

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 59 of 2017**

**STATE**

**V**

**ISHWAR CHAND**

**Counsel** : Ms. L. Latu and Mr. A. Kumar for the State.  
: Mr. S. Luvena for the Accused.

**Dates of Hearing** : 02, 03, September, 2020  
**Closing Speeches** : 04 September, 2020  
**Date of Summing Up** : 08 September, 2020  
**Date of Judgment** : 08 September, 2020

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "MS")*

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

*Statement of Offence*

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

*Particulars of Offence*

**ISHWAR CHAND**, on the 1<sup>st</sup> day of January, 2016 at Sigatoka in the Western Division, had carnal knowledge with "**M.S**", without her consent.

2. The three assessors had returned with a mixed opinion that the accused was not guilty of the offence of rape as charged by a majority of two is to one. The prosecution called three witnesses and the defence called the accused and another witness.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. On 31<sup>st</sup> December, 2015 the complainant with Anita and Angeline travelled to Sigatoka to work on the farm where the accused was working. The wife of the accused namely Shareen had arranged for the complainant to work on the farm.
5. Upon reaching Sigatoka the accused and his wife were waiting for them they paid their minivan fare and then all went for shopping. The accused bought six bottles of beer by the time they reached the house of the accused it was getting dark.
6. At the house of the accused Anita was cooking while the accused and his wife with the complainant started drinking beer. After the 6 bottles of beer had finished they drank one bottle of wine. Four more bottles of beer was purchased the complainant drank only 2 glasses and by this time it was early hours of 1<sup>st</sup> January 2016.
7. Before going to sleep the complainant told Anita that she should look after her since she was uncomfortable with the accused particularly the way he was talking to her and while doing shopping he wanted to be with her and not his wife.
8. When the complainant went to sleep the accused and his wife were drinking, she was tired of travelling and was drunk.

9. While the complainant was sleeping she felt somebody on top of her having sex. Her mouth was pressed which stopped her from saying anything, but she was able to make a sound with her mouth closed. At this time the complainant pinched her niece Angeline to wake her who then hit the accused with a book.
10. At this time, the accused pulled the complainant to the other side of the curtain, by this time Anita woke up and shouted and also swore at the accused and then pushed the curtain aside. The accused jumped over his wife and went outside. The complainant stated the accused had inserted his penis in her vagina while with one hand he was pressing her mouth.
11. The reason why the complainant was certain the accused had inserted his penis into her vagina was when he had come on top of her, she woke up but couldn't shout because the accused was pressing her mouth with his hand and having sex with her. The complainant did not give permission to the accused to have sex with her.
12. The complainant was medically examined the same day at the Sigatoka Hospital. The doctor had observed injuries on the labia majora, perineum and the cervix which were consistent with forceful trauma.
13. The final witness Anita Devi informed the court that the complainant is her sister in law, on the 31<sup>st</sup> December 2015 the witness with her daughter and the complainant went to Sigatoka. The witness was not drinking but the complainant, the accused and his wife were.
14. After the complainant slept the witness also slept but she does not know when the accused and Shareen came and slept. When sleeping Angeline hit her on her leg and she woke her up, at this time Angeline hit the accused with the book the witness had used to fan herself.

15. The complainant was on the other side of the curtain and not where she was sleeping when she went to bed. The witness saw the accused trying to block the complainant's mouth she quickly got up and pushed the curtain. She saw the accused on top of the complainant, both were naked and having sex. The witness yelled and screamed at the accused who then jumped off and ran outside. The complainant was crying and she wanted to go home.
16. On the other hand the accused informed the court, on 31<sup>st</sup> December, 2015 he met the complainant, Anita and Angeline for the first time at Sigatoka town with his defacto partner Shareen.
17. Since the complainant and Anita did not have any money the accused paid \$100 each to the complainant and Anita out of which their fare was also paid. The amount of \$200 was obtained by the accused as a loan from the owner on the condition that the complainant and Anita will work and the money will be deducted from their wages.
18. All of them contributed towards shopping and then 6 bottles of beer was purchased. After 6pm they all arrived at their home Anita started to cook while the complainant, Shareen and the accused drank 6 bottles of beer and one bottle of wine. Since the complainant wanted to drink more the three of them went to buy more beer. After buying 4 bottles of beer they came back home.
19. At the time they were drinking the 4 bottles of beer the complainant said that she will go back home tomorrow and that she will not work. The complainant asked the accused to ask his employer for another \$100 and that Anita will be paying \$300 by working in the farm.
20. When everyone went to sleep the accused and Shareen did not sleep after about 15 minutes the complainant started to cry. At this time, the accused

and Shareen were lying down on the bed and talking when they heard the complainant cry.

