

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 02 OF 2019

BETWEEN : STATE

AND : AMENONI NASILASILA

Counsel : Ms M Khan with Ms M Konrote for State
: Ms U Baleilevuka with Mr M Anthony for
Accused

Date of Hearing : 16th – 17th September, 2019

Date of Summing Up : 19th September, 2019

Date of Judgment : 20th September, 2019

JUDGMENT

- [1] The Accused, Amenoni Nasilasila is charged with one count of rape. The particulars of the charge allege that the Accused on 22 December 2018 at Sigatoka had carnal knowledge of the complainant without her consent.
- [2] After a 3-day trial, the three assessors gave their opinions of not guilty. In our system of justice, the assessors' opinions aid the Court to arrive at a verdict. The verdict is of the trial judge. The trial judge is not obliged to conform to the assessors' opinions. If the judgment of the Court does not conform to the assessors' opinions, then the trial judge is obliged by law to give cogent reasons.
- [3] I now pronounce the judgment. In doing so I direct myself in accordance with my summing up. I bear in mind that the prosecution carries the burden of proof to

establish guilt beyond reasonable doubt. The Accused elected not to give evidence. He carries no burden to prove anything.

[4] The prosecution is required to establish guilt by proving the following elements of rape beyond reasonable doubt:

- (i) On the alleged date and place the Accused had sexual intercourse with the complainant.
- (ii) The complainant did not consent to sexual intercourse.
- (iii) The Accused knew the complainant did not consent.

[5] The first element is not in dispute. The Accused admits that he had sexual intercourse with the complainant on the said date and place. The defence case is that the complainant consented to sexual intercourse and that her account of force was used by the Accused to obtain her consent is false. Apart from the evidence elicited from the cross examination of the prosecution witnesses, the defence relies upon their witness, Mr Katonibau to show that the complainant is not a truthful witness and that her account of force was used by the Accused to obtain her consent is false.

[6] Mr Katonibau is a close friend of the Accused. I accept his evidence that he visited the Accused on 23 December 2018 at the police station and then met with the complainant at an eatery. This meeting occurred a day after the incident. Mr Katonibau gave the Court an impression that his meeting with the complainant was a coincidence when he ended up at the same location as the complainant shortly after learning of the predicament of his friend, the Accused. I do not think Mr Katonibau's meeting with the complainant at the eatery was a coincident. His story does not add up when he said the complainant told him she consented to sexual intercourse with the Accused and that on her request he took her back to the police station for her to withdraw her report. He remained in the vehicle when she went inside the station and when he learnt that the report could not be withdrawn he did not see fit to inform the police what the complainant had allegedly told him about her consenting to sexual intercourse. His failure to inform the police of the conversation he had with the complainant supports her account that he was putting pressure on her to withdraw her report.

- [7] The complainant's evidence is that she had a conversation with Mr Katonibau on 23 December 2018 and that it was Mr Katonibau who tried to convince her to drop the case against the Accused. Her evidence is that she told Mr Katonibau she was going ahead with the case and she told the same to the Accused's mother when she met her at the police station later that afternoon.
- [8] The complainant was consistent with her account that the Accused had sexual intercourse with her using force and without her consent. She gave a detailed account of how the Accused used force and had sexual intercourse without her consent.
- [9] Since the Accused did not evidence, there is no evidence from him to contradict the account of the complainant. This is not a case of his words against her. The entire prosecution case rests on the credibility of the complainant and her evidence.
- [10] The complainant was cross-examined at length on the issue of lack of consent. She maintained that she did not consent and that the Accused used force to have sexual intercourse. The lack of consent was communicated verbally and also by conduct. Her evidence is that she told the Accused to stop and that she did not want to have sex. Her evidence is that she resisted him but he became more aggressive towards her. She said that she was scared of him because she knew he was intoxicated and not listening when she told him to stop. She said she did not know what else he could have done to her when he was not listening. This account of the complainant that the Accused used force and that she did not consent to sexual intercourse was unshaken by the cross-examination.
- [11] The cross-examination centred mainly on the complainant's conduct during the incident and after the incident. The complainant agreed that she chose to stay back alone with the Accused on the day of the incident. However, she explained that she and her family trusted him. When asked whether she was still in love with the Accused, she rejected that proposition and said that she still loved him because of their friendship. She rejected the proposition that she cried out rape because she was upset with the Accused leaving her in the bathroom after sexual intercourse without giving a towel. Evidence is the answer of the complainant and not the proposition put in the question to the witness.

- [12] The complainant agreed that she did not run outside to raise alarm. However, she explained that she thought she will be safe by locking herself in the bathroom.
- [13] The complainant agreed that she did not sustain bodily injuries during the incident despite the Accused being aggressive towards her. Apart from the fall inside the bathroom she did not say that the Accused used physical violence on her causing her bodily injuries.
- [14] The medical evidence is not conclusive. The complainant was medically examined on the same evening following the incident on 22 December 2018. The examining doctor found abrasions on the complainant's genitalia but the doctor could not say if those injuries were caused by non-consensual sex. The medical evidence of lack of bodily injuries is consistent with the complainant's account that she felt little sore from the fall in the bathroom but she did not sustain any visible injuries.
- [15] The complainant's explanations for the lack of bodily injuries are reasonable in the circumstances of this case. The degree of her resistance during the incident was explained on the basis that she was in a state of fear because she knew the Accused was intoxicated and not listening. Her decision to run into the bathroom and not outside to raise alarm is also reasonable in the circumstances. She had to make impulsive decisions without much thought. It would be unreasonable to expect her to react in stereotype reactions when sexually assaulted.
- [16] The complainant complained to her boyfriend that the Accused had raped her shortly after the incident. Mr Mataibau's evidence is that when that complaint was made the complainant was distressed and crying. The recent complaint evidence adds consistency to the complainant's conduct and negates consent.
- [17] The complainant struck me as an honest and reliable witness. I believe her account that the Accused used force and that she did not consent to sexual intercourse. I accept that she said stop or no, but the Accused carried on to have sexual intercourse knowing she did not consent. I feel sure that the complainant did not consent to sexual intercourse and that the Accused knew she did not consent.

[18] The prosecution has satisfied the guilt of the Accused beyond reasonable doubt and the verdict of the Court is that he is guilty of rape as charged. Accordingly, he is convicted.



.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for State

Baleilevuka Law and AC Law for Accused