

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 85 OF 2015

STATE

v

SUNIL CHAND PRAKASH

Counsel: Ms. L. Latu for State
Mr. S. Khan for Accused

Date of Summing: 25th February, 2019
Date of Judgment: 27th February, 2019

JUDGMENT

1. The accused was charged with rape on following information and tried before three assessors.

Statement of Claim

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Claim

SUNIL CHAND PRAKASH, on 24th day of October 2014 at Rarawai, Ba, in the Western Division, had carnal knowledge of **KESHNI LATA**, without her consent.

2. At the ensuing trial, the Prosecution called four witnesses, the complainant, her husband Arvind, doctor Anaseini and interviewing officer Cop. Ashwin Prasad. At the close of Prosecution's case, the accused was put to his defence and the Defence called six witnesses including the accused.
3. After a deliberation of nearly forty minutes, assessors returned with a unanimously opinion that the accused is not guilty of Rape as charged.
4. I review evidence led in trial for me to be satisfied that the opinion of the assessors is supported by evidence led in trial and in accordance with the directions I have given in my Summing-Up.
5. The prosecution's case is substantially based on the evidence of the complainant Keshni Lata. She is 26 years old. Lata said on the 24th of October, 2014, at about 2.00 pm she was washing clothes inside the house. All her children were inside the house and the doors were closed. Her brother-in- law Sunil, the accused in this case, bumped the door and came inside the house. He took a glass of Rum and Cola from the washing machine and forced her to drink. She did not drink. She pushed the glass away and the glass fell off. Then he picked it up and put it inside his pocket.
6. Then he forcefully pulled her inside the bathroom. She told him that she is going to yell out. Then he assaulted her and said that if she said this to anybody he will assault her. He slapped her on her left cheek and scratched one of her hands. Then he forcefully opened her clothes. She did not like it. Then he pushed her. She fell down. Then he forcefully inserted his penis into her vagina and had sex with her. She said "no" to him but he did not listen to her. After that he ran away to the garden. Her small son Adrian saw him. She said that Sunil spent 10 minutes in her house that evening doing all these things.
7. Lata said that when Sunil came, the children were inside the house. Sunil told them to go out as he forced opened the door. After Sunil left, she wore her clothes and sat inside her bedroom. When her husband returned back from town at about 5.00 pm, her youngest son Adrian told the husband that 'dada', meaning uncle, came inside and he ran away from the house. She then informed the husband about the incident. She said that Sunil pushed the door, came inside and forcefully had sex with her. She said she also informed Sunil's wife.

8. Lata said that she didn't tell the husband as soon as he arrived because she got scared as Sunil, when he was inside the house, had told her that he will kill her. After she had told her husband, husband got angry and called Sunil inside the porch and inquired about incident. Sunil denied the allegation. Then they went to the police station and then to the hospital on the same day. She was examined by a female doctor. She informed the doctor that Sunil forcefully had sex with her, slapped her and also scratched one of her hands. She said that Sunil is her brother-in-law and a fatherly figure to her.
9. Accused does not deny sexual intercourse with the complainant. Therefore there is no dispute as to the first two elements of the offence of Rape. The only dispute is in relation to the consent. The complainant says that the accused forcefully had sexual intercourse with her, without her consent. The accused on the other hand says that he had an affair with the complainant and that the sexual intercourse was consensual. The case turns on one word against the other. The resolution of the dispute depends on whether the court can accept the complainant as a truthful witness.
10. Prosecution says that the complainant is consistent in her conduct and that she told the truth in court when she said that she was forced to have sexual intercourse with the accused. To prove complainant's consistency, Prosecution relies on recent complaint evidence and medical evidence.
11. The fact that the complainant had made a complaint about the rape at the first available opportunity to someone or to an authority is an important piece of evidence that will generally bolster up the consistency and credibility of the complainant's version in a case of sexual nature. The Supreme Court in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) observed:

"In In any case evidence of recent complaint was never capable of corroborating the complainant's account: R v. Whitehead (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v. The State Crim. App. 12 of 1989; Jones v. The

Queen [1997] HCA 12; (1997) 191 CLR 439; Vasu v. The State Crim. App. AAU0011/2006S, 24th November 2006"

12. Complainant says that she complained to her husband Arvind about the incident shortly after his arrival at home on the 24th October, 2014 and, on the same day, she reported the matter to police, and thereafter, to the doctor at the medical examination.

