

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 281 of 2018

STATE

vs.

MOHAMMED YUNUS

Counsel: Mr. M. Vosawale with Ms. S. Sharma for the State
Mr. D. Sharma with Mr. S. Deo for the Accused

Date of Hearing: 12th, 13th, 14th, 15th, 16th, 19th August 2019

Date of Ruling: 21st August 2019

RULING

[ON NO CASE TO ANSWER]

1. The accused is being charged with three counts of Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) (a) of Crimes Act, two counts of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act, one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act and four counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (b) (i) of the Crimes Act*

2009.

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her kiss him from his head and down to his legs.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of Crimes Act 2009.

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, unlawfully and indecently assaulted **MAHMUN NISHA**, by kissing the lips of **MAHMUN NISHA**.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the mouth of **MAHMUN NISHA** with his penis, without her consent.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, procured **MAHMUN NISHA**, without her consent, to commit an act of gross indecency by making her lick his thighs and genitals.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210 (1) (b) (i) of the Crimes Act 2009,*

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, procured MAHMUN NISHA, without her consent, to commit an act of gross indecency by making her lick his anus.*

COUNT SIX

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the vagina of MAHMUN NISHA with his penis, without her consent.*

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH *on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than COUNT 6 penetrated the vagina of MAHMUN NISHA with his penis, without her consent.*

COUNT EIGHT

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, penetrated the anus of **MAHMUN NISHA** with his finger, without her consent.

COUNT NINE

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in **COUNT 7** penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.

COUNT TEN

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than in **COUNT 3** penetrated the mouth of **MAHMUN NISHA** with his penis, without her consent.

COUNT ELEVEN

Statement of Offence

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

Particulars of Offence

MOHAMMED YUNUSH on the 28th day of June, 2018 at Nasinu, in the Central Division, on an occasion other than the one stated in **COUNT 9** penetrated the vagina of **MAHMUN NISHA** with his penis, without her consent.

2. The hearing of this matter commenced on the 12th of August 2019. Having adduced the evidence of three witnesses, including the complainant, the prosecution concluded its case on the 19th of August 2019. The learned counsel for the defence then made an oral submissions pursuant to Section 231 (1) of the Criminal Procedure Act, stating that there are no evidence to establish each of the offences as charged in the information. The learned counsel for the defence further submitted that certain constitutional rights of the accused have been breached during the investigation, thus making this prosecution an abuse of the process of the law. Having heard the oral submissions of the learned counsel for the defence, the court directed the parties to file their respective written submissions and the matter was adjourned till 20th of August 2019 for the arguments/oral submissions. On the 20th of August 2019, the learned counsel for the prosecution and the defence made their respective oral submissions.
3. Having carefully taken into consideration the evidence adduced during the course of the hearing, the respective oral and written submissions of the parties, I now proceed to pronounce the ruling under Section 231 (1) of the Criminal Procedure Act as follows.

The Law on No Case to Answer

4. Section 231 (1) of the Criminal Procedure Act states that:

“When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.”

5. Accordingly, the trial Judge is required to find the accused not guilty at the conclusion of the case of the prosecution, if the court considers that there is no evidence to establish that the accused committed the offence.

6. The Fiji Court of Appeal in Talala v State [2019] FJCA 50; AAU155.2015 (7 March 2019) held that the test under Section 231 (1) of the Criminal Procedure Act is to determine whether there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge. It is not a duty of the court to take into consideration the credibility, reliability and the weight of the evidence at that state. The Fiji Court of Appeal in Talala v State (supra) held that:

"It is well settled that, the test at this stage of the trial is whether there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the charge and not an assessment of the weight and credibility of such evidence, unless the evidence is inherently vague or improbable."

7. The High Court of Fiji in State v Nikolic [2019] FJHC 91; HAC115.2018 (18 February 2019) held that:

"The test for a no case to answer application in the High Court is settled. The test is whether there is some incriminating evidence, direct or circumstantial, on all the essential ingredients of the charged offence or offences (Sisa Kalisoqo v R Criminal Appeal No. 52 of 1984, State v Mosese Tuisawau Cr. App. 14/90, State v Woo Chin Chae [2000] HAC 023/99S)."

8. In view of the above discussed judicial precedents, the applicable test under the Section 231 (1) of the Criminal Procedure Act is to determine whether the prosecution presented some relevant and admissible incriminating evidence, direct or circumstantial, on all the essential elements of the offence as charged.
9. During the course of the submissions, the learned counsel for the prosecution conceded that there are no evidence in relation to counts 1, 2, 8 and 11 of the information. Therefore, the

court is only required to consider whether there are evidence on the essential elements of the count 3, 4, 5, 6, 7, 9, and 10 of the information.

