

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 23 of 2019

STATE

V

1. ASIF KHAN
2. IMMANUEL SILUS KUMAR SIDAL
3. PHILIP RAO

Counsel : Ms. Dharshani Rao for the State
Mr. Amrit Sen for the 1st, 2nd and 3rd Accused

Dates of Trial : 1-4 June 2020

Summing Up : 5 June 2020

Judgment : 15 June 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KBL". The name of the prosecution witness No 2 is also suppressed. Accordingly, she will be referred to as "EV".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecution (DPP), the three accused were charged with the following offences:

COUNT 1

Statement of Offence

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

Particulars of Offence

ASIF KHAN, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

IMMANUEL SILUS KUMAR SIDAL, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

PHILIP RAO, between 15 and 16 March 2019, at Taveuni, in the Northern Division, penetrated the vagina of KBL with his penis, without her consent.

- [2] The three accused pleaded not guilty to the respective charges against them and the ensuing trial was held over 4 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the Assessors found the 1st Accused not guilty of Count 1; the 2nd Accused not guilty of Count 2 and the 3rd Accused not guilty of Count 3.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the unanimous opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).

- [6] The Assessors were directed that in order for the prosecution to prove the first count of Rape against the 1st Accused, they must establish beyond any reasonable doubt that;
- (i) The 1st Accused;
 - (ii) During the specified time period (in this case between 15 and 16 March 2019);
 - (iii) At Taveuni, in the Northern Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and
 - (vi) The 1st Accused knew or believed that the complainant was not consenting, or the 1st Accused was reckless as to whether or not she was consenting.
- [7] The Assessors were directed that in order for the prosecution to prove the second count of Rape against the 2nd Accused, they must establish beyond any reasonable doubt that;
- (i) The 2nd Accused;
 - (ii) During the specified time period (in this case between 15 and 16 March 2019);
 - (iii) At Taveuni, in the Northern Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and
 - (vi) The 2nd Accused knew or believed that the complainant was not consenting, or the 2nd Accused was reckless as to whether or not she was consenting.
- [8] The Assessors were further directed that in order for the prosecution to prove the third count of Rape against the 3rd Accused, they must establish beyond any reasonable doubt that;
- (i) The 3rd Accused;
 - (ii) During the specified time period (in this case between 15 and 16 March 2019);
 - (iii) At Taveuni, in the Northern Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and
 - (vi) The 3rd Accused knew or believed that the complainant was not consenting, or the 3rd Accused was reckless as to whether or not she was consenting.

- [9] Each of the above individual elements were further elaborated upon in my summing up in respect of the three charges.
- [10] In support of their case, the prosecution called the complainant KBL, a friend of the complainant, EV, and Corporal 3364 Merewalesi, who was the Investigating Officer in this case.
- [11] The three accused exercised their right to remain silent. A map of Taveuni Island was tendered to Court as Defence Exhibit DE1.
- [12] The prosecution and the defence by consent tendered to Court an Agreed Bundle of Photographs. The said bundle comprises of photographs of the 2nd Accused's residence, taken by the police during the course of their investigations and also photographs taken by the defence of the 2nd Accused's residence. The bundle also contains a map or sketch drawn by the police of the 2nd Accused's residence.
- [13] I have summarized the evidence of all witnesses during the course of my summing up. The complainant testified that her date of birth was 10 June 2001. Therefore, at the time of the alleged incident she was 17 years and 9 months old, and she is currently 19 years old.
- [14] The complainant testified as to how she and her friend EV had come to the 2nd Accused's house, on 15 March 2019, together with her cousin Meli, in the vehicle driven by the 2nd Accused. On the way they had picked up the 3rd Accused, who was said to be a friend of Meli and the 2nd Accused.
- [15] At the 2nd Accused's house they had started drinking alcohol. They had been drinking the Joskes, which were with Meli, and also some bottles of long neck beer. The complainant said that they drank the beer first and then the Joskes. The complainant testified that the five of them present at the time had consumed six bottles of long neck beer. They had all drunk the Joskes as well. She could not recall how many bottles of Joskes were consumed by them. However, she said that she felt really drunk. Although she could talk normally she said she was unable to walk normally. All this drinking was taking place in the kitchen of the 2nd Accused's house. Later the drinking had continued in the sitting room.
- [16] The complainant testified that the 2nd Accused had asked her to join him in going and picking up another friend of his from Vatuviri (The 1st Accused). She had agreed. Accordingly, she had accompanied the 2nd Accused and gone and picked up the 1st Accused.
- [17] After returning to the 2nd Accused's house, on picking the 1st Accused, the complainant had asked Meli where her friend EV was. Meli had said that EV was lying inside one of the rooms.

