

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 126 of 2019

STATE

v

NITIN NEERAJ KUMAR

Counsel : Ms. Swastika Sharma for the State
Mr. Avinesh Reddy for the Accused

Dates of Trial : 27-31 July 2020

Summing Up : 04 August 2020

Judgment : 10 August 2020

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "VW".

JUDGMENT

[1] The accused, Nitin Neeraj Kumar, was charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

NITIN NEERAJ KUMAR, on the 4th day of March 2019, at Nasinu, in the Central Division, penetrated the mouth of **VW**, with his penis, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

NITIN NEERAJ KUMAR, on the 4th day of March 2019, at Nasinu, in the Central Division, penetrated the vagina of **VW**, with his penis, without her consent.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 5 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by their unanimous decision, the three Assessors found the accused guilty of the two charges.
- [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 opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 207 (1) and (2) (c) of the Crimes Act No. 44 of 2009 (Crimes Act) and also the salient provisions of Section 207 (1) and (2) (a) of the Crimes Act.
- [6] The Assessors were directed that in order to prove the first count of Rape, the prosecution must establish beyond reasonable doubt that:
 - (i) The accused;
 - (ii) On the specified day (in this case the 4 March 2019);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Penetrated the complainant's mouth, with his penis;
 - (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[7] Similarly, Assessors were directed that in order to prove the second count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 4 March 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[8] Each of the above individual elements were further elaborated upon in my summing up in respect of the two counts.

[9] In support of their case, the prosecution called the complainant, VW. The prosecution also tendered as Prosecution Exhibit PE1- Photograph No 5 in the Photographic booklet dated 8 March 2019.

[10] The accused gave evidence on his own behalf and also called three witnesses, namely Jonathan Ashraf Amhaz, Salanieta Aditubuna and Komal Kushbu Nair, in support of his case.

[11] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:

1. The complainant is VW.
2. At the time of the alleged incident, the complainant was working at Movie Electro shop as a Sales Girl.
3. The accused is Nitin Neeraj Kumar.
4. The accused's date of birth is 8 September 1993 and he is 26 years old.
5. Movie Electro shop's main branch is at Nakasi.

6. After opening the shop, the complainant went to Movie Electro shop at Centre Point at around 11.00 a.m. [Although not specifically stated this should be on the day of the alleged incident-4 March 2019].
7. When the complainant reached the shop at Centre Point, she met the accused
8. The accused asked the complainant to get CDs from Nakasi. Since the accused was alone at the shop, the complainant went to get movies from Nakasi.
9. At around 12.30 p.m. the complainant reached the shop at Centre Point and only the accused was at the shop.

[12] Furthermore, In terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence have consented to treat the following as "*Additional Admitted Facts*".

1. The admissibility of the following document and its contents are not contested and the same will be tendered during trial by consent:

Photographic booklet dated 8th March 2019.

[13] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as "*Agreed Facts*" and "*Additional Admitted Facts*" without placing necessary evidence to prove them, they must therefore, treat the above facts as proved beyond reasonable doubt.

[14] I have summarized the evidence of all the witnesses in my summing up.

[15] The complainant clearly testified to the incidents which transpired on 4 March 2019.

[16] The complainant said she was working as a Salesgirl at Movie Electro Shop. She had been working there for about three months prior to the 4 March 2019. The Movie Electro Shop has 3 branches. The main branch was at Nakasi. The other 2 branches were at Yatu Lau Arcade in Suva and Centre Point. She had been working at the Suva branch.

[17] On the 4 March 2019, her boss Jonathan Amhaz had wanted the complainant to work at the Centre Point branch for that day.

[18] It is an admitted fact that when the complainant reached the shop at Centre Point, at around 11.00 a.m., she met the accused Nitin Neeraj Kumar. It is also an admitted fact that the accused asked the complainant to get CDs from the main branch at Nakasi. It is also admitted that since the accused was alone at the shop, the complainant went to get

movies from Nakasi. It is also admitted that around 12.30 p.m., the complainant reached the shop at Centre Point and at the time, only the accused was alone at the shop.

[19] The complainant said that she was meeting the accused for the first time that day. When asked as to how often she had met Nitin Kumar prior to 4 March 2019, the witness answered: *"It was the first time"*.

