

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 58 OF 2016

STATE

V

OSEA TUIKORO

Counsel: Ms. S. Naibe for State
Ms. P. Reddy for Defence

Date of Summing Up: 11 December 2019

Date of Judgment: 12 December 2019

JUDGMENT

1. The Accused was charged on the following information and tried before three Assessors:

First Count

Statement of Offence

ABDUCTING WITH INTENT TO CONFINE PERSON: Contrary to
Section 281 of the Crimes Act 2009.

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, abducted **KITE SENINUQANUQA** with intent to cause her to be secretly and wrongfully confined.

Second Count

Statement of Offence

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

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, penetrated the vagina of **KITE SENINUQANUQA** with his penis, without her consent.

Third Count

Statement of Offence

BREACH OF DOMESTICE VIOLENCE RESTRAINING ORDER:

Contrary to Section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, breached the Domestic Violence Restraining Order number 487/15 of Lautoka Magistrates' Court dated 9th December, 2015 by interfering with **KITE SENINUQANUQA** a protected person under the said Order.

2. After a short deliberation, the Assessors expressed a mixed opinion. The Assessor No.1 found the Accused guilty on the 1st count only. The Assessor No. 2 found the Accused guilty on the 3rd count only. The Assessor No. 3 found the Accused not guilty on all three

counts. The Assessors were unanimous in their opinions that the Accused is not guilty on the 2nd (Rape) count. The majority opinion is that the Accused is not guilty on all three counts. Having taken into consideration the opinion of the Assessors, it is now my turn to pronounce the judgment.

3. There is no dispute as to the identity of the Accused. Accused agrees that the complainant was in a de-facto relationship with him.
4. To find the Accused guilty on the first count, the Prosecution must prove beyond a reasonable doubt that the Accused abducted the complainant and that the abduction was done with the intent to confine the complainant.
5. The complainant is the only witness called by the Prosecution. The complainant said that she was grabbed from her back and forcefully pushed her in to a vehicle by the Accused and then taken to Accused's mother's house in Navutu. She further said that her mother was woken up by her scream and she (her mother) was witnessing the incident. Under cross-examination, the complainant admitted that she left the house on the previous day of the incident at around 10 pm to drink alcohol with friends and returned home a little bit drunk after clubbing at around 5 am on the 14th February, 2016.
6. Upon arrival at the house at Navutu, she said that the Accused locked (bolted) the door and she was kept inside the house in Navutu for nearly 3 hours. Under cross-examination, the complainant admits that after alighting from the vehicle she walked to the house in Navutu with the Accused on her own free will and she did not attempt to escape although she had the opportunity to do so. The complainant said that after having sexual intercourse with the Accused she slept with the Accused in the same bed for few hours and after having lunch together she was dropped home by the Accused for her to report for the afternoon shift.

7. According to complainant's evidence, the mother of the complainant is an important eye witness to the alleged abduction. The complainant's mother is listed as a witness for prosecution. However the Prosecution closed its case without calling this important witness. Although there is no need for corroboration of complainant's evidence, the unexplained absence of complainant's mother's evidence would have created a reasonable doubt in the minds of the Assessors as to the credibility of the complainant's evidence on alleged abduction.
8. Considering the entirety of the evidence, the Prosecution failed to prove beyond a reasonable doubt that the Accused, when he took the complainant to her mother's house, had an intention to confine the complainant.
9. In order to prove the 2nd count (Rape) the Prosecution must establish that the Accused penetrated complainant's vagina with his penis without her consent.
10. From the line of cross-examination, it appeared that there is no dispute that the Accused had penetrated the vagina of the complainant with his penis. The complainant agreed that no physical harm or threat was done to her by the Accused immediately before or during the sexual intercourse. The complainant admits that she gave the consent to the accused verbally for them to have sexual intercourse. She admits that no resistance was offered and no alarm was raised by her immediately before or during the sexual intercourse.
11. Although the complainant said that she was grabbed from the back and forcibly pushed into the vehicle, she admits that no assaults or arguments took place in the vehicle. The complainant admits that when they reached the house in Navutu, she had got out of the vehicle by herself and walked from the vehicle to the house on her own free will. She said that she knew that the landlord of that house used to be in the house, but she did not raise any alarm. She admits that a conversation took place calmly just before the sexual intercourse to iron out the differences. She admits that the Accused had asked if they both could have sex and she replied 'yes'.


