

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 58 OF 2014

STATE

v

MIRA SAMI

Counsel: Mr. Alvin Singh for State
Ms. K. Vulimainadave for Accused

Date of Summing Up: 05th March, 2018

Date of Judgment: 07th March, 2018

JUDGMENT

1. The Accused is charged on the following Information and was tried before three Assessors.

First Count

Statement of Offence

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

Particulars of Offence

MIRA SAMI on the 21st day of August, 2013 at Lautoka in the Western Division penetrated the vagina of **KRITIKA SHARMA** with his penis, without her consent.

Second Count
(Representative Count)

Statement of Offence

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

Particulars of Offence

MIRA SAMI between the 22nd day of August, 2013 and the 6th day of November 2013 at Lautoka in the Western Division penetrated the vagina of **KRITIKA SHARMA** with his penis, without her consent.

Third Count
(Representative Count)

Statement of Offence

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

Particulars of Offence

MIRA SAMI between the 07th day of November, 2013 and the 8th day of November, 2013 at Lautoka in the Western Division, penetrated the vagina of **KRITIKA SHARMA** with his penis, without her consent.

2. After a short deliberation, Assessors found the Accused **not guilty** on all counts.
3. Having disagreed with the opinion of Assessors, I proceed to give my reasons as follows.
4. There is no dispute as to the identity of the Accused. It was agreed that Accused is Complainant's uncle.
5. Prosecution adduced evidence of the Complainant, her mother Kulsnum Bano and the Investigating Officer Cpl. Taufa. At the end of the Prosecution case, Accused elected to give evidence.

6. Accused admits to having sexual intercourse with the Complainant. Therefore, only dispute in this case is with regard to consent.
7. I am satisfied that the Complainant told the truth in Court when she said that Accused used force and sexual intercourse on each occasion took place without her consent.
8. One of the main points of Defence's case is that the Complainant did not complain to her aunty, her stepmother or police at the first available opportunity.
9. The last alleged incident occurred on the 8th November, 2013 and the matter was first reported to Ba Police Station on 5th December, 2013. There is a delay of nearly one month.
10. Complainant has given an acceptable explanation for her belated complaint. She said that the Accused threatened her that he would kill her if she told anything to anybody. She also said that she was not given a chance to talk to her parents.
11. To better understand Complainant's explanation, it is apposite to examine the surrounding circumstances that forced her to delay the complaint. Complainant is from a broken family. She had to drop out from school when her grand-parents stopped sending her to school. According to her stepmother, Kulsnum Bano's evidence, Complainant is a good girl with an unblemished character. She was the only girl in the family and had to be left alone at home during day time. An ex-St. Giles patient used to visit and started bothering the Complainant. Frequent worrying visits by the ex-St. Giles patient forced Complainant's stepmother to look for a 'safe place' for her daughter. She sent the Complainant to her aunty Ashni's place in Lovu, Lautoka, when she (aunty) agreed to look after the Complainant. Ashni is Complainant's father's sister. Accused is Ashni's husband. Complainant was sent to her aunty's place only for a visit. However, both aunty and Accused persuaded her to work at Accused's work place, 'New Look Upholstery'. She was only 17 years old at that time.
12. Complainant was in a vulnerable position at her aunty's place. She was under the roof of Accused who is the sole breadwinner of the family. Complainant did not want to work but she had no option but to work at Accused's work place when her aunty insisted that she go and help her uncle. She was sent to work without her parent's knowledge or permission.
13. Complainant did not have a telephone to communicate with anybody. Whenever her stepmother wanted to talk to Complainant, she had to ring on aunty Ashni's phone. Her

stepmother managed to speak to Complainant on three occasions over the phone. Every time she called, she called on aunty Ashni's phone and managed to talk only when aunty gave the phone to Complainant.

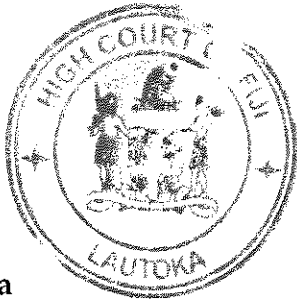
14. After sending Complainant to Accused's place, first call was made after two weeks. Complainant was not talking to her stepmother in the normal way. She gave only 'yes' or 'no' answers. By listening to Complainant, stepmother realised that something was wrong with Complainant. Therefore, after two days, she called Complainant again and asked whether she wants to come back and live with them; but she said 'no', and replied that she is okay living with them. Once again stepmother called her. She said she's okay.
15. It was argued at the trial that this type of behavior is not expected from a typical rape victim. However, a reasonable explanation was available in evidence in this case. Complainant had to answer the phone in the presence of aunty when the phone was given to her. Therefore, it would not have been possible for Complainant to talk to her stepmother frankly, and convey the complaint as she wished. Furthermore, Complainant's behavior has to be looked at in the context of the warning and death threat she had received from the Accused.
16. Obviously, the Complainant had another opportunity to complain when she was taken to several doctors after she started vomiting. However, every time she went to see a doctor she was accompanied either by her aunty or Accused. She said that she wanted to tell the story to Dr. Bhaggat but Accused's presence prevented her from doing that. Accused himself admitted that he took the Complainant to the doctors in his van. When Dr. Bhaggat's scan revealed that Complainant was pregnant, she could no longer hide the fact of sexual intercourse. When aunty asked who the father of baby was she lied and said that it was one boy from Nadi. Complainant frankly admitted that she had to lie to her aunty because, at that time, the Accused was present watching them.
17. Complainant finally felt comfortable to reveal the truth when she was taken to her parents in Ba. Her stepmother confirmed how she received the complaint after Complainant's arrival at home. At the beginning Complainant was a bit hesitant and told only about the abortion and attributed baby's fatherhood to a boy in Nadi. Eventually, she opened up and revealed that it was the Accused who made her pregnant. She asked Complainant as to why she never informed earlier about what was happening, she said that Accused had threatened her that he would kill her. Then after two days, she went and reported the matter to Women's Crisis Centre, Police and also Social Welfare.

18. I am satisfied that the belated complaint is well explained in evidence adduced by Prosecution.
19. The second argument of the Defence is based on powerful stereotypes exist in our society about how female rape victims should behave. It was also strenuously argued on behalf of the Defence that Complainant could have yelled and otherwise objected to what the Accused was doing, if she was not consenting. Complainant in her evidence explained her passive behavior during sexual intercourse. She said that she tried her best to save herself but she was alone and couldn't do anything. She wanted to stand up and run away. She could not shout for help because Accused covered her mouth with his hands. She said that she was in fear of her uncle who had threatened to kill her.
20. It was also suggested that Complainant should have received injuries if she had struggled or resisted. Complainant said that she had some injuries on her both thighs. However, there was no medical report to that effect. She said that she told police about injuries and when she went to the Police Station in December, those injuries were not visible. Complainant was medically examined nearly one month after the last incident. It is possible that the injuries may have healed by the time of medical examination.
21. Furthermore, presence of injuries in victim's body is not crucial to prove lack of consent. The offence of rape may or may not be accompanied by violence, force or the threat of force. It is no part of the Prosecution's obligation to prove that the Accused used force or the threat of force in order to bring about a rape conviction.
22. Complainant in her statements to police had not mentioned that her mouth was closed and that she received injuries. Complainant said that she could not tell everything to police. That is a possibility and also I do not consider omissions highlighted by the Defence to be material in this case.
23. Complainant admits that she accompanied the Accused home after those incidents and reported to work with him until 30th August, 2013. In the circumstances of this case, she seems to have no other option but to accompany the Accused, at whose house she was made to reside. Complainant said that she stopped working after 30th August because she felt bad about what Accused did to her. Accused confirmed that Complainant left the job by herself after working for a short period. If she really enjoyed the association of the Accused she could have continued to report to work with him.

24. Complainant's stepmother's evidence is not shaken. There are no material contradictions between her statement to police and her evidence in Court. And also there are no material contradictions between her evidence and that of the Complainant. Stepmother had told police that she first heard from the Complainant about the abortion and, then in the afternoon, Accused was implicated. She said that Accused admitted his wrongdoing and apologized in front of a family gathering. When Accused was named the father of the aborted baby, Accused begged her husband and said, *'brother, I have done a mistake and please forgive me'*. She had then told him *'no, if you have done something wrong then I will take this matter to Court'*. Unshaken evidence of the stepmother no doubt bolstered the Prosecution's case.
25. During the course of cross-examination, it was suggested by the Counsel for Defence as to why she did not accompany her aunty on the 7th November in her visit to her family in Kumkum, if she was really scared of the Accused. Complainant said that it was her aunty who asked her to stay back home and that's why she had to stay back.
26. I observed the demeanor of the Complainant. She was straightforward and not evasive. When the Defence Counsel was suggesting repetitively that she was lying, she burst into tears and registered her protest. She even refused to give evidence any further. I had to adjourn Court for a while for her to relax. I am convinced that the Complainant is a genuine and honest witness.
27. Accused maintained that he had had consensual sexual intercourse with the Complainant on each occasion. Version of the Defence is inconsistent, implausible and therefore, unacceptable. According to Accused's evidence, it was not he who had raped the Complainant but the Complainant had virtually raped him.
28. Accused said that, on the 2nd day of her work, Complainant became crazy for him, came behind and held him tightly, started kissing and wanted to have sex with him. She opened the zip of his pants. He said he was not interested in her at all. He said he has a beautiful wife and did not want to have sex with the Complainant and she was the one who lured him to do that. Describing the saga at his home, when his wife was away in Ba, Accused said that Complainant came to his bedroom unexpectedly while he was sleeping and started kissing on his lips, came on top of him and started sucking his penis, and she asked him for how long she can have sex with him. He said he had no interest in her and his unblemished record was tarnished by Complainant when she lured him into this sexual encounter.