21. When Shareen asked the complainant why she was crying the complainant did not say anything it was Anita who said that the accused had raped the complainant.
22. When the accused heard this he jumped out of the bed and stood up, he did not say anything but went and told his employer about the allegation made against him.
23. The accused also stated that when the complainant was crying he was not near the complainant he denied the allegation he maintained that he did not do anything to the complainant as alleged.
24. The final defence witness Shareen Monika Prasad informed the court that in 2015 she was living with the accused in a defacto relationship.
25. According to the witness when they were drinking the 4 bottles of beer the complainant was asking for \$100 and saying that she will leave for Suva the next day.
26. The complainant also said that Anita will stay back and work in the farm when the accused and the witness Shareen said that they did not have the money the complainant was forcing them to ask their landlord to give \$100. After the drinks finished the complainant went to bed, however, the accused and the witness were not sleeping they were lying down on the bed talking more or less whispering.
27. The accused was lying towards the corner and the witness was beside him with the complainant next to her. After about 15 to 20 minutes the

complainant started crying. At this time the witness woke up and sat on the bed and then went to the complainant.

28. The complainant held the witness tightly when she asked what happened the complainant said the accused had raped her. At this time Anita stood up and said that she had seen what the accused had done to the complainant, Angeline was also awake.
29. The witness could not believe what Anita had told her and she told Anita to stop lying because the accused was beside her and both were awake. The witness maintained that nothing happened as alleged by the complainant and it was a lie.
30. Taking into consideration the evidence adduced by the prosecution and the defence I accept the evidence of the complainant as truthful and reliable. I have no doubt in my mind that the complainant told the truth in court.
31. She gave a coherent and clear account of what had happened to her that early morning. Her demeanour was consistent with her honesty. The complainant was able to withstand cross examination and was not discredited.
32. On the other hand the accused and his former defacto partner did not tell the complete truth. The accused had met the complainant for the first time the accused himself was an employee of the owner yet he was supposedly doing things which the owner should have done.
33. I reject the defence assertion that the complainant had a motive to make a false allegation against the accused who she had met for the first time.

34. It was obvious to me that the accused and his former defacto partner had made up a story to make it look like it is the complainant as well as her sister in law Anita who had acted in concert to implicate the accused.
35. The sleeping arrangement in my view was not such that the accused would not have come on top of the complainant as stated by her.
36. The medical report of the complainant also supports the complainant's version of forceful sexual intercourse and I accept the opinion of the doctor that the complainant's cervix and the labia majora had sustained injuries with palpation and abrasions as mentioned in the medical examination form. The complainant had also promptly reported the matter to the police. I also accept the distressed condition of the complainant was genuine after the incident which was seen by Anita and Shareen.
37. Furthermore, Anita had also seen what the accused had done to the complainant I accept Anita was able to see the accused clearly since the curtain had moved which gave an uninterrupted view to this witness. Although Anita had agreed that she had misled the court in respect of the sleeping arrangement I accept she had not understood the question correctly.
38. There is nothing to suggest to me that Anita also had any motivation to falsely implicate the accused. This witness gave an honest account of what she had seen who was forthright and believable.
39. Like the accused his former defacto partner Shareen did not give an honest account of what had happened on the bed. I reject the defence evidence that the accused and Shareen were talking and/or whispering to each other after a long night of drinking. Shareen was obviously trying to save the accused with whom she had been living for some time (although not now).

40. I accept the evidence of all the prosecution witnesses as reliable and credible. The evidence of the accused and his former defacto partner is not tenable on the totality of the evidence.
41. The defence has not been able to create a reasonable doubt in the prosecution case.
42. This court is satisfied beyond reasonable doubt that the accused on the 1<sup>st</sup> of January, 2016 had penetrated the vagina of the complainant with his penis without her consent.
43. I also accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.
44. In view of the above, I accept the minority opinion of the assessors that the accused is guilty of one count of rape as charged.
45. I find the accused guilty as charged and I convict him accordingly.



**Sunil Sharma**  
**Judge**

**At Lautoka**

08 September, 2020

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Howell and Associates, Tavua for the Accused.**