

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 09 of 2016

BETWEEN : STATE

AND : JAINENDRA NARAYAN PAL

Counsel : Mr Babitu for the State
Mr Patrick Kumar for the Accused

Dates of Hearing : 20 & 21 August 2019

Closing Speeches : 22 August 2019

Date of Summing up: 26 August 2019

Date of Judgment : 29 August 2019

JUDGMENT

1. The Accused is indicted for one count of rape contrary to Section 207(1) and (2) (b) of the Crimes Act. The particulars of offence read as follows;

“Jainendra Narayan Pal on the 15th day of December 2015, at Nadi in the Western Division, penetrated the vagina of Vilisita Waqaitubuna, with his fingers without her consent.”

2. The Accused pleaded not guilty and the trial commenced on 20 August 2019. The Prosecution called three witnesses and after the prosecution case was closed the Accused and another witness gave evidence for the defence.
3. After the summing up the assessors returned with a unanimous opinion that the Accused is guilty to the offence of rape.
4. Having directed myself in accordance with the summing up I will now review the evidence in this case to pronounce my judgment.
5. The prosecution case is that the Accused penetrated the vagina of the complainant with his fingers under the pretext of performing a medical examination. According to the complainant's evidence she had believed that the Accused was a medical doctor who is attached to the Nadi hospital. The complainant alleged that the Accused took her into a room and penetrated her vagina with two fingers.
6. The complainant was cross examined at length by the defence. Although the defence highlighted a few inconsistencies in her evidence, in my view those inconsistencies are insignificant and not material. Further the complainant provided explanations for those inconsistencies. Despite the lengthy cross examination by the defence, the credibility of the complainant's evidence remained unchallenged.
7. I have observed the demeanor of the complainant and the manner in which she gave evidence in court. I am satisfied that the complainant's evidence is truthful and reliable.
8. According to the prosecution evidence the complainant had informed the incident to a doctor at Nadi hospital on the very next day. Dr Fesiatu confirmed that the complainant came to the hospital and informed him about the incident. Further he confirmed that the complainant was under the impression that the Accused was a doctor. Dr Fesaitu said that the Accused is a lab technician and

he has no authority to examine patients. The witness further said that since he felt uncomfortable after hearing what the complainant had gone through, he referred the complainant to a female doctor. Dr Elenoa gave evidence that after the complainant informed about the incident, she medically examined the complainant.

9. The Accused denied the allegation. His position was that the complainant brought up the allegation of rape because he refused to hand over the blood test results to the complainant. He denied that he took the complainant to his room. Under cross examination the Accused admitted that most of the things he did in respect of the complainant were questionable. In my opinion the explanations given by the Accused were not plausible.
10. I have considered the evidence given by the defence witness, Dharmend Singh as well. He described the clothes of the complainant that she was wearing on 15 December 2015, in detail. During the cross examination he was asked as to how he remembered all the details. The defence witness said that he had written the details in a book and when he was asked where the book is, he said that his daughter played with the book. Once it was suggested to the complainant during cross examination that two security officers by the names of Dharmend and Naresh accompanied her. However, when Dharmend gave evidence he said that on 15 December 2015 he was a mortuary attendant.
11. The evidence given by the Accused and the defence witness did not correspond with the line of cross examination by the defence counsel. Their evidence was not consistent, and I am not satisfied that their evidence is credible and reliable. Therefore, I am not inclined to believe the evidence of the defence witnesses.
12. The assessors were given directions on the elements of rape, recent complaint, previous inconsistent statements, and other general considerations. It appears that the assessors have rejected the evidence of the Accused and the defence

witness. I am satisfied that they had reasons to believe the evidence adduced by the prosecution as truthful and reliable evidence.

13. As per Section 206(1) the term consent means consent freely and voluntarily given by a person with necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Further Section 206(2)(e) states that a person's consent to an act is not freely and voluntarily given if it is obtained by false and fraudulent representation about the nature or purpose of the act. The prosecution presented evidence that the Accused, being a lab technician penetrated the vagina of the complainant with his fingers by false and fraudulent representation of performing a medical test. I am satisfied that the prosecution evidence clearly establishes that the complainant did not freely and voluntarily give consent to the Accused.

14. It is my considered opinion that the prosecution proved the elements of rape beyond reasonable doubt. I concur with the unanimous opinion of the assessors.

15. In the circumstances I find the Accused guilty and convict him for the offence of rape as charged.



A handwritten signature in black ink, appearing to read 'Rangajeeva Wimalasena'.

Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Patrick Kumar Lawyers