[20] The complainant said: *"When I reached the shop after 12.30 p.m., I wanted to go to use the washroom. And there was no toilet paper in the washroom. Then I came and asked Nitin for the toilet paper. And then he went to buy toilet paper from R. B. Patel. And then when he came back, I went to use the toilet. I went inside the toilet, but I never locked the door. I only pushed the door (closed but never locked it)."*

[21] The complainant then testified as follows regarding the alleged incident:

Q. *You told us you went to the toilet, you never locked it – you only pushed the door?*

A. *Yes.*

Q. *Why did you only push the door?*

A. *Because I did not expect anything to happen.*

Q. *When you came to the toilet where was Nitin?*

A. *He was inside the counter as shown on Photograph No. 3.*

Q. *Then what happened?*

A. *I went inside the washroom, I pushed the door but I did not lock, I pulled down my pants till my knee, as I was just about to sit down, he pushed the door inside.*

Q. *What were you wearing that day?*

A. *I was wearing jeans and a t-shirt.*

Q. *What else were you wearing?*

A. *A panty and a bra.*

I was about to sit down on the toilet pan.

Q. *Who pushed the door?*

A. *Nitin.*

Q. *What do you mean he pushed the door inside?*

A. *He pushed the door inside to come inside the toilet.*

- Q. *When he pushed the door, how did you feel?*
A. *I was scared.*
- Q. *What did you do?*
A. *I tried to stop him but I couldn't, because he had got in, closed the door and he stood there at the door.*
- Q. *How did you try to stop him?*
A. *I tried to push him away, but I couldn't because he was standing there, and his legs were blocking the door.*
- Q. *How did you try to push him away?*
A. *I tried to pull him to one side but I couldn't, because he had blocked the entrance and he braced himself using his hands on the wall.*
- Q. *Which wall did he put his hands on?*
A. *Photo No. 4. From inside the washroom (he put his hands) on the closed door.*
- Q. *Then what did you do?*
A. *I couldn't do anything because he had braced himself firmly on the wall.*
- Q. *And then what happened?*
A. *At that time my pants were already down on my knee, he then pulled down his pants also until his knee, then he told me to suck him.*
- Q. *What was Nitin wearing?*
A. *He was wearing long pants and a t-shirt.*
- Q. *What tone did he tell you to suck him in?*
A. *He did not tell me to suck him – but he just pulled down his pants, then he pulled my head down to suck him.*
- Q. *What did he use to pull your head down?*
A. *His hands.*
- Q. *Which hand?*
A. *His right hand.*
- Q. *When he was pulling down his pants, what were you doing?*
A. *I was asking him not to do it but to open the door.*
- Q. *What happened after that?*

A. *After he pulled my head down to suck him, he then turned me around to face the pan.*

Q. *What do you mean by 'suck him'?*

A. *To put my mouth into his balls (palo).*

Q. *Is there any other word for palo or balls?*

A. *Penis.*

Q. *What did you exactly mean by 'to put my mouth into his balls' (penis)?*

A. *For his ball to go inside my mouth.*

Q. *For how long was his penis inside your mouth?*

A. *2 minutes.*

Q. *When his penis was inside your mouth, what were you doing?*

A. *Nothing because he had already pushed down my head, and his hands were pressing my head.*

Q. *Which hands?*

A. *His right hand.*

Q. *What was he doing with his left hand?*

A. *He used it to pull down his pants.*

Q. *What were you doing with your hands?*

A. *Nothing, because when I tried to push him I couldn't.*

Q. *How did you feel when you had his penis in your mouth?*

A. *I felt scared, I felt yucky.*

Q. *After that what happened, what did he do?*

A. *He then forced me to face the (toilet) pan.*

Q. *How did he turn you?*

A. *He hold my head and he turned me to look at the back/facing the wall.*

Q. *How did he hold your head?*

A. *He was still holding on to my head and he turned me to face the pan, towards the wall.*

Q. *Which wall are you referring to?*

A. *Photo No. 4 – to face that pan (toilet pan), and facing that wall at the back.*

Q. *What were you doing when he did that to you?*

A. *I couldn't do anything because he was holding on to my head.*

Q. *Can you show which part of your head did he hold?*

A. *Witness demonstrates by holding the top of her head.*

Q. *And how was his grip when he was holding your head?*

A. *He was holding my hair firmly so I couldn't do anything.*

Q. *Then what happened (after he turned you to face the wall)?*

A. *After he turned me towards the pan, he then told me to bend down and then he inserted his balls into my female part.*

Q. *What do you mean by balls?*

A. *Penis.*

Q. *What do you mean by female part?*

A. *Vagina.*

Q. *For how long did he insert his penis into your vagina?*

A. *For 5 minutes.*

Q. *What were you doing in those 5 minutes?*

A. *I was scared, I did not know what to do.*

Q. *When Nitin was inserting his penis into your vagina, what was he doing with his hands?*

A. *He used his hands to grip on my lower waist.*

Q. *How did you feel at that time?*

A. *Scared.*

.....

