

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 59 of 2019

STATE

V

TIMOCI TUIYOYO

Counsel : Ms. S. Naibe for the State.
: Ms. V. Diroiroi for the Accused.

Dates of Hearing : 27, 28, 31 August, 2020
Closing Speeches : 01 September, 2020
Date of Summing Up : 01 September, 2020
Date of Judgment : 03 September, 2020

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "VL".

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) (a) of the Crimes Act 2009.

Particulars of Offence

TIMOCI TUIYOYO on the 10th day of March, 2019, at Nadi in the Western Division, penetrated the vagina of “VL” with his penis without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

TIMOCI TUIYOYO on the 10th day of March, 2019, at Nadi in the Western Division, unlawfully and indecently assaulted “VL” by touching her vagina.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of both the counts.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called one witness whereas the defence called the accused and another witness.
5. During the early morning of 10th March, 2019 the complainant was awakened by her father so that she could accompany them to the church. The complainant wanted to sleep so she did not go with her parents.
6. After her parents left, the complainant was alone in her house lying down in her bedroom when she heard the bedroom door open. She did not care because her brother usually came into her bedroom to take her phone.
7. When this person came and lay beside her at this time she smelt liquor the complainant still thought it was her brother. This person was so close that she could hear his breathing just as the complainant turned around to face this person the complainant’s face was covered with her blanket. The

complainant was turned over facing the floor whereby her mouth and her nose got blocked. When the complainant was lying face down, with her hands she was moving from side to side trying to defend herself and also gasping for breath since this person had covered her nose and mouth with his hand.

8. The complainant struggled for about 15 minutes both were pushing each other until she felt weak. At this time, her strapless bra was pushed down but her shorts and panty were removed, he started to touch her body and also her vagina. The complainant explained that with one hand this person had covered her mouth and nose from over the blanket.
9. The complainant was again turned face up and then he penetrated his erected penis into her vagina and had sexual intercourse with her for about 15 minutes without her consent. When this person was having sexual intercourse, the complainant's hands were free but she was tired and helpless since she had been lying facing the floor for about 15 minutes.
10. By this time, the accused hand slipped off her face the complainant removed the blanket that was covering her head and then she saw the accused, her maternal uncle. After recognizing the accused the complainant said "*aren't you ashamed we are in the same family and you doing this to me.*" The accused responded by saying, "*I have been admiring you for a long time.*" This conversation took place when the accused was over her and having sexual intercourse.
11. Moments later the complainant heard her mother's voice the accused stood up and jumped out of the window. The complainant was on her bed crying when her mother entered her bedroom. It was on the same day the matter was reported to police.

12. According to the complainant when she recognized the accused, she was shocked she did not consent to have sexual intercourse with the accused or for him to touch her vagina.
13. On the other hand, the accused told the court that he went to the complainant's house looking for Epeli the complainant's brother the door of the house was open so he went into the house and called out for Epeli.
14. There was no response so he went into Epeli's bedroom to check. In the bedroom he saw someone lying down fully covered in blanket so he kicked the person twice because he knew it was Epeli since it was Epeli's room.
15. The accused was shocked to see the complainant, the accused sought forgiveness and asked about Epeli, the complainant replied Epeli was not at home. The conversation was for about 2 minutes only, after a while the complainant's mother came into the bedroom and asked him what he was doing there.
16. The accused did not respond but stood up and walked away through the main door. He denied committing the offences as mentioned by the complainant and maintained that he did not do anything as alleged. The complainant made a false report against him.
17. The accused relationship with the complainant's family was not good in 2019 because he had a fight with the complainant's uncle.
18. Dr. Vasia Cati who gave evidence for Dr. Pene who had examined the complainant stated the professional opinion of Dr. Pene upon vaginal examination there were no signs of any trauma seen, however, these observations did not rule out that the patient was raped or sexually assaulted.

19. Taking into consideration the evidence adduced by the prosecution and the defence this court is unable to accept the evidence of the complainant as truthful and reliable. The evidence of the complainant is not plausible the narration given by her is also not probable. It is difficult to accept that the complainant had indeed undergone what she told the court and yet not receive any scratch of injury on her body or her vaginal area.
20. What is even more puzzling is that if the complainant's mother had come into the bedroom as narrated by the complainant then why did the complainant not tell her mother about what she had been through. The complainant did not say anything about this in her evidence at all.
21. Furthermore, the complainant had undergone a medical examination within 4 hours of the alleged incidents yet the examining doctor did not see any signs of trauma or injuries on the complainant. The doctor had also observed that the complainant was not distressed which is quite unusual considering what the complainant had told the court.
23. The accused on the other hand, gave a credible account of what had happened at the complainant's house, despite being vigorously cross examined he was consistent in his evidence. The inconsistencies between the accused evidence and his caution interview were not significant to upset or disturb his evidence. This court is able to rely on the evidence of the accused as reliable the demeanour of the accused was consistent with his honesty.
24. It was also obvious to me that the complainant was making up a story as she went along in her evidence without realizing that whatever she told the court was not reasonable. The description of what had happened to her was not convincing and probable to say the least.
25. On the totality of the evidence it is unsafe to find the accused guilty of any of the offences he is charged with. There are many doubts in this case.

This court is not satisfied beyond reasonable doubt that the accused on 10th March, 2019 had penetrated the vagina of the complainant with his penis without her consent and had also unlawfully and indecently assaulted her by touching her vagina.

26. For the above reasons, I accept the unanimous opinion of the assessors that the accused is not guilty of one count of rape and one count of sexual assault as charged. On the evidence before the court it was open to the assessors to come to a not guilty opinion.

27. The accused is acquitted forthwith. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

03 September, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.