when they went to get some breadfruits in the morning of 31st of March 2016. She then consented for it. The accused then took the victim to nearby pine trees, where

they had vaginal intercourse. After that, the accused wanted to have anal intercourse, for which the victim refused. He then punched on the side of her ribs. He then penetrated the anus of the victim with his penis irrespective of her refusal. On the following day, the victim left to Suva without informing the accused. On the 4th of April 2016, she made a report to the Police Station at Nasinu regarding this matter.


6. The victim in her evidence mentioned that she wants to withdraw this complaint, that she made against the accused as she needs him to look after her children, who are presently living in Kadavu with the parents of the accused. The evidence in respect of her intention to withdraw the complaint should not be construed adversely against the accused unless there is evidence to establish that she was forced, influenced or threatened by the accused to do so. However, that evidence is allowed to take into consideration together with all other evidence adduced in the hearing, in order to determine the credibility and reliability of the evidence given by the victim.
7. The learned counsel for the Defence in her closing submissions suggested that the evidence given by the victim in court is not credible and reliable, hence, cannot be accepted as truth on the ground of inconsistent nature of her evidence.
8. According to the evidence given by the victim during the evidence-in-chief, the accused assaulted her on her head when he failed to catch any fish. Once again the accused assaulted her on the side of her ribs when she refused to have anal intercourse as he demanded. However, in the cross examination, the victim affirmatively answered "yes" when she was asked by the learned counsel for the defence that this assault had never occurred as the accused was at his farm at Lomaji on the 31st of March 2016. She was further suggested by the defence that this alleged rape had never happened on the 31st of March 2016 as the accused was at his farm on that day. Answering to that proposition, the victim said that the accused left to Lomaji after having sexual intercourse. During the re-examination, the victim said that the accused only assaulted her but he never raped her.

9. Accordingly, the victim in her evidence-in-chief said that the accused assaulted her twice. Firstly on her head when they were fishing and then on the left side of her ribs when she refused to have anal intercourse as demanded by the accused. He then penetrated her anus with his penis without her consent. During the cross examination, the victim said that he did not assault her. However, he had sexual intercourse with her before he left to the farm. The victim, in the re-examination, said that he never raped but only assaulted her. The victim did not give any explanation for these inconsistencies, apart from saying that she wants to withdraw this complaint.
10. In view of the reason discussed above, I find that the victim has given inconsistent evidence in respect of the main dispute of this case that is, whether the accused assaulted her and then raped her by penetrating her anus with his penis without her consent.
11. Moreover, the victim in her evidence admitted that she has stated in the first statement that she made to the Police on the 4th of April 2016, that the accused assaulted her because he was angry as her brother had chased them from the house of the brother in Omkar because the accused failed to repair the kitchen of that house. The victim in her evidence said that he assaulted her because they failed to catch any fish. When she was asked about this inconsistent nature of her evidence, she explained that the version that she has given to the Police in her statement is true. Accordingly, I find that she has given false evidence during the evidence-in-chief, saying that the accused assaulted her as they failed to catch any fish.
12. The victim further admitted in her evidence that there are inconsistencies between the evidence given by her in court and the first statement that she made to the Police regarding the time and the manner that the accused assaulted her. In the first statement made to the Police, the victim has stated that the accused assaulted on her stomach after he inserted his penis into her anus. In her evidence, she said that the accused punched on the side of her ribs when she refused to have anal intercourse as he demanded. He then penetrated his penis into her anus irrespective of her refusal.

13. Furthermore, the victim agreed that she has not stated in any of her two statements that the accused told her that she is a rat when he smacked her as she testified in her evidence. Moreover, she has not stated any of the statements that the accused told her that her vagina is too big and he want to have her anus.
14. Apart from the above discussed inconsistencies, the victim in her evidence explained that she did not want to tell about this incident to anyone at her house in Kadavu as it was a matter between her and her husband. Moreover, she did not want to report this matter when she came to Suva. However, her brother forced and influenced her to report this matter to Police Station. Eventually she made this complaint at the Nasinu Police Station on the 4th of April 2016, that was four days after this alleged incident took place.
15. According to her evidence, the victim came to Suva without informing the accused as she was angry with the accused because he did not return home from his farm. She then called him from Suva and asked him to come to Suva with kids to live with her. The accused was angry and told her that she drinks too much and has so many affairs. The accused then told her that he will not come to Suva and disconnected the telephone conversation. The victim got angry with him for his response. This conversation has taken place before she made this complaint to the Police on the 4th of April 2016.
16. Having considered the above discussed issues of delay, the victim's intention to withdraw the complaint and the inconsistencies of her evidence, I find that there are reasonable doubts regarding the following issues, that:
 - i) Whether this alleged assault and the rape actually took place,
 - ii) Whether this alleged incident took place in the day time as explained by the victim in her evidence or in the night time as stated in her statement made to the Police,
 - iii) Whether the accused assaulted the stomach of the victim or the side of her ribs as explained in her evidence,
 - iv) Whether the accused assaulted her before or after he penetrated the anus of the victim with his penis without her consent,

- v) Whether he assaulted the victim because of the argument over his failure to repair the kitchen of her brother's house or he failed to catch any fish.
17. In view of the above mentioned reasonable doubts, it is my considered opinion that the evidence given by the victim is not credible and reliable. Hence, I do not accept her evidence.
18. Accordingly, I find the Prosecution has failed to prove beyond reasonable doubt that the accused is guilty for these offences of Rape and Assault Causing Actual Bodily Harm. Hence, I do not find any cogent reasons to disagree with the unanimous opinion of guilt given by the three assessors.
19. In conclusion, I hold that the accused is not guilty for the offence of Rape, contrary to Section 207(1) and (2) (b) of the Crimes Act and Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act and acquit from the same accordingly.
20. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva

01st September 2017

Solicitors

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused