

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 10 of 2020

STATE

V

VINOD CHAND

Counsel : Mr. S. Seruvatu for the State.
: Ms. S. Veitokiyaki and Mr. A. Kumar for the
Accused.

Date of Hearing : 27 June, 2023
Closing Speeches : 29 June, 2023
Date of Judgment : 30 June, 2023

JUDGMENT

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

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

VINOD CHAND on the 28th day of December, 2019 at Sigatoka, in the Western Division, had carnal knowledge of “U.L” without her consent.

2. In this trial, the prosecution called one witness and after the prosecution closed its case, this court ruled that the accused had a case to answer for the count of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. In respect of the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis

without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element of the offence is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the penis. This element is also not in dispute.
8. The third element of consent is in dispute which means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his

penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

15. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
16. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

17. The complainant informed the court that in the year 2019 she was residing with her husband the accused. From July, 2019 till December, 2019 due to some domestic issues despite living under one roof the couple did not have any relationship between them. They were sleeping in different bedrooms.
18. On 28th December, 2019 at about 11pm the complainant was in her bedroom while the accused was in the sitting room drinking beer. When she was going to the washroom the accused came and held her from behind and swung her around making her face the wall. The complainant struggled to free herself so she sat on the floor.
19. As she sat down the accused pushed her and made her lie on the floor and then pulled her towards the door skirting and pushed her chin upwards with his hand. Thereafter the accused pressed her chest with both his hands and put one of his knees on her stomach.
20. The complainant at this time was struggling with the accused trying to free herself and at the same time asking the accused to leave her. At this time the complainant started to have short breath so she put her hand under her head.
21. The accused told her to stay straight and be calm he then started to remove her shorts with one hand. The complainant was lying down and she could not do anything the accused was able to remove her shorts and after removing his shorts he penetrated his penis into her vagina and had sexual intercourse. The complainant continued to tell the accused that she did not want this.

22. The accused said he will ejaculate inside, the complainant said not to do this then the accused said he will ejaculate on top of her, the complainant said no. Thereafter the accused pulled out his penis and went to the washroom. By this time there was no electricity in the house and it was raining heavily. She quickly wore her clothes and went into her bedroom and locked it.
23. Finally, the complainant said that she did not consent to have sex with the accused. The next day she went in the neighbour's car and reported the matter at the police station.
24. In cross examination the complainant stated that although she stayed under the same roof with the accused there was no relationship between them.
25. The complainant said what she told the court she had told the police officer writing her police statement. The complainant was referred to her police statement dated 29th December, 2019 taken at 10am when asked to show where in the police statement she had told the police officer the accused had said to her to be straight and stay calm the complainant said it was not there including the fact that the complainant was pushed towards the door skirting and the accused had pressed her chin upwards. It was also not in her police statement that she had put her head on her hand to avoid hitting the door skirting.
26. The complainant denied that she was never pushed by the accused to the door skirting or he had not put his hand up her chin or had not forced her to have sex with him. The complainant denied lying in court she did not scratch the accused or push him off her with her hand under her head.

According to the complainant the accused was powerful and at this time she was lying on the floor.

27. Upon further questioning the complainant maintained that the accused had one knee on her stomach and the other knee on the floor. When the complainant was questioned where in her police statement it was mentioned that the accused had one knee on her stomach and the other knee on the rug the complainant said it was not there.

28. The complainant denied that she had wanted to have sex with the accused. She maintained that she did not consent for the accused to have sex with her. When it was suggested that she could have immediately gone to the police the complainant explained:

“Myself, I am a lady, how can I go in the night when the power is off, raining heavily no transport... I just went inside my room so that I can be safe by next morning...”

29. The complainant denied she had made a false allegation of rape to get the accused out of his house.

30. In re-examination the complainant stated that whatever she told the court that was not in her police statement had happened to her that night.

PREVIOUS INCONSISTENT STATEMENT

31. This court directs its mind to the fact that the defence counsel during cross examination of the complainant had questioned her about some inconsistencies in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.

32. This court is allowed to take into consideration the inconsistencies or omissions between what this witness told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents.
33. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
34. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
35. This was the prosecution case.

DEFENCE CASE

36. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
37. The accused informed the court that the complainant was his wife and they got married in September 2008, however, the marriage ended in a

divorce in 2021. In 2019 the couple had some differences otherwise they had a good relationship with each other.

38. According to the accused they had a very good sexual relationship. The accused had sex with the complainant two times in a day or sometimes three times on the bed, on the settee, on the rug and under the shower.
39. On Saturday 28th December, 2019 in the evening the accused drank 3 bottles of beer at about 11.30 pm he wanted to go and sleep. At this time he was in the sitting room talking with the complainant. The complainant went to her bedroom removed her trousers came back and held the accused and said that they should stay nicely and they should have sex.
40. Upon hearing this, the accused said he did not at any time force the complainant to have sex with him. The accused also stated that what the complainant told the court about him that he had forced her is not correct, she lied in court. After having sexual intercourse both had their shower and both went into their respective bedrooms to sleep.
41. The accused maintained that the complainant had consented to have sexual intercourse with him that night. He denied all the allegations raised against him by the complainant.
42. In cross examination the accused agreed in 2019 there were some issues or problems between the complainant and him. As a result since September, 2019 they started sleeping in separate bedrooms but they continued having sexual intercourse.
43. On the night of 28th December, when the accused was drinking beer in the sitting room the complainant was in her bedroom. The accused denies all

the allegations raised against him by the complainant. He maintained that he had sexual intercourse with the complainant but with her consent.

44. The accused denied there was any separation between him and the complainant when asked why they were sleeping in two separate bedrooms. The accused stated "*she went away she said I want to sleep alone we use to do housework together. We use to do everything together we use to have sex together but sleeping in other rooms.*"
45. The accused maintained that he loved his wife very much and that she had consented to have sex with him that night. There was no electricity outage at the time they were having sexual intercourse and there was no heavy rain, the weather was fine.
46. This was the defence case.

ANALYSIS

47. The prosecution states that the complainant and the accused were husband and wife. From July, 2019 till December, 2019 although the complainant and the accused were living under one roof they were not having any marital or sexual relationship. As a result they were sleeping in separate bedrooms.
48. On 28th December, 2019 at about 11pm the accused was drinking beer in the sitting room. The complainant was in her bedroom, she was going to the washroom when the accused came from behind held her and swung her around. When he stopped the complainant was facing the wall she sat on the floor in the hope that the accused would leave her.

49. The accused did not stop but pushed her on the floor and pulled her towards the door skirting. The accused pushed her chin upwards with his hand. Thereafter the accused pressed her chest with both his hands and put one of his knees on her stomach.
50. The complainant at this time was struggling with the accused trying to free herself and at the same time asking the accused to leave her. Due to the pressure on the chest the complainant started to have short breath.
51. The accused told her to stay straight and be calm he then removed her shorts with one hand. The complainant was lying down and could not do anything the accused was able to remove his shorts and he forcefully penetrated his penis into the complainant's vagina and had sexual intercourse. The complainant did not consent to have sexual intercourse with the accused.
52. On the other hand, the defence says the allegation is a made up story she changed her tune after consenting to have sex with the accused. A scrutiny of the complainant's evidence will show that whatever she told the court is a lie. There is a doubt on how the accused would have had forceful sexual intercourse with the complainant in the manner described. She did not say anything or provide any resistance whatsoever and there is no evidence of any injuries to her.
53. This is a case of negating from her consent with a view of taking over the house of the accused where the complainant was living. She has set up the accused in such a manner that he is now at her mercy. The couple have been married for over ten years and despite their differences they were living under one roof.

54. The accused and the complainant have been fulfilling their marital responsibilities towards each other and they have been actively having sexual intercourse wherever it was convenient for them within the house. Although it was night time the complainant had all the opportunity to leave the house and seek assistance from the neighbour or push the accused when he was on top of her but she did not because she had consented and was part of the equation. As a matter of fact the complainant came into the sitting room and both had consensual sexual intercourse. There is nothing wrong with that they have done this on many occasions.
55. The complainant was never forced by the accused she consented to have sexual intercourse it was only due to her greediness in getting the property of the accused that she is crying rape.
56. The complainant had given two police statements when facts were fresh in her mind yet she told the court some other things. What she told the court was not told to the police officer writing her police statement points to her credibility.
57. The defence submits that the complainant made up a story to divert attention from the truth that she had consented to have sex with the accused that night. The inconsistencies are crucial which shows that the complainant did not tell the truth in court and has in the process made a false allegation against the accused.
58. Finally, the defence is asking this court not to give any weight to the evidence of the complainant but to consider the accused evidence which was what had actually happened.

DETERMINATION

59. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
60. In this case it is not in dispute that the complainant and the accused at the time of the allegation were husband and wife and they were sleeping in separate bedrooms. The separation between the two was due to some dispute between them. The only issue in this trial is whether the complainant had consented to have sexual intercourse with the accused.
61. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a consistent and coherent account of what the accused had done to her. She was able to withstand cross examination and was not discredited as to the main version of her evidence that she had not consented for the accused to have sexual intercourse with her that night. The complainant was steadfast in what the accused had done to her and she maintained her complaint throughout her evidence. I have no doubt in my mind that the complainant told the truth in court.
62. I accept that the complainant could not have told anyone about what the accused had done to her in the middle of the night so the only available opportunity to her was the following morning whereby she promptly reported the matter to the police. I also accept that the complainant had locked the door of her room after the incident for her safety. In my considered judgment the lack of resistance by the complainant in pushing

the accused away from her cannot be taken in isolation but in the totality of the circumstances of the complainant.

63. The complainant had done what she could have possibly done and I accept when the accused was using force on the complainant he was more powerful than her. Another important fact is that the complainant and the accused were not sleeping in the same room.
64. I reject the evidence of the accused that there was no separation between him and the complainant as not worthy of belief. I also do not believe the accused when he said that despite sleeping in separate bedrooms they were having sex.
65. I accept that the accused had forcefully penetrated his penis into the vagina of the complainant without her consent. Furthermore, the accused knew or believed the complainant was not consenting and he did not care if she was not consenting at the time. The failure by the complainant to tell anyone about what the accused had done immediately after the incident does not affect her credibility.
66. Experience has shown that individuals differ in terms of how they react after an unexpected happening. Some display obvious signs of distress and some not. The fact that the complainant did not call the police or tell her neighbour in the middle of the night does not mean that she cannot be believed or nothing had happened without her consent.
67. I accept that there were some inconsistencies or omissions between what the complainant told the court and her police statements, however, those discrepancies were not significant to adversely affect the credibility or the

thrust of the complainant's evidence. Passage of time does affect one's memory.

68. The complainant was not shaken as to the basic version of her allegation. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

69. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following manner about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony* (1985) 1 SCC 505:

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'


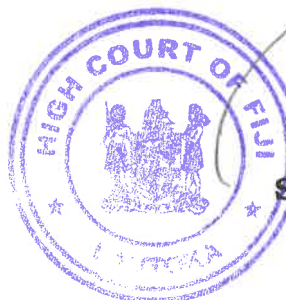
70. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. I reject the defence assertion that the accused had not done anything to the complainant without her consent as unworthy of belief. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said there was no separation between him and the complainant and they continued having sexual intercourse while sleeping in separate bedrooms does not make sense. He was narrating in court a story of an ideal man who was approached by the complainant to have sex with her is unbelievable and fanciful. I also reject the defence assertion that the complainant was motivated to make a false allegation so that she removes him from the property and she gets all the shares in the property is an afterthought.
71. In cross examination I also noted that the accused was not answering questions asked he was putting up a strong appearance to show to the court that he was a victim of the complainant's dishonesty in saying that she had not consented to have sexual intercourse with him. I reject the

evidence of the accused as unreliable and untruthful in this regard. This court rejects the defence of consent as not worthy of belief.

72. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

73. This court is satisfied beyond reasonable doubt that the accused on 28th December, 2019 had penetrated the vagina of the complainant with his penis without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
74. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.
75. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka

30 June, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Babu Singh & Associates, Nadi for the Accused.