29. Accused contradicted himself on this crucial evidence of inhibited sexual desire (ISD). He said about the first day's incident when he saw Complainant texting using his phone. He asked her whom she was texting. She replied she was texting her boyfriend. He then asked how many boyfriends she got. She said she has many boyfriends. Then he asked whether he too can be one. She replied 'yes' and in a moment she wants to have sex with him. He had taken her to the toilet for sexual intercourse even without closing the shop.
30. If he had a beautiful wife and had no interest in the Complainant at all then why he wanted to propose himself to be her boyfriend. The question posed by the Counsel for Prosecution was never satisfactorily answered. I am confident Accused was not telling the truth.
31. Furthermore, it is highly unlikely that a 17 year old girl would give herself up to a 40 year old uncle and agree to have sexual intercourse on the very first day of the purported love affair.
32. Accused said that he had no knowledge about or contact with Complainant's family and Complainant's stay at his place was unilaterally arranged by his wife without his permission or knowledge. He even denied that Complainant is his niece and he had any responsibility over her notwithstanding his wife had brought her under his roof.
33. It is highly impossible for Accused's wife to keep the Complainant without Accused's permission and concurrence. In contrast to his own evidence, Accused admitted that he took Complainant to several doctors in his van, and finally took her to her parents in Ba, had grog with them and had a sleep over although he said he had no connection with his in laws. Accused contradicted his own admission No.(iv) when he failed to acknowledge that Complainant is his niece.
34. Accused said that he was not aware that the Complainant had an abortion and he only knew that she had a blood clot. It is hardly believable that the fact of abortion was not brought to his knowledge by his wife in the circumstance that he took Complainant to Dr. Bhaggat in his van. Complainant said that Accused was watching when she was being questioned by aunty about baby's father when the scan revealed her pregnancy.
35. Quite surprisingly, Accused's wife had not informed Complainant's stepmother about any of those medical conditions, abortion and blood clot. It is quite clear that Accused and his wife acted in collusion to hide those facts from their parents.

36. Accused is married to Complainant's father's own sister. Accused himself admitted that he and his wife maintained a good relationship with Complainant's family. There is no plausible reason for the Complainant or her stepmother to make up an allegation of such a serious nature to put the Accused in trouble.
37. When the Counsel for Prosecution posed the question as to why Complainant and her stepmother wanted to falsely implicate him, Accused advanced the 'ransom theory'. He said that they demanded his house, van and \$ 3000 to refrain from lodging a complaint with police.
38. Complainant and her stepmother vehemently denied having demanded money or property from the Accused. They said that they have nothing to do with the red car parked at their in-law's compound. Accused himself admitted that he is not a rich person. He had a van and wooden-tin house on a Mataqali land back in 2013. He earned maximum \$500 per week from his job and transport. He said he could not afford even \$300 to pay for Complainant's medical expenses. Therefore, there is no reasonable basis for Complainant and her stepmother to demand money and property, specially the junk red car from this 'poor Accused'.
39. When he was implicated for the first time at the family gathering, Accused challenged the Complainant's parents to go to police. If his hands are clean, then why he wanted to give into their demand and give \$ 400 and the junk red car instead of complaining to police.
40. I carefully observed the demeanor of the Accused. He was evasive and not straightforward. He did not maintain his eye contact with the Judge or Assessors. At one point in time, the Counsel for Prosecution had to warn him to look at the Judge. His demeanor is not consistent with honesty.
41. I reject the evidence of the Defence and the unanimous opinion of Assessors.
42. I find the Accused guilty on each count. Accused is convicted on each count of Rape accordingly.
43. That is the judgment of this Court.



Aruna Aluthge
Judge

At Lautoka
07th March, 2018

Counsel: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused