

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 010 OF 2019

STATE

v

JONE BEBE

Counsel: Ms. S. Shameem for State
Ms. T. Kean for Defence

Date of Summing Up: 7 November 2019

Date of Judgment: 12 November 2019

JUDGMENT

1. The Accused was charged on the following information:

Count 1

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to section 209 of the Crimes Act, 2009.

Particulars of Offence

JONE BEBE, on the 1st day of January 2019, at Manu Village, Tailevu in the Eastern Division, assaulted **KL** with intent to commit rape.

Count 2

Statement of Offence

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

Particulars of Offence

JONE BEBE, on the 1st day of January 2019, at Manu Village, Tailevu in the Eastern Division, had carnal knowledge of **KL** without her consent.

2. The Assessors were unanimous in their opinion that the Accused is guilty on each count. It is now my turn to pronounce the judgment having taken into account the opinion of the Assessors.
3. The Accused does not deny that he had had sexual intercourse with the Complainant on 1 January 2019. What he denies is the assaulting and the forcible sexual intercourse. His defence is that the sexual intercourse was consensual.
4. The Prosecution called the Complainant, her father, Waisake, and Doctor Rakai who had conducted the medical examination on the Complainant. At the end of the Prosecution's case, the Accused was put to his defence whereupon he elected to give sworn evidence and call his witness, Mosese.
5. The Prosecution relies on recent complaint evidence, distress evidence and medical evidence to support the Complainant's evidence that she was assaulted and raped.
6. The Complainant is 18 years of age and a single mother of an infant. I observed her demeanour in Court. By appearance, she is a timid girl but forthright in her answers. She testi-

fied that on the day of the incident she was washing some kitchen utensils beside her father's house when her cousin Jone (Accused) approached her. He wanted to pour water on her. Jone then pulled her from her t-shirt to the nearby bush. She tried to scream but she could not as he closed her mouth. She could smell home brew on his mouth. She was scared because Jone was drunk. Having pulled the Complainant into the bush, Jone punched her in her face and bit her neck. Her head became numb. She tried to push him but she could not. She tried to resist but failed because Jone was huge. She fainted and fell to the ground. Jone took off her t-shirt, skirt and the panty and he undressed himself. She did not agree to have sex with him. When she was being pulled, she told Jone that she did not want to have sex with him as her daughter was still small. Jone did not listen to her. Jone knew that she was not agreeing to have sex. He laid on top of her and inserted his penis into her vagina.

7. The Complainant informed her father Waisake everything that Jone had done to her. It was a complaint made promptly after the incident. At the time the complaint was received by Waisake, the Complainant looked weak and was just lying down. She never talked. Waisake in his evidence confirmed receiving the complaint from her daughter, but according to him, the complaint did not specify that she was raped. The Complainant's stressful condition coupled with cultural taboos existing in her society in talking sexual matters openly with parents may well have been the reason why she could not bring herself to describe everything exactly what Jone had done to her. Waisake's subsequent reaction manifested in his readiness to go and assault Jone and his determination to go to the police station the next day confirm that the complaint he received was something serious and that what the Complainant had told her father was true.

8. The Complainant had told Waisake about the punch in her eye, how Jone took her hand outside the house and how Jone wanted to have sex with her. That is enough for this complaint to be considered as a recent complaint in a sexual case although it did not give the full details of the exact sexual offence. The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.[See: *Raj v State* [2014] FJSC 12; CAV0003.2014 (20 August 2014)].

The recent complaint and Complainant's distressed condition observed by her father soon after the alleged incident are consistent with her evidence that she was raped.

9. The Complainant admits that she prevented her father from going for the Accused to punch him. She also agrees in an answer to a leading question posed by the Defence Counsel that she 'cared' for the Accused. However, she specifically stated that she prevented her father on the basis that they both go to the police station the next day. Therefore her intervention to prevent her father from taking the law unto his own hand should not be construed to suggest that the complaint to police was eventually made because of the pressure coming from her family. The Complainant's conduct should also be understood in the Fijian context where traditional *bulubulu* ceremonies play a crucial role in the families in sweeping the sex offence complaints under the carpet. Waisake in fact admitted that he finally agreed to accept the apology offered by Jone's family *albeit* after the complaint to police had been made.
10. Dr. Rakai's evidence and the injuries she had noted are also consistent with the evidence of the Complainant. The doctor had examined the Complainant on 2 January 2019. The superficial laceration on the interior surface of *major labia* and the bleeding noted are consistent with that of a forceful sexual intercourse although the doctor did not completely rule out the possibility of Complainant having received such injuries in a consensual sexual intercourse.
11. Although the doctor was not in a position to give the specific age of the injuries, in the absence of any suggestion that the Complainant was engaged in any other sexual activity contemporaneously with the allegation and in the light of Accused's admission that he had carnal knowledge of the Complainant on the 1 January 2019, it was open for the Assessors to infer that the vaginal injuries were caused by the Accused. Coupled with those, other injuries noted in the Complainant's face and the neck are consistent with the Complainant's evidence that the sexual intercourse was not consensual.
12. The evidence of the Defence is not appealing to me. According to the Accused, he had gone with his family to reconcile with the Complainant's family not because he was guilty of a rape but to prevent further harm being caused to the Complainant by bad rumours that were

flying around in the village about them having sexual intercourse. This explanation is not appealing to the common sense of the Assessors and also to me. I am unable to convince myself as to why a person would go with his family to seek forgiveness for having consensual sexual intercourse with his girlfriend merely because of rumours.

13. I am unable to accept that a mother had willingly gone to a bush to have sexual intercourse with a man when her 6 month-old infant is left unattended at home, and to be later discovered by the grandmother.
14. According to the Accused, when he was about to have sexual intercourse, Mosese had suddenly appeared in the bush. When the Complainant saw Mosese, she was shocked and surprised. Surprisingly, though, Mosese's presence had not deterred Jone from going ahead with the sexual experience. He had stopped his act only when he heard the Complainant's grandmother calling her. I am unable to come to terms with a behaviour of a woman who had given consent to a sexual intercourse when a stranger is watching.
15. It was suggested to the Complainant that she did not scream, shout, resist and run away because the sexual intercourse was consensual. The Accused said that it was consensual and he went ahead after being fully satisfied that she was consenting to have sexual intercourse. The Complainant specifically explained how she had reacted to his aggression. When she was trying to shout, her mouth was closed. She was dragged to the bush, punched in her face and bit her neck. She nearly fainted and fell to the ground. She was drunk and that made her fright. In her own words, he was huge and she could offer no resistance. The Assessors had the opportunity to compare the physics of the two. The disparity in the built would have convinced the Assessors that it was never a leveled playground for her. The Accused in his testimony was obviously trying to save himself, a conduct expected of any accused faced with a serious offence.
16. Mosese was called to support the version of the Accused. According to Mosese's, evidence, the Complainant was apparently consenting to have sexual intercourse. That is what he

could gather from Complainant's conduct of not crying out for help and her act of hugging the Accused.

17. Mosese is admittedly an eye witness, a rare resource available to a prosecutor in a rape case. Ironically, Mosese was not called by the Prosecution for the obvious reason that they did not place much reliance on this witness. Although Mosese said in his evidence that he is related to the Complainant, this fact was not clarified from the Complainant in cross examination by the Defence.

18. According to the Complainant, she had even called out to Mosese for help and asked him to take a stick to beat Jone. Mosese, according to the Complainant, did nothing. It is not surprising to me about the wisdom of the Prosecution to drop an eyewitness who had turned a blind eye to an alleged rape victim who was desperately seeking help. He was either complicit in crime or lacking in courage to confront the Accused who was drunk. Having told about watching the 'free show' at a close proximity and not having heard of any cry for help from the Complainant, Mosese admits that he is partially deaf. However, he would have surprised the Assessors when he said that he could hear the Complainant's grandmother calling from quite a distance. He was certainly not telling the truth. I believe he advanced the 'deaf theory' to justify his inaction. Moses's evidence is also not consistent with the evidence of the Accused who said that he opened only the zip to have intercourse while Mosese said that Jone's trousers had been lowered up to his knees. Even the Accused did not say that the Complainant was hugging him nor was there a suggestion to that effect put to the Complainant by the Defence Counsel. In light of these inconsistencies, it is open for the Assessors to reject the evidence of Mosese.

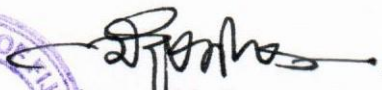

19. When I consulted the Counsel at the end of my Summing-Up about redirections, the Defence Counsel drew my attention to a mistake inadvertently made in the summary of evidence about Moses's relationship with the Accused. The mistake was later corrected in the presence of the Assessors. It is true that it was not born out in evidence that Mosese is related to the Accused. Mosese only told that he is related to the Complainant. This fact could have boosted Mosese's credibility as a witness. However it has to be accepted that if Mosese is related to the Complainant, by virtue of that relationship, he is also related to the Ac-

cused because Jone is related to the Complainant as her cousin. Despite this alleged relationship with the Complainant, Mosese proved himself to be an untrustworthy witness.

20. Having considered the entirety of evidence, I reject the version of the Defence and accept the version of the Prosecution. I accept the unanimous opinion of the Assessors that the sexual intercourse is non-consensual.

21. The assault and the biting had been followed by a forceful sexual intercourse and the assault was obviously intended to submit the Complainant to the sexual intercourse. The Prosecution proved both counts beyond reasonable doubt. The accused is found guilty on each count as charged. The Accused is convicted accordingly.

22. That is the judgment of this court.

Aruna Aluthge
Judge

At Suva

12 November 2019

Solicitors: Office of the Director of Public Prosecution for State

Legal Aid Commission for Defence