12. There is no dispute that in 2015, a DVRO was issued with a non-molestation order against the Accused. However, when the DVRO was in force she used to meet the Accused to exchange the son. She admits that the Accused had treated her and the children well and he did not portray any harmful behaviours towards her during that period. Even after the alleged rape incident in February, 2016, she had gone back to the Accused and stayed with him till April 2018. In April 2018, she had left the Accused allegedly due to his abusive behaviour. However she had not reported him to the police this time.
13. Although she said that the only reason why she returned to the Accused was because she cared about her children's wellbeing, she admitted that her son was already in the custody of the Accused and the daughter is safe in the care of her aunt in Navua.
14. The complainant admits that when she returned home after the alleged incident, her mother was very angry at both her and the Accused, and even confronted her as to why she went and stayed with the Accused. She admitted that she did not inform her mother at the same time as to what actually happened. She informed about the alleged rape incident only when her mother started questioning her on the following day. The mother was not in court to confirm what she heard from the complainant.
15. When it was suggested that the only reason why she did not make a prompt complaint to her mother was because she had gone with the Accused voluntarily and also had sexual intercourse with him voluntarily, she agreed with the Defence Counsel. She admitted that she did not go to the police station on her own free will and it was her mother that took her to the police station. She also admitted that she was forced by her mother to make a report with police and it was her mother that told her what to say in her statement.
16. The complainant admitted that her mother did not approve of her relationship with the Accused from the very beginning and also blamed her because, after being separated, her

mother had to leave her job in Samoa to look after the children. The complainant also admitted that she was heavily dependent on her mother.

17. In view of the evidence above it appears that the complainant had complained to police only because she was forced by her mother. Complainant's evidence is sufficient to create a reasonable doubt in the minds of the Assessors that the sexual intercourse in fact took place with her consent.
18. The Prosecution also failed to prove that the Accused either knew that the complainant was not consenting or was reckless as to whether she consented. The complainant admitted that the Accused had asked her immediately before the sexual intercourse if he could have sex with her and she replied 'yes'. Her explanation is that she said 'yes' because she was scared of him that he will do something to her. She agreed however that she did not inform the Accused that she was consenting only because she was scared of him. She said that her fear was based on assumptions. In the circumstances known to the Accused it was reasonable for him to believe that the complainant was consenting to the sexual intercourse and her consent was free and voluntarily.
19. The Third Count concerns the breach of a Domestic Violence Restraining Order. There is no dispute that a non- molestation domestic violence restraining Order under Section 27 of the Domestic Violence Act was made against the Accused in 2015.
20. The complainant admits that when the DVRO was in force she used to meet with the Accused. She had gone back to the Accused and stayed with him until April 2018. Although she said that the Accused resumed his abusive behaviour in April 2018, she admitted that no complaint was made to the police. Her explanation is that she was scared to go to the police. If she had the courage to go and complaint to police on previous occasions and obtain a DVRO the Assessors would not believe her evidence that she was scared to complain to police this time.

21. I observed the demeanour of the complainant. She was evasive. She failed to attend court to give evidence and her attendance was secured only after a bench was issued. It is reasonable for the Assessors to reject the evidence of the complainant. The benefit of the doubt must be given to the Accused.
22. The Prosecution failed to prove the charges beyond reasonable doubt.
23. I accept the majority opinion of the Assessors and find the Accused not guilty on all three counts. The Accused is acquitted and discharged accordingly.
24. That is the judgment of this court.




Aruna Aluthge
Judge

At Lautoka
12 December 2019

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