Q. *You said Nitin had pulled down his pants. Can you tell us at the time he was inserting his penis into your vagina, how was his pants?*

A. *His pants were on his knees.*

Q. *What position were you in at the time he was inserting his penis in your vagina?*

A. *I was bending down facing the wall.*

Q. *After 5 minutes, after inserting his penis in your vagina, what happened?*

A. *After that he wore his pants, and he went out of the toilet. Also I wore my pants, took my bag and I left the premises.*

Q. *Where did Nitin go to?*

A. *He went out of the toilet and went and stayed at the counter.*

Q. *When Nitin went out of the toilet, how did you feel?*

A. *I was scared but I just took my bag, went out and I left.*

Q. *What were you scared of?*

A. *I was scared because it was the first time it had happened to me.*

[22] The complainant then testified that she had left Centre Point. She had got into a bus from there to Suva and come to the Movie Electro Shop in Suva. She had met her friend Salanieta and asked for her boss's number, since she did not know her boss's number. The complainant had then called her boss Jonathan. He had told her that he's busy that day, and told her to come and see him on the next day.

[23] On the morning of the next day she had gone and met her boss at his workplace at ANZ Bank and informed him of all that the accused had done to her the day before.

[24] During the course of her cross examination the complainant agreed to the following:

1. That the accused had no weapons with him at the time of the alleged incident.
2. That the accused did not physically assault her during the time of the alleged incident.
3. That the accused did not threaten her with physical violence.
4. That there were many shops besides the place of the alleged incident.
5. That she did not scream during the course of the incident.
6. That she did not have any sort of bruising on her body due to the alleged incident.
7. That she did not have any vaginal bruising following the incident.
8. That if she had kept her mouth closed, the accused could not have penetrated her mouth with his penis.

9. That the accused was skinny in built.
10. That at some point of time during the alleged incident, the complainant's vagina was lubricated (The complainant said that her vagina was not lubricated when he inserted his penis).
11. That she left the door to the toilet unlocked.
12. That she could have stood up when the accused was having vaginal intercourse with her.

[25] In cross examination it was suggested to the complainant that she knew the accused Nitin well before this particular day, had met him, seen him, spoken to him and worked with him. However, the complainant denied this suggestion.

[26] *The following further suggestions were, inter-alia, put to the complainant and she answered as follows:-*

Q. I put it to you that as usual you started flirting with Nitin?

A. No.

Q. I put it to you that he flirted back?

A. No.

Q. I put it to you that you and Nitin inevitably started kissing in the kitchen area?

A. No.

Q. I put it to you that you then had oral sex with my client outside the toilet, but beside the sink area?

A. No.

Q. I put it to you that you then proceeded into the washroom to have full vaginal sex (or else) from that point people could have seen you?

A. No.

Q. I put it to you that after consensual sex, my client ejaculated inside your vagina during the sex?

A. Yes.

Q. I put it to you that you then proceeded to ask my client to get toilet paper since there was none in the toilet?

A. No.

Q. I put it to you that Nitin went and brought toilet paper for you so that you can wipe the sperm off and around your vaginal area?

A. No.

Q. I put it to you that you proceeded outside to smoke with your friends?

A. No.

Q. I put it to you that from there, you went to Suva branch and met Salanieta?

A. Yes.

Q. I put it to you that you only told her that you want to see the boss about something?

A. No.

Q. I put it to you that you then left somewhere, came back and told her that Nitin raped you?

A. No.

Q. I put it to you that when she told you that you could have shouted and people could have heard you, you replied with a laugh and went to see your boyfriend?

A. No.

- [27] It was further suggested to the complainant that she could have even bitten the accused's penis after he penetrated her mouth.
- [28] The main issue of contention in this case is the issue of consent. The accused has testified in Court and totally denies the charges of Rape against him. He admits to both sexual acts as referred to the Information, but submits that the said acts took place with the consent of the complainant.
- [29] The accused testified that after the complainant arrived at the Centre Point shop on 4 March 2019, they had been testing the DVD's. While testing the movies, they had started joking – witness said like dirty jokes. The accused said that the joking went deep. He said *"She took it seriously, I took it seriously"*.
- [30] The accused then said: *"Then VW stood up, pulled my hand, she said come we will go to the kitchen and both of us went to the kitchen. Then she kissed me and I kissed her back."*

After we finished kissing I asked her if she wants to suck me – like putting VW's mouth inside my penis or my balls going inside her mouth. Ball means penis. She agreed. Then she went down. Then I pulled my pants down. Then she started sucking."

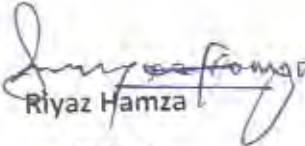
- [31] The accused said that this incident took place just near the sink and the toilet door. According to him, the complainant had been sucking his penis for less than 1 minute.
- [32] When asked as to then what happened, the accused said: *"Then she came back up again – then we started kissing again. Then she asked me if you want to have sex. And I asked her it's up to you, if you want it then we can do it....Since my pants was already down, she opened her pants, pulled it down and she turned around. She went into the toilet and had one hand on the pan and the other hand on the wall. She opened her pants before going to the toilet. She pulled down her pants up to her knees. Then she bent down.....When I went inside ready to have sex – when I wanted to insert my penis, she guided me through."*
- [33] When asked as to what he meant when he said the complainant guided him through, the witness said: *"She told me not that part of the private part – she held my balls/penis and guided it into her vagina. Then we started doing it – we started having sex."*
- [34] When asked whether the complainant was co-operating in the sex, the accused said yes, and said that the complainant was stating in Fijian: *"Lako Nitin, vama lua, vama lua"* meaning *"Go Nitin, go slowly, go slowly"*. The accused also said that the complainant was making sex sounds (the usual moans while having sex). The witness said this had lasted for about 3 minutes also.
- [35] The accused said that thereafter, he went back to the counter to serve customers. The complainant had remained in the kitchen. She had shouted from the kitchen saying that there is no toilet paper. So the witness had taken money from the till, gone to R. B. Patel, bought the toilet paper and given it to the complainant.
- [36] Thereafter, he testified that Komal had called asking him to send the complainant to the main branch at Nakasi. The witness had given the complainant her bus fare and the complainant had left for Nakasi.
- [37] Defence witness Jonathan Amhaz testified that he was the owner of the Movie Electro Shop. The accused, who was the cousin brother of his ex-wife, was working as a Salesperson at his shop. The witness said that the complainant was also working for him

at his DVD Shop. The witness confirmed that the complainant would have known the accused from the time she had started working for him at his DVD Shop.

- [38] He testified to the relationship the complainant had with fellow employees and that she used to frequently complain about her fellow employees.
- [39] The witness testified as to how the complainant had come to his office at the ANZ Bank and complained to him that the accused had forcefully tried to have sex with her.
- [40] Defence witness Salanieta Aditubuna, was working as a Salesgirl at the Movie Electro Shop. She too confirmed that the complainant and the accused knew each other since they were working together.
- [41] The witness testified to the events that took place on the 4 March 2019. The witness said that that day, the complainant had come to the Suva Shop and was fully joking and laughing. After joking she had said that she had come back from the Centre Point Shop. She had also said that she had just had sex with Nitin. She said *"she had sex from the shop and told us the story, and she went out."* When asked to explain further the witness said that the complainant had told her that Nitin had asked her to have sex from the back (meaning doggy style). The complainant had then left saying that she is going to see her boyfriend.
- [42] However, this witness was unable to satisfactorily explain as to why she had stated as follows in her Police statement: *"She told me that Nitin followed her to the washroom and they had sex. When she told me that Nitin raped her, I told her she could have shout and people could heard you."*
- [43] The final defence witness was, Komal Kushbu Nair, who worked as General Manager of the 3 branches of Movie Electro Shop. The accused was her cousin brother. The witness also confirmed that the complainant and Nitin knew each other before the incident and the reason for same. The witness denied that she ever asked the complainant to get married to Nitin as stated by the complainant during her testimony.
- [44] From the above testimony of all the witnesses it is clear to me that the complainant and the accused knew each other prior to the 4 March 2019, the date of the alleged incident. Therefore, this Court cannot accept the complainant's testimony that she was meeting the accused for the very first time on the day of the alleged incident. This casts a serious doubt on the credibility and reliability of the complainant's evidence.

- [45] Considering all the evidence in this case, reasonable doubts have also been caused in my mind as to the manner in which the alleged incidents of rape took place. I am of the opinion that the benefit of such doubts must be given in favour of the accused.
- [46] For all the aforesaid reasons, I find that the unanimous opinion of the Assessors in finding the accused guilty of the two charges of Rape is perverse and not justified. Therefore, the said opinions' of the Assessors is rejected.
- [47] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the two counts of Rape with which the accused is charged.
- [48] In the circumstances, I find the accused not guilty of the two counts of Rape.
- [49] Accordingly, I acquit the accused of the two counts of Rape.




Riyaz Hamza

JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 10th Day of August 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Reddy and Nandan Lawyers, Suva.