13. It was contended by Defence that complainant's evidence is not consistent on this point. In her evidence, the complainant admits that she related the matter to her husband when her son informed that accused entered the house and ran away. When the Prosecuting Counsel asked what made her tell her husband, she said: he (her son) told her husband that 'dada' (uncle) came inside, and he ran away from the house. The version of the Defence is that this is an affair that got caught. Accused said that after coming to know about the incident the complainant was assaulted by her husband and that she was forced to make a complainant to police. Her testimony gives rise to a reasonable doubt that she was under pressure to make a complaint to police. I reproduce below the relevant parts of her testimony.

Q: Did you tell anyone about what Sunil did to you on that day, that afternoon?

A: I told my husband my Lord and I also informed Sunil's wife my Lord.

Q: So when did you tell your husband?

A: When he returned back from town my Lord at about 5.00 pm then my youngest son told my husband then with him I also informed my husband regarding this.

Crt: Who informed him first?

A: My youngest son my Lord.

Q: Who is this youngest son of yours that told your husband first?

A: Adrian.

Q: So what made you tell your husband?

A: He told my husband that 'dada' came inside, meaning uncle came inside and he ran away from the house.

Q: So how did you relate the incident to your husband?

A: *I was washing clothes my Lord, then he came inside.*

Q: *My question is, how did you tell your husband?*

A: *I informed my husband that he pushed the door my Lord and he came inside and he had forcefully sex with me.*

Q: *This was after Adrian told your husband that his dada came home?*

A: *Together with Adrian I informed my husband my Lord.*

14. In her statement to police made on 25th October, 2014, the complainant had told the police: *'Then at about 5 pm., my husband came home from town and my eldest son Adrian told him that uncle Sunil ran from the house and then my husband asked me and I then told him about the incident....'*
15. When the State Counsel asked her again, deviating from her earlier position, complainant replied that- *'together with Adrian she informed her husband'*.
16. It is clear that the complainant related the incident only when her son had told her husband first and when she was asked *what happened?* Then she complained that Sunil entered the house and forcefully had sex with her. In the circumstances, the credibility of the recent complaint is greatly affected.
17. The version of the Defence is further supported by evidence relating to complainant's conduct during and after the alleged incident. The complainant admits that there was a rumour going around that she was having an affair with the accused. She said that the rumour originated when the accused praised the nicety of her breast and he peeped into the bathroom. She admitted that there was a confrontation between the accused and her husband after these incidents and the accused was banned from coming into her house. Although she did not disclose to court, she admits having told police that the accused gave lollies to her children and she was asked to send the children out of the house before the doors were closed. Accused had offered her rum and cola. Under these circumstances complainant had ample reasons to believe that the accused had entered her house to do a harm. Quite surprisingly, she did not create a scene although another brother-in-law was living close by. She had the opportunity to

run away, scream or yell. She only told the accused '*I will yell out*', but she did not yell.

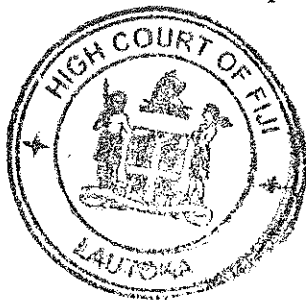
18. After the incident, she did nothing expected of a rape victim. She changed the cloths in the bedroom and called the children inside. When her husband arrived inside the house she was washing clothes. She did not say she was crying. When she was produced for a medical examination a few hours later, the doctor's first impression of her was that she was calm.
19. Accused in his evidence denies that upon hearing the incident he assaulted the complainant. However he admits that he got very angry and he growled at his wife. He said that he called the accused and talked in the house to settle the matter then and there; he said that the accused took oath on Ramayan and denied everything. Then he called the police. It is noteworthy that the police, having recorded witness statements, interviewed the accused and obtained the medical report had waited six months to charge the accused. Complainant said that her husband went to the police station three times because the accused was not being charged. Complainant gave a second statement to police after eight months strengthen her case.
20. I observed the demeanour of Arvind giving evidence and his conduct in court. He proved himself to be an aggressive man. He inappropriately confronted the Defence Counsel despite being warned. His aggressive conduct is consistent with the version of the Defence.
21. Having heard evidence and observed demeanour of witnesses in court it was open for the assessors to come to the conclusion that this is an affair that got caught and that the complainant had lodged the complainant with police either due to pressure coming from her husband or save her own skin or for both.
22. The Defence Counsel highlighted some inconsistencies in complainant's previous statements to police *vis-a-vis* her evidence. The Complainant had made two statements to police, the second being made eight months after the first. The Defence Counsel in the course of his cross examination highlighted certain inconsistencies in relation to both her previous statements. I listed some of them

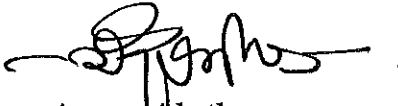
at paragraphs 46 to 48 of my Summing Up. I would not consider most of them to be material inconsistencies so as to discredit complainant's version. However she refrained from telling the court that accused called her name before entering the house and that accused took the kids outside and gave them lollies before locking both the doors. In her first statement she had not told that accused had threatened to kill her. She made a second statement 8 months after the incident to tell the police that accused threatened to kill her and that no affair ever existed between her and the accused. In view of other evidence led in trial it is open for the assessors to reject the evidence of the complainant on the basis of those inconsistencies.

23. Prosecution relies on medical evidence to prove the consistency of complainant's version. The doctor confirmed that the complainant had received some external injuries on complainant's left forearm and left cheek. There is no dispute that the complainant had injuries on her body as recorded in the medical report (PE1). The complainant said that the accused dragged her into the bathroom, slapped her on her left cheek and scratched one of her hands. The accused's version is that the complainant received those injuries when she was being assaulted by her husband Arvind. Prosecution denies that the complainant was assaulted by her husband.
24. There is an inconsistency between complainant's evidence and medical evidence. The complainant had told police that the accused punched her on her right arm. She repeated the same story while giving the history to the doctor. However, the doctor confirmed that the complainant had no injuries on her right arm. The swelling on the left cheek is consistent with complainant's version. However it is also consistent with the Defence's evidence, specifically with that of Rita who said that she slapped the complainant on her cheek. Maharaj and Emi contradicted each other in their evidence on the assault. It appeared that they were giving evidence to blow the assault incident out of proportion. However, that did damage the version of the Defence which only required raising a reasonable doubt in the prosecution's case.
25. The doctor found no injuries in complainant's vagina. She agreed that, while having very forceful and rough sex, it would not be uncommon to have some vaginal damage. By looking at her vaginal findings, the doctor agreed that it is possible that her finding is consistent with consensual sex. However, the doctor

said that it really depends on the reaction of the victim; if the victim feels helpless and was just lying down, no injuries could be found. Complainant did not say that she was frozen or just lying down. She has resisted and even slapped the accused to be overpowered. Therefore it is open for assessors to conclude that the medical evidence is consistent with the version of the Defence.

26. There is no dispute that the sexual intercourse took place in the bathroom when there is nobody in the house and there was a bed in the bedroom. It is not impossible for him to prefer bathroom sex in the circumstances of this case and for reasons given by the accused.
27. I had the opportunity to observe the demeanour of the Complainant. Complainant is not straightforward and not confident in her testimony.
28. The evidence is sufficient to create a reasonable doubt in the minds of assessors as to the credibility of the complainant's evidence that she did not consent to sexual intercourse. The benefit of that doubt should be given to the accused.
29. I accept the unanimous opinion of the assessors and acquit the accused accordingly.
30. The accused is acquitted and discharged.




Aruna Aluthge
Judge

AT LAUTOKA
27th February, 2019

**Solicitors: Office of the Director of Public Prosecution for State
Nazeem Lawyers for Accused**