

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 08 of 2017

STATE

v.

JOSEFA ROLIGADRA

Counsel: Ms. K. Semisi for State
Mr N. Lajendra for Respondent

Date of Hearing: 18th and 19th June 2018

Date of Summing Up: 21st June 2018

Date of Judgment: 22nd June 2018

JUDGMENT

1. The name of the complainant is suppressed.
2. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act, one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act and one count of Act with Intent to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act. The particulars of the offences are that:

JOSEFA ROLIGADRA is charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

JOSEFA ROLIGADRA on the 20th day of November 2016 at Suva in the Central Division penetrated the vagina of **AB** with his fingers without her consent.

SECOND COUNT

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009

Particulars of Offence

JOSEFA ROLIGADRA on the 20th day of November 2016 at Suva in the Central Division assaulted **AB** with intent to rape her.

THIRD COUNT

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255 (a) of the Crimes Act No. 44 of 2009

Particulars of Offence

JOSEFA ROLIGADRA on the 20th day of November 2016 at Suva in the Central Division, with intent to cause grievous harm to **AB**, unlawfully wounded the said **AB** by hitting her head multiple times with a piece of wood and corrugated iron.

3. The Accused pleaded not guilty for these offences, hence, the matter proceeded to hearing. The hearing commenced on the 18th of June 2018 and concluded on the 19th

of June 2018. The prosecution called two witnesses including the complainant and tendered six documents as the exhibits of the prosecution, including the report of the DNA test. The accused neither gave evidence nor called any other witnesses for his defence. Subsequently, the learned counsel for the prosecution and the defence made their respective closing addresses. I then made my summing up.

4. The three assessors in their unanimous opinions found the accused not guilty for all three counts.
5. Having carefully considered the evidence presented in the trial, the closing addresses of the parties, the summing up and the unanimous opinion of the three assessors, I now pronounce my judgment as follows.
6. In view of the evidence adduced in the hearing, the main dispute in the matter is the identity of the perpetrator, who committed this crime to the complainant, on the 20th of November 2016. The prosecution claims that it was the accused who committed this crime. The defence claims otherwise, stating that it was not the accused but someone else has committed this crime.
7. The case of the prosecution is mainly based upon the evidence of identification given by the complainant. In her evidence, the complainant explained that she saw the suspect clearly, during the course of this ordeal. The complainant described the suspect as tall and dark complexion male, having a beard and a cut on the left cheek, and also a broad nose. Moreover, the complainant had identified the accused as the perpetrator at the identification parade.
8. The defence case mainly relies on the report of the DNA test. According to the report, certain items had been tested for DNA samples. Most of the DNA samples found in those items had the DNA profiles of the complainant and an unidentified male. None of those DNA sample contains DNA profile of the accused.
9. DNA evidence is one of the most trusted and accurate evidences. It is based on our genes, encoded in DNA (deoxyribonucleic acid). DNA evidence can be collected from

blood, hair, skin cells, and other bodily substances. Each individual has a unique DNA profile (except for identical twins, who share the same genetic code). A minuscule amount of genetic material could be sufficient to identify a suspect. The DNA evidence has been introduced to the criminal justice system in 1980s. Since then, the DNA evidence has gained a reputation as one of the most trusted and reliable scientific evidences in criminal cases.

10. The accuracy and effectiveness of the DNA evidence have been discussed in many major common law jurisdictions. The Court of Appeal (Criminal Division) of England, in **R v Robert Graham Hodgson (2009) EWCA Crim 490** has quashed the conviction of the Appellant, who had been convicted in 1982 for murdering and raping a young woman in 1979. In that case, the deceased was raped and murdered in the night of 5th of December 1979. The Police had failed to find the suspect. However, in 1980, the Appellant made a confession that he was the person who raped and murdered the deceased. Prior to his confession, the Appellant had made a false allegation against another, stating that person was the suspect. The crown charged and prosecuted the Appellant for this case. The appellant was convicted and sentenced for life imprisonment in 1982.
11. Sometimes later in 1998, the swab taken from the deceased was re-tested for DNA. It was found that the sperm collected in vaginal and anal area of the deceased do not match with the DNA of the Appellant. On that ground the Court of Appeal found the conviction was unsafe and quashed it accordingly.
12. In **R v Allan Ian Grant (2008) EWCA Crim 1890** the Court of Appeal of England found that it was unsafe to put the case to the jury, when it was confirmed that the DNA sample found in the balaclava contains two or more contributors, including the Appellant. In that case, the Appellant was charged for Robbery. The only evidence that the prosecution had relied on was the balaclava helmet that was found at a place close to the crime scene, which contains DNA profile, which matched with the DNA profile of the Appellant. However, DNA sample found in the balaclava did not only contain the DNA profile of the Appellant, but also contain the DNA profiles of two or more people. Lord Justice Gage in **Grant (supra)** found that:

"In our judgment, the judge was wrong to reject the submission at the close of the prosecution case. The fact of the matter is that there was on the balaclava DNA material from two different people, possibly more than two different people. From that evidence, it seems to us that it was always going to be impossible for the prosecution to satisfy the jury, so that they were sure, that this appellant was the man who was wearing the balaclava at the time that the robbery was committed. For instance, suppose the prosecution was able to identify that the other person whose partial DNA was on the balaclava, and he or she was arrested, it would not be possible without more to identify with certainty which of the two committed the robbery. That was a problem, or a hurdle which the prosecution always faced and, it seems to us, that that difficulty provides the answer to this appeal."

13. The Supreme Court of Fiji in **Chand v State [2012] FJSC 6; CAV0014.2010 (9 May 2012)** had discussed the effectiveness of DNA in evidence, where Justice Marsoof has held that:

"In my view, the DNA evidence is unassailable given that the testimony of Mrs. Llewellyn and the DNA report of Mr. Andrew Donnelly were not challenged at the trial. Since the introduction of the DNA fingerprinting technique, the use DNA of evidence has been widely accepted across the world. For decades, the authority for admissibility of scientific evidence was the case of Frye v United States 293 F. 1013 (1923) in which the Court observed that "while Courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

Although DNA evidence has generally been acted upon in judicial decisions since then, it must be stressed that DNA evidence would not

always be admissible, especially when a party offers expert testimony challenging the reliability of the procedures or the results. On one side of the line are decisions such as Spencer v. Commonwealth, 384 S.E.2d 775 (Va. 1989) where the Court held that DNA testing is a reliable scientific technique, the laboratories involved had performed the tests properly, and that there was no challenge as to reliability by the defense, the DNA evidence would be admissible. On the other side of the line are cases such as State of Minnesota v. Schwartz N.W. 2d 422 (Minn. S.C., 1989), where the Court emphasized that reliability of the results was crucial, and citing the high error rate of a particular laboratory, the Court asserted that DNA tests were only as reliable as testing procedures used by the laboratory conducting them. It is equally important to establish the chain of custody of the blood samples that produced the DNA evidence. In Daubert v. Merrell Dow Pharmaceuticals, Inc. [1993] USSC 99: 509 U.S. 579 (1993), the Court held that the Judge would assume the role of 'gatekeeper' and ensure that any scientific evidence that was admitted was not only relevant to the issue at hand but was also reliable."

14. In this case, the complainant, in her evidence, said that the accused was dressed in a white t-shirt. He then removed it and used it to tie the hands of the complainant. The complainant managed to untie her hands and put that t-shirt on her in order to cover herself from the accused, who inserted his finger into her vagina. The said white t-shirt had been taken for DNA testing. The complainant in her evidence identified the photograph of the said white t-shirt.
15. Certain DNA samples have been extracted from the t-shirt and tested with the DNA profiles obtained from the complainant and the accused. According to the report, it has found a mixed DNA profile in the t-shirt, containing a major contributor and a minor contributor. It had been confirmed that the complainant cannot be excluded as the major contributor of this DNA profile. Moreover, it has found that the minor contributor to that DNA profile is an unknown male contributor, and not the accused.

16. This finding supports the evidence given by the complainant only in to the effect that she put that t-shirt on her after she untied her hands. Because of the fact, that she had worn this t-shirt, her DNA profiles have been found in the t-shirt. However, no DNA profile of the accused was found in the t-shirt, even though the complainant claims that the t-shirt was worn by the accused before he used it to tie her hands up.
17. Moreover, the complainant said that the suspect ripped off her clothes, including her brassiere. The complainant identified the photo of her brassiere during her cross examination. The said brassiere was also tested for DNA profiling. According to the result, it contains with mixed DNA profile, contributed by the complainant and an unknown male contributor. The DNA profile of the accused has not been found in any of the items tested in the DNA report.
18. Both parties admitted the correctness and the accuracy of the DNA report and tendered it as an agreed document. Therefore, the court considers the findings of the DNA test as unchallenged proven facts beyond reasonable doubt.
19. The complainant was convincing and coherent in her evidence, specially her evidence of identification. However, the experience tells us, that even such a convincing witness could make mistaken identification. The evidence of DNA report is unassailable and have created a significant doubt about the accuracy of the identification made by the complainant.
20. In view of these reasons, I do not find any cogent reasons to disregard the unanimous opinion of not guilty given by the three assessors.
21. In conclusion I hold that the prosecution has failed to prove beyond reasonable doubt that the accused guilty for these three offences as charged. Therefore, I find the accused not guilty for three offences as charged and acquitted him from the same accordingly.

22. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
22nd June 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
Lajendra Lawyers for the Defence.