10. According to the evidence given by the complainant that the accused had come to her room while she was sleeping on the night of the 28th of June 2018. He then had pulled her from her dress and took her into the room where the accused was sleeping. He then asked her to lick his thighs, genitals and anus. He had threatened the complainant, hence, complainant had licked his thighs, genitals and anus. The complainant had then asked her to perform oral sex on him, which the complainant did. Thereafter, the accused had pushed the complainant to the bed and inserts his penis into her vagina. The accused then told the complainant that the vagina was dry and put baby oil into her vagina and then again inserted his penis into her vagina. The accused then laid on the bed and asked the complainant to sit on his penis, which she did as asked by the complainant thus inserting the vagina of the complainant with his penis. He then asked the complainant to sit on her knees and inserted his penis into her vagina from her backside. After having sexual intercourse with the complainant, the accused had asked the complainant to make a cup of coffee. The complainant went and made coffee. Having drank the coffee, the accused had again asked the complainant to perform oral sex on him, which she performed as asked by the accused.
11. After the complainant gave evidence about four incidents of penetration of the penis of the accused into her vagina, the learned counsel for the prosecution made an application, seeking an order to expunge the evidence of the complainant, which she gave in relation to the incident where the accused asked her to sit on his penis. The learned counsel said that particular incident is not the factual basis for any of the offences as stated under count 6, 7, 9 and 11 in the information. The counts 6, 7, 9 and 11 are founded on four different allegations that the accused had inserted into the vagina of the complainant without her consent. This application was refused on the basis that the complainant had already explained about four incident of such penetration of the penis of the accused into her vagina. The factual basis of the offences pertaining to counts 6, 7, 9, and 11 have not been properly explained in the respective particulars of offences of those counts. The particulars of offences of counts 6, 7, 9 and 11 have merely outlined that the accused penetrated the vagina of the

complainant with his penis without her consent. No facts were provided in those particulars of offences in order to distinguish the factual basis of these four counts. The learned counsel for the prosecution then admitted that the evidence given by the complainant regarding four incidents of penetration of the penis into the vagina are the factual basis of the counts 6, 7, 9 and 11. The matter then proceeded and the prosecution concluded their case.

12. During the course of this hearing under Section 231 (1) of the Criminal Procedure Act, the learned counsel for the defence submitted that the evidence presented by the complainant does not correspond with the disclosures that provided by the prosecution, hence, the evidence of the complainant could not be taken into consideration. Moreover, the learned counsel submitted that the particulars of the offences of counts 6, 7, 9 and 11 have not provided the factual basis of those counts, which prevented the defence to properly comprehend the nature of those four counts.
13. The learned counsel for the prosecution then deviated from her earlier position, which I discussed above, and submitted that the factual basis that the prosecution relies on in respect of count 6, 7, 9 and 11 are as follows, that:

Count 6: The incident that the accused asked the complainant to sit on his penis, thus inserting his penis into the vagina of the complainant when she sat on his penis,

Count 7: The incident that the accused poured baby oil into the vagina of the complainant and then inserted into the vagina of the complainant with his penis.

Count 9: The incident that the accused penetrated into the vagina of the complainant with his penis from her back,

Count 11: The incident of the penetration into the vagina of the complainant with the penis of the accused on the settee of the living room.

14. It appears that the same learned counsel for the prosecution, who earlier made an application to expunge the evidence pertaining to the incident where the accused had asked the complainant to sit on his penis, thus penetrating into her vagina with his penis, saying that incident was not the factual basis of any of the offences as stated under counts 6, 7, 9 and 11, now making a submission, stating that particular incident is the factual basis of the count 6 in the information.
15. Be that as it may, the learned counsel for the prosecution then conceded that there is no evidence in respect of the count 11 of the information.
16. According to the evidence given by the complainant, she was threatened and then assaulted by the accused, asking her to perform oral sex on him twice and then to lick his thighs, genitals and anus. He then pushed her to the bed and inserted into her vagina with his penis. He then asked her to sit on his penis. He then inserted his penis into her vagina from her back. In view of these evidence, I find there are some admissible evidence for the main elements of the offences as charged under counts 3, 4, 5, 6, 7, 9 and 10 of the information.
17. I now take my attention to the second limb of the submissions of the defence, where the learned counsel for the defence argued that certain constitutional rights of the accused have been breached during the investigation, hence, the prosecution of the accused in this proceedings amounts to an abuse of the process of justice. Therefore, the accused should not be called to provide a defence for these offences as charged.
18. The learned counsel for the defence contends that the accused was assaulted and kept in the police custody for more than 12 hours without giving any medical attention. Moreover, the learned counsel submitted that the prosecution has suppressed certain evidence, without disclosing them to the defence. Having carefully taken into consideration the submissions made by the learned counsel for the defence, I find that the defence alleges that the rights of the accused to be freedom from cruel and degrading treatment under Section 11 of the Constitution has been breached. Moreover, the defence claims that the rights of the accused

to be informed in advance of the evidence as stipulated under Section 14 (2) (e) of the Constitution has also been breached.

