

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 297 of 2017

STATE

vs.

KALAM AZAAD KHAN

Counsel: Ms S. Sharma for the State
Mr. A. Chand with Mr. K. Cheng for Accused

Date of Hearing: 06th to 08th August 2018

Date of Summing Up: 10th August 2018

Date of Judgment: 13th August 2018

JUDGMENT

1. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) 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:

KALAM AZZAD KHAN is charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence (b)

KALAM AZAAD KHAN on the 23rd day of September, 2017 at Nabua, in the Central Division had carnal knowledge of **JASMINE KHAN** by

inserting his penis into the vagina of JASMINE KHAN, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence (b)

KALAM AZAAD KHAN on the 23rd day of September, 2017 at Nabua, in the Central Division assaulted **JASMINE KHAN** thereby causing bodily harm.

2. The hearing commenced on the 6th of August 2018 and concluded on the 8th of August 2018. The prosecution called two witnesses, including the complainant. The accused and two other witnesses gave evidence for the defence. 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 unanimous opinion, found the accused not guilty for the offence of Rape, but found him guilty for the offence of Assault Causing Actual Bodily Harm.
4. Having carefully considered the evidence presented during the hearing, the respective closing addresses of the counsel, the summing up and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
5. The prosecution alleges that the accused had sexual intercourse with the complainant without her consent. He had then assaulted the complainant on her face, when she told him that she had no feelings to have sexual intercourse. The accused denies the allegation, and claims that the complainant gave her consent to have sexual intercourse. However, she had told him that she lost her feeling of having sexual intercourse, while they were having

sexual intercourse. He had then stopped it and pulled his penis out. Moreover, the accused said that his hand accidentally hit the face of the complainant, when he spread his arms outwards that caused the injuries to the left side of the face of the complainant.

6. In view of the evidence and the agreed facts, the only issue in this case in respect of the offence of rape is whether the complainant gave her consent to have sexual intercourse with the accused. The prosecution and the defence have no dispute on the following facts, *inter alia*;
 - (i) The complainant and the accused had sexual intercourse on the 23rd of September 2017,
 - (ii) The accused had stopped and pulled his penis out from her vagina, when she told the accused that she has no feelings to have sexual intercourse.
7. Accordingly, the issue of consent can be further reduced to determine whether the complainant had initially gave her consent to the accused to insert his penis into her vagina.
8. In view of the evidence given by the complainant, she had told the accused that she has no feeling to have sexual intercourse, when he approached her from behind. He had then pulled her dress and started to fondle with her breasts. She had then surrendered herself to the accused as she was frightened. The complainant explained that the accused had assaulted her at a previous occasion in 2016, when she refused to have sexual intercourse with him. Therefore she was frightened and surrendered herself.
9. Moreover, the complainant admitted during the cross examination that the accused caressed and kissed her when he started to fondle her breasts. Furthermore, she said that she did not show any sign of disagreement until he inserted his penis into her vagina. Once she told him that she has no feelings of having sexual intercourse, the accused had stopped it and pulled his penis out from her vagina.


10. The learned counsel for the defence in his closing address submitted that if the complainant surrendered herself to the accused due to the fear she had, how could she then told the accused that she has no feeling of having sexual intercourse in a while. The accused in his evidence said that the complainant only asked him to wait until she deletes the messages in her mobile phone, when he asked her to have sexual intercourse. She was happy and responsive for the sexual intercourse, until she told him that she had lost the feeling of having sexual intercourse.
11. I further find, there is no evidence of aggression or threatening behaviours of the accused when he approached her to have sexual intercourse. He had only asked her to have sexual intercourse and then caressed and kissed her while fondling her breasts. Once she told him that she has no feelings, he had stopped and pulls out his penis from her vagina.
12. In view of these evidence, I find that there is a reasonable doubt, whether the complainant had initially given her consent and later withdrawn it while they were having sexual intercourse. Therefore, I do not find that the prosecution has proven beyond reasonable doubt that the complainant had not given her consent to the accused to insert his penis into her vagina. Accordingly, I do not find any cogent reasons to disregard the unanimous opinion of not guilty given by the three assessors.
13. I now draw my attention to the second count, that is, Assault Causing Actual Bodily Harm.
14. The accused in his evidence said that it was an accident that caused the injuries to the face of the complainant. The complainant had suddenly touched the side of his body under his arm. He had reacted to the sudden touch by spreading his arms outwardly. At that point of time, his hand had hit the face of the complainant, causing the injuries to her face.
15. Having taken into consideration the evidence given by the doctor and the medical report, I do not find the account given by the accused is reasonably believable. Hence, I refuse to accept the explanation given by the accused in this regard. Moreover, I find that the

evidence given by the accused has failed to create any doubt about the incident of causing actual bodily harm.

16. I am mindful of the fact that, though, I have refused to accept the evidence given by the defence, the prosecution still has the burden of proving that the accused has committed this offence of Assault Causing Actual Bodily Harm, beyond reasonable doubt.
17. The complainant in her evidence said that the accused got angry when she said that she had no feelings of having sexual intercourse while they were engaged in the sexual intercourse. Though he stopped and pulled out his penis, he had punched on her face with that anger.
18. The learned counsel for the defence, vehemently cross examined the complainant and the Doctor, regarding the inconsistent nature of the evidence given by the complainant and the history recorded in the medical report. According to the evidence of the complainant, the accused had assaulted her only once. However, D10 of the medical report states that she was assaulted on multiple occasions. The learned counsel for the defence in his closing address urged that this inconsistency is fundamental and the complainant had failed to give an explanation for this inconsistency.
19. The complainant said that she could not recall what she had related to the doctor about the history of the incident. Having taken into consideration the medical evidence and the evidence of the complainant, I do not find this inconsistency has fundamentally affected the credibility of the evidence given by the complainant in respect of the second count. I accordingly accept the evidence given by the complainant in respect of the second count of Assault Causing Actual Bodily Harm as reliable and truthful evidence.
20. In view of these reasons, I find that the prosecution has proven beyond reasonable doubt that the accused has assaulted the complainant on her face, causing injuries to the left side of her face. Therefore, I do not find any cogent reasons to disregard the unanimous opinion of guilty given by the three assessors.

21. In conclusion, I find the accused not guilty for the offence of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and acquit him from the same accordingly.
22. Moreover, I find the accused guilty for the offence of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act and convict him for the same accordingly.




R.D.R.T. Rajasinghe
Judge

At Suva
13th August 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the Defence.