

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 99 of 2016

STATE

V

ENESHWAR RAJ

**Counsel** : Ms. Shirley Tivao for the State  
Ms. Talei Kean with Mr. V. Tuicolo for the Accused

**Dates of Trial** : 26 September, 28-29 September & 2 October 2017

**Summing Up** : 3 October 2017

**Judgment** : 5 October 2017

## JUDGMENT

[1] The accused was charged with the following offences:

### COUNT 1

#### *REPRESENTATIVE COUNT*

#### *Statement of Offence*

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

*Particulars of Offence*

**ENESHWAR RAJ** between the 30<sup>th</sup> day of November 2015 and the 4<sup>th</sup> day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

**COUNT 2**

*Statement of Offence*

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

*Particulars of Offence*

**ENESHWAR RAJ** between the 1<sup>st</sup> and 31<sup>st</sup> day of December 2015 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with an eggplant without her consent.

**COUNT 3**

*Statement of Offence*

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

*Particulars of Offence*

**ENESHWAR RAJ** on the 5<sup>th</sup> day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

**COUNT 4**

*Statement of Offence*

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

### *Particulars of Offence*

**ENESHWAR RAJ** on the 5<sup>th</sup> day of January 2016 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with his finger without her consent.

- [2] As could be noted there are four counts of Rape; two counts in terms of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) and two counts in terms of Section 207 (1) and (2) (b) of the Crimes Act.
- [3] The accused pleaded not guilty to the charges and the ensuing trial was held over 4 days.
- [4] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors unanimously found the accused not guilty of count 1, and unanimously found the accused guilty of counts 3 and 4. By a majority decision the three Assessors found the accused guilty of count 2.
- [5] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [6] During my summing up I explained to the Assessors the provisions of Section 207 (1), (2) (a) and (2) (b) of the Crimes Act.
- [7] The Assessors were further directed that in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that:
  - (i) the accused;
  - (ii) during the specified period (in this case the 30 November 2015-4 January 2016);
  - (iii) at Nasinu, in the Central Division;
  - (iv) penetrated the complainant's vagina, with his penis;
  - (v) without the consent of the complainant; and
  - (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [8] In order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that:
  - (i) the accused;
  - (ii) during the specified period (in this case the 1 December 2015-31 December 2015);
  - (iii) at Nasinu, in the Central Division;

- (iv) penetrated the complainant's vagina, with an eggplant;
  - (v) without the consent of the complainant; and
  - (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [9] In order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
  - (ii) on the specified day (in this case the 5 January 2016);
  - (iii) at Nasinu, in the Central Division;
  - (iv) penetrated the complainant's vagina, with his penis;
  - (v) without the consent of the complainant; and
  - (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [10] Similarly, in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;
- (i) the accused;
  - (ii) on the specified day (in this case the 5 January 2016);
  - (iii) at Nasinu, in the Central Division;
  - (iv) penetrated the complainant's vagina, with his finger;
  - (v) without the consent of the complainant; and
  - (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11] The above individual elements were further elaborated upon in my summing up.
- [12] The sole witness for the prosecution was the complainant, Renuka Devi Narayan. The accused, Eneshwar Raj, gave evidence on his own behalf. It is an admitted fact that the accused and the complainant have been husband and wife for 10 years and have a 9 year old daughter of their marriage.
- [13] The prosecution alleges that this is a case of marital Rape. During the period of 30 November 2015 to 5 January 2016, the complainant and the accused were married to each other.

[14] A brief summary of Renuka's testimony is as follows:

*She testified that she had got married to the accused on 5 April 2006. She said that at the beginning of the marriage, the first two years, the marriage was running smoothly.*

*After that there were some small conflicts. In 2013, her marriage started to break up. This was because her husband was not working and they used to have arguments about that.*

*She testified that her husband assaulted her. He had punched her and she had got swollen eyes. She had reported this matter to the Police.*

*Between 30 November 2015 to 4 January 2016, she testified that the relationship between herself and her husband was not too good. This was due to small conflicts and arguments. During this period, they always had arguments and her husband forced her to have sex with him every night. She stated "if I deny him he always used to force me to have sex with him every night. If I deny he always pulls my clothes off and he always makes love bites on my neck. And he won't listen to me. He used to always have sex with me."*

*Renuka explained that by sex she meant the accused inserting his penis inside her vagina. Although the accused was legally married to her, she did not want to have sex with him, and didn't consent to have sex with him. She had told the accused that she didn't want to have sex with him. However, the accused would not listen to her and would forcefully have sex with her. She said she felt unhappy about this.*

*Between 30 November 2015 to 4 January 2016, nearly every night the accused would forcefully have sex with her.*

*On one occasion during this period, the accused had inserted an eggplant into her vagina. Renuka explained further. After returning home from work, it was night time and they were sleeping. She and her husband had arguments again. She didn't want to have sex but the accused had forced her. He had sexual intercourse with her 2 times and after that in an aggressive manner he had inserted an eggplant into her vagina. She states that she felt something different in her vagina. She felt something hard. Different to a penis. When she got up to go to the washroom to wash herself, she had put on the lights. She had then seen the eggplant. Only at that time did she realise that her husband had inserted an eggplant in her vagina.*

*Renuka testified that actually she didn't know that the accused would do such a thing as he was legally married to her. Although she had felt very bad about this incident, she didn't want to argue with the accused as she*



*was afraid of him. She was afraid that he would punch her. So she kept it to herself.*

*The complainant testified further as to the events which took place on 5 January 2016. She said it was a Tuesday. She had returned from work around 5.00-5.30 in the evening. They had their dinner and had arguments. The accused had forcefully had sexual intercourse with her and thereafter, had forcefully inserted his fingers into her vagina and kept her awake until morning. He had not let her sleep.*

*She testified that on this day she refused to have sexual intercourse with the accused. However, he had forcefully pulled her clothes off and started having sex with her. Renuka again explained that by sex she meant the accused inserting his penis inside her vagina. Thereafter, the accused had forcefully inserted two of his fingers into her vagina.*

*Renuka testified that after these incidents of 5 January 2016, she had been fed up with his behaviour. Therefore, she had made a complaint to the Police.*

*The witness admitted in cross examination that the day the accused was discharged from prison, on 30 November 2015, she had consensual sexual intercourse with him that night. But she said his behaviour was different to other times. "Before he was caring. That night he was a bit different."*

*She also admitted that on 25 December 2015, she admitted that she, the accused and some of her cousins went to a night club and also that she had consumed one or two glasses of alcohol. However, she denied that she had sexual intercourse with the accused after returning home.*

*It was put to her in cross examination, that the accused was not forcing her to have sex every day. She replied that nearly every day the accused forced her, but that night they were out in the night club. So they returned next day in the morning.*

*It was put to Renuka in cross-examination that she had not told the Police that the accused had acted in an aggressive manner at the time he had inserted an eggplant into her vagina. She replied that she had actually told the Police but maybe they did not write it down.*

*When confronted with the incidents of 5 January 2015, and as to whether she and the accused had sexual intercourse on the floor (that night), she replied thus "Actually I was on the bed sleeping with my daughter. We were sharing one room. So accused pulled me off from the bed. We had a mattress on the floor. He forced me to have sex that night. I denied him but he didn't listen. He pulled off my clothes and had sex with me two times and he never let me sleep that night. He put his fingers inside my vagina and he kept me awake until the morning."*

*It was also put to her in cross-examination that, in relation to the incidents which took place on 5 January 2016, she had told the police that the accused had forcefully had sexual intercourse with her two times and then inserted his finger inside her vagina. Whereas, in the evidence-in-chief she had stated that the accused had forcefully had sexual intercourse with her and thereafter had forcefully inserted two of his fingers into her vagina. Renuka explained that she clearly recalls it was two fingers. However, she accepted when she was giving her statement to the police maybe she missed telling them it was two fingers.*

*It was suggested to Renuka in cross-examination that the allegations of Rape is all false and that she only complained of Rape so that she could be with somebody else. The witness denied this allegation. She said "I was not thinking of that. To have another man in my life. I forgave him so many times. How will I think of getting another man in my life."*

**[15]** The accused denied that he raped his wife Renuka at any point of time. He testified that all the acts of sexual intercourse with her during the period 30 November 2015 to 5 January 2016 was consensual. He also denies that he inserted an eggplant into Renuka's vagina or that he inserted his fingers into her vagina.

**[16]** A synopsis of the accused's evidence is as follows:

*He stated that his wife had obtained a DVRO against him in 2013.*

*He had been imprisoned on two occasions for the breach of the DVRO. The first occasion was in April 2015. He had been sentenced to 6 weeks imprisonment and had been released in May 2015. The second occasion was at the end of July 2015. He had been imprisoned for 3 months and 20 days. He had been released on 30 November 2015. On both occasions he had been imprisoned at the Korovou Prison.*

*While he was serving in prison his wife and daughter had come and visited him.*

*He alleges that his wife was cheating on him. In his evidence, he referred specifically to the names of Sanjay, Rajiv and Ashnil. Ashnil is his neighbor and also his cousin.*

*The witness testified that he had warned the complainant that he will go and inform her sister and friends as to what she was doing and that for her freedom she is trying to send him to prison. He explained further, that whenever the complainant had affairs she used to send him to prison so that she can enjoy her life.*

*He stated thus "whenever she has affairs and I get to know about it, before I can tell anyone, she goes and reports to the Police and puts false*

*allegations against me.....the first time I went to prison she was having an affair with Rajiv, and second time I went to prison she was having an affair with Ashnil."*

*In cross-examination it was put to him that the reason he did not leave Renuka was because she was not having any affairs as alleged by him. The accused denied this position.*

*The accused admitted that he was angry and also hurt that Renuka was having these affairs (with Rajiv and Ashnil). It was suggested to the accused in cross-examination, that because he was so angry and hurt of these affairs, that from 30 November 2015 to 4 January 2016 he forcefully had sexual intercourse with Renuka every night. He however, denied this proposition.*

*It was suggested to the accused that on one occasion between 1 December 2015 to 31 December 2015, he inserted an eggplant into Renuka's vagina without her consent. The accused denied this allegation.*

*It was also suggested to the accused, that on 5 January 2016, he forcefully had sexual intercourse with Renuka. This allegation too the accused denied.*

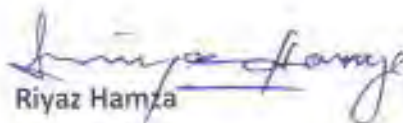
*It was also suggested to the accused, that on 5 January 2016, he inserted his finger into Renuka's vagina without her consent. The accused denied this allegation as well.*

- [17] In this case, the three Assessors were unanimous in finding the accused guilty of counts 3 and 4. Which means that they have believed the evidence of the prosecution witness, Renuka Devi, as truthful and reliable in respect of proving the said two counts. Therefore, it is clear that the Assessors have rejected the evidence of the accused in this regard.
- [18] In my view, the Assessor's opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinion of the Assessors in respect of counts 3 and 4.
- [19] Count 1 is a representative count. I explained to the Assessors as to what is meant by a representative count. I explained that this representative count of Rape against the accused is based on act or series of acts done during a specified time period (In this instance between 30 November 2015-4 January 2016). The prosecution is expected to prove just one incident of Rape which falls within this period in respect of such a count. They need not prove a continuous or a series of incidents of Rape in support of a representative count.
- [20] In this case the three Assessors were unanimous in finding the accused not guilty of count 1. Considering the totality of the evidence led at the trial, I am of the considered opinion that this is not justified. What the prosecution had to prove was just one



incident of sexual intercourse, without the consent of the complainant, which took place within this period.

- [21] It is my view that the prosecution has proved the charge of Rape against the accused in Count 1, beyond any reasonable doubt.
- [22] Count 2 is a somewhat unusual charge. The accused has been charged for penetrating the vagina of his wife Renuka with an eggplant without her consent.
- [23] There is no evidence elicited by either the prosecution or the defence to the effect that any such or similar objects had been used by the complainant and the accused in the past when indulging in sexual intercourse, during the course of their marriage. Therefore, we are left with an isolated incident of an eggplant being inserted into the complainant's vagina on one occasion.
- [24] By a majority decision, the Assessors have found the accused guilty of the said count. They have believed the evidence of the prosecution witness, Renuka Devi, as truthful and reliable in respect of proving the said count. Therefore, it is clear that the Assessors have rejected the evidence of the accused in this regard.
- [25] In my view, the Assessor's opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the majority opinion of the Assessors in respect of Count 2.
- [26] In conclusion, considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond any reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the four counts of rape.
- [27] In the circumstances, I find the accused guilty of all four counts of Rape as charged.
- [28] Accordingly, I convict the accused on all four counts of Rape.

  
Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA  
Dated this 5<sup>th</sup> Day of October 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Office of the Legal Aid Commission, Suva.