19. Section 44 of the Constitution has expounded the procedure for the enforcement of the rights that have been stipulated under the chapter of Bill of Rights. Section 44 of the Constitution states that:

- i) *If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.*
- ii) *The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*
- iii) *The High Court has original jurisdiction*
 - a) *to hear and determine applications under subsection (1);*
and
 - b) *to determine questions that are referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate.*
- iv) *The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.*
- v) *If in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of this Chapter, the member presiding in the proceedings may, and must if a party to the proceedings so requests, refer the question to the High Court unless, in the member's*

opinion (which is final and not subject to appeal), the raising of the question is frivolous or vexatious.

- vi) *When the High Court gives its decision on a question referred to it under this section, the court in which the question arose must dispose of the case in accordance with—*
 - a) *the decision; or*
 - b) *if the decision is the subject of appeal to the Court of Appeal or to the Supreme Court — the decision of the Court of Appeal or the Supreme Court, as the case may be.*
- vii) *The Attorney-General may, on behalf of the State, intervene in proceedings before the High Court that relate to a matter concerning a provision in this Chapter.*
- viii) *If the proceedings before the High Court relate to a matter concerning a provision of this Chapter, the High Court must not proceed to hear and determine the matter until it is satisfied that notice of the matter has been given to the Attorney-General and a reasonable time has elapsed since the giving of the notice for consideration by the Attorney-General of the question of intervention in the proceedings.*
- ix) *A notice under subsection (8) is not required to be given to the Attorney-General if the Attorney-General or the State is a party to the proceedings.*
- x) *The Chief Justice may make rules for the purposes of this section with respect to the practice and procedure of the High Court (including rules with respect to the time within which applications are to be made to the High Court).*

20. According to Section 44 (3) of the Constitution, the High Court has original jurisdiction to hear and determine the matters under Section 44 (1) and (5) of the Constitution.

21. In pursuant of Section 44 (1) of the Constitution, if a person considers that any of his rights as stipulated under the bill of rights has been or is likely to be contravened in relation to him, he could apply to the High Court for redress. Such an application under Section 44 (1) of the Constitution, can be made without prejudice to any other matter with respect to the matter that the person concerned may have (*vide Section 44 (2)*).
22. Section 44 (5) of the Constitution states that if a question arises during any proceedings in a subordinate court regarding the contravention of the rights under the bill of rights, the subordinate court could refer such question to the High Court to determine.
23. According to Section 44 (3) of the Constitution, the High Court derives the jurisdiction to hear any matter relating to any breach of constitutional rights under the chapter of Bill of Rights if such an application is made pursuant to Section 44 (1) or a reference is made to the High Court from a subordinate court pursuant to Section 44 (5) of the Constitution. Hence, the High Court has no jurisdiction to hear any issue of the breach of constitutional rights during any other proceedings.
24. In view of the above discussed reasons, it is my considered opinion that this court has no jurisdiction to hear any constitutional redress matters during the course of this proceedings. The accused could invoke the jurisdiction of the High Court pursuant to Section 44 (1) of the Constitution, if he wishes to pursue his claim of alleged breaches of his constitutional rights.
25. Furthermore, the learned counsel for the defence submits that the prosecution failed to disclose certain evidence which is vital for the defence. Therefore, the prosecution has breached the rights of the accused to be informed in advance of the evidence of the prosecution as stipulated under Section 14 (2) (c) of the Constitution.

26. Section 14 (2) (e) of the Constitution states that:

"Every person charged with an offence has the right to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence."

27. The evidence that the learned counsel for the defence alleges as suppressed, have not been used by the prosecution during the course of this hearing. According to section 14 (2) (e) of the Constitution the right to be informed of the evidence is limited to the evidence that the prosecution intends to rely on. The evidence that the defence claims, have not been relied on by the prosecution during the hearing. Hence, I do not find that the non-disclosure of those evidence prejudiced the accused during the hearing.
28. In conclusion, I am satisfied that there are no evidence in relation to the offences as charged under counts 1, 2, 8 and 11 in the information. Therefore, I find the accused not guilty of the offences as charged under counts 1, 2, 8 and 11 of the information and acquit him from the same accordingly.
29. Moreover, I find that there are evidence that the accused committed the offences as charged under counts 3, 4, 5, 6, 7, 9, and 10 in the information pursuant to Section 231 (1) of the Criminal Procedure Act.




R.D.R.T. Rajasinghe
Judge

At Suva
21st August 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
R. Patel Lawyers for the Accused.