- [18] Thereafter, the complainant said she had kept on drinking for a couple of hours in the kitchen. Then she had wanted to take nap. The 2nd Accused had shown her his room. She had been lying down on the bed inside the room. The door to the room was closed but not locked. There had been a dim yellowish, orange light inside the room. The light had been attached to the ceiling.
- [19] The witness said that at the time she had been wearing a thin strap top and jeans. Inside she had been wearing her panties.
- [20] Thereafter, the witness testified as to how the 3rd Accused, then the 2nd Accused and then the 1st Accused, in that order, had sexual intercourse with her without her consent. At the time the 1st Accused was forcibly having intercourse with her she had blacked out. The prosecution version is that each of the three accused took advantage of the complainant's drunken state and had sexual intercourse with her without her consent.
- [21] The complainant said that a couple of hours later she had woken up, she had looked for her jeans and her panty and found them underneath the bed. She had put on her clothes and gone back to the kitchen. The three Accused, Meli and her friend EV were in the kitchen at the time.
- [22] She had then asked the 2nd Accused whether he has a spare towel so that she can take a bath. She had then taken a bath. The time had been past mid-night, She said she was still having a hang-over.
- [23] Thereafter, the complainant said that she and her friend had remained at the 2nd Accused's house until morning the next day. She and EV had left the 2nd Accused's house around 6.00 in the morning.
- [24] They had travelled to town by public transport. In town they had met one Master Praveen, who was a school teacher at South Taveuni Primary School. She and EV had then travelled in Master Praveen's white twin cab to Maravu. They had been in Maravu for a couple of minutes and then come back to South Taveuni Primary School. They had reached the school around 11.00 a.m., on 16 March 2019. Her friend EV had been dropped off at her home in Vuna by Master Praveen.
- [25] The complainant said that she had spent the rest of the day and that night (Saturday night) at Master Shamal's quarters at South Taveuni Primary School. While at Master Shamal's the police came looking for her the next morning. Thereafter, she had returned home.
- [26] The witness agreed that on Sunday morning (17 March 2019) the Principal of her School, D J Singh, the Vice Principal, Pratap and the Assistant Principal and Chaplain, Mrs Jennings had come outside Master Shamal's quarters and called her out.
- [27] The complainant testified that she was expelled from school following this incident. She also agreed that Master Shamal and Master Praveen were also dismissed from their employment.

- [28] The three accused totally deny the allegations against them. The defence position is that the complainant is fabricating the allegations of Rape against them. The accused totally deny that they had sexual intercourse with the complainant. The Defence position is that the complainant and her friend EV were drinking at the 2nd Accused's house till the morning of 16 March 2019 and that they were both treated very well. They had no complaints to make at the time they left the 2nd Accused's house.
- [29] The Defence position is that the reason why the complainant is alleging that the three accused raped her was because she had been expelled from her school (South Taveuni Secondary School) due to misconduct and because she required to gain entry to a new school.
- [30] The Defence also suggested that the complainant was too drunk so as to be aware of anything that happened to her that night.
- [31] It is clear from the evidence in this case that the 2nd Accused was known to the complainant and her friend EV, prior to the date of the alleged incident, which was 15 March 2019. However, it is also clear from the evidence that, the complainant and her friend EV, saw or met the 1st Accused and 3rd Accused for the first time on the date of the alleged incident. Thereafter, the complainant identified the 1st Accused, the 2nd Accused and 3rd Accused in Court; while EV identified the 2nd Accused and 3rd Accused in Court.
- [32] In the circumstances, I explained to the Assessors as to how they should deal with the evidence of dock identification and as to what weight they should give to the said evidence.
- [33] Considering all the evidence led in this case in its totality, I am of the opinion, that more than a reasonable doubt has been created by the defence in this case.
- [34] In my view, the Assessors' unanimous opinion in finding the 1st Accused not guilty of Count 1; the 2nd Accused not guilty of Count 2 and the 3rd Accused not guilty of Count 3, is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinions of the Assessors.
- [35] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charges of Rape against each of the accused, beyond reasonable doubt.
- [36] In the circumstances, I find 1st Accused not guilty of Count 1; the 2nd Accused not guilty of Count 2 and the 3rd Accused not guilty of Count 3 and accordingly I acquit the 1st Accused of Count 1; the 2nd Accused of Count 2 and the 3rd Accused of Count 3.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 15th Day of June 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Labasa.
Solicitors for the Accused : Maqbool & Company, Labasa.