

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 12 OF 2019

THE STATE

v

MOHAMMED RIZWAN ALI

Counsel : Ms. S. Naibe with Ms. Prakash for State
Ms. K. Boseiwaqa with Mr. A. Swamy for Defence

Dates of Hearing : 6, 7 and 8 February 2023

Date of Judgment : 10 February 2023

(The name of the Complainant is suppressed. She is referred to as BA)

JUDGMENT

1. The Accused is charged with one count of Sexual Assault contrary to Section 210 (1)(a) of the Crimes Act 2009 (Count 1), and one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009 (Count 2).
2. The Accused pleaded not guilty to the charges. The trial commenced on the 6 February 2023 and concluded on 8 February 2023. The Prosecution presented the evidence of BA, the

complainant, her mother and her eldest brother. At the end of the Prosecution case, the accused was put to his defence. The accused exercised his right to remain silent and did not call any witnesses. The counsel from both sides made oral submissions and supplemented the same with written submissions. Having carefully considered the evidence presented at the trial and the submissions, I now proceed to pronounce my judgment as follows.

3. The Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. The burden never shifts to the accused at any stage of the trial. I shall not draw any negative inference from accused's election to remain silent. The presumption of innocence in favour of the accused will prevail until the charges are proved beyond reasonable doubt.
4. According to the Information, the accused on Count 1 is charged with Sexual Assault. A person commits the offence of Sexual Assault if he unlawfully and indecently assaults another person (Section 210 (1) (a) of the Crimes Act). The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act 'indecent'.
5. Section 207(2) (a) of the Crimes Act which describes the offence of Rape (as charged) reads as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent.
6. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given. The Prosecution is required to prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.
7. I shall now summarise the salient parts of evidence led in this trial.

PW 1 - BA (The Complainant)

8. BA, now aged 17 years, is a student of Form 6. She resides in a four bed room house at Vatiaka, Ba, with her parents and four brothers. The eldest brother Rehan is 13 years.
9. In 2019, she was only 13 years old and attending class 7. On 8 January 2019, she was home, playing with her four brothers. Ridu, who lived in the same village, came home and asked for water. She knew Ridu because he used to come to her house to charge his phone and also to drink water. Her family had a good relationship with Ridu. She gave him water and went to the kitchen to wash dishes. Ridu came to the kitchen from her back and started touching her breast and her vagina. He then put his hand on her vagina on top of her clothes. She was wearing long pants, a vest and a blue t-shirt. She felt bad and tried to push him. She ran away from there. Then Ridu went out. She locked the gate and came inside the house. At that time her brothers were still playing outside.
10. After that, Ridu opened the gate and came back inside the house. He picked her and carried her to the bedroom on his shoulder and put her on the bed. She told him to leave her, but he did not leave her. He took off his clothes and her clothes and started touching her breast, vagina and the whole body. Then he kissed her and her vagina. He put his penis in her vagina. After that he took out his penis and fell the water from his penis on the rug. When asked how she did feel when he put his penis in her vagina, her answer was that 'I didn't like it'. She could not do anything though she wanted to kick him and run away. He was holding her leg and the hand so tight. At that time, no conversation took place between her and Ridu. She could not shout for help because he was holding her mouth. She did nothing when she was putting his penis in her vagina because he was holding her tightly. She didn't like what he was doing. Once he was done, he wore his clothes and ran away. She picked her clothes and ran to the washroom to have a wash. When he was in the wash room, Ridu asked -*where is the ice which you gave me?* She replied- *Where you put it, you just find it.* This incident happened at around 3 p.m.
11. When her mother, Jasmine Nisha returned home in the afternoon from work, she looked so afraid. Her mother asked her what the matter is. She told everything Ridu had done to her.

Mother was shocked and she wanted to beat her. Then mother told her father who then called Ridu and his wife on phone.

12. She identified the accused in the dock as the person she referred to as Ridu.
13. Under cross-examination, BA said that the door, once locked from inside, could be opened from outside because there was a hole in it. After having a wash, she did not change the bed sheet because she had just changed the bed sheet recently. She admitted that the day the incident happened, she was having second day of her menstruation and that she had had her pad on. She was bleeding, but wasn't bleeding heavily. The blood was not dripping down her body onto the bed sheet.
14. She yelled for help. Ridu was holding her hand tightly and also put his hand on her mouth. She was just lying on the bed facing the ceiling, looking up at the whole time and couldn't see anything else that was happening at the lower part of her body. She even did not want to see the bad thing that was happening. She could only feel what exactly was happening. Things were not fresh in her mind when she made the statement to police as she was worried about what had happened. She could not remember if she told the police that Ridu carried her on his shoulders.

PW 2: Jasmin Nisha

15. Nisha is the mother of BA. She has five kids, one daughter and four boys. In the year 2019, she was residing in Vatiaka, Ba. She recalls an incident happened in 2019. When she was returning home from work at around 5 p.m., her third son, Mohammed Riazul came to the bus stop and started telling a story of what had happened in the day time. When she reached home, BA came to her crying. BA looked frightened and she told that, when she was playing with the kids outside, Mohammed Rizwan entered the house and asked for a glass of water. When the daughter gave him water, he got hold of the daughter up in his arms, hugged her, put her on the bed and took off her clothes. BN said she saw some water on her legs. Then she got off the bed. She told her husband what she heard from BA. Her husband called Rizwan and his wife. He knew Rizwan who worked in farms. He is known in the area as Ridu. He used to come home to drink water and charge the phone.

PW: 3 Mohammed Rehan

16. Rehan, 13, is the eldest brother of BA. In 2019, he was 10 years of age. When they were playing in the compound, one boy, by the name of Ridu, came and wanted to play hide and seek. Ridu made them climb a tree and went inside the house. Ridu went to his sister Bubu and asked for a glass of water. Bubu gave him water. Then Ridu went inside to put the glass and started kissing and touching Babu on her shoulder. Bubu was saying *move, move, nai karo means don't do it*. Ridu got hold of Bubu and took her to the bedroom when Bubu was crying. He closed the door and took off Bubu's clothes and his clothes. Ridu climbed on Bubu and started kissing Bubu. He saw Ridu jumping on top of Bubu. He saw everything from the window and the hole on the wall from a distance of two meters. There was light in the room and nothing was obstructing his view. When he was looking through the window, Ridu said *-what you people doing here?* He told Ridu- *we looking at our sister*. Ridu kissed Bubu, opened the door and came outside. Then his wife came and took him.
17. He knew Ridu as a person who used to come home twice a week to charge his pone and take a bottle of ice. Ridu is from the same village. When Ridu comes home at times, he used to talk to him. When the State Counsel asked Rehan whether he would be able to identify Ridu, his reply was 'No'.
18. That is the case for Prosecution.

Analysis

19. Prosecution substantially relies on the evidence of the complainant. To support its case, the Prosecution called complainant's mother Jasmin Nisha and her eldest brother Rehan. Prosecution says that the complainant is an honest and truthful witness and that her evidence should be accepted. The case for Defence is one of complete denial. They say that the complainant did not tell the truth in Court and that the accused was never present at complainant's house the day the alleged incident took place.
20. Prosecution invites the Court to take several pieces of evidence into account, which they say are consistent with those of an honest rape victim, in evaluating the credibility of the

complainant. They include evidence on recent complaint, distressed post incident conduct and lack of motive on the part of the complainant to fabricate an allegation against the accused.

Recent complaint

21. The Defence Counsel argues that the alleged recent complaint should not in the circumstances of this case be admitted as a piece of evidence that would prove the consistency of the conduct of the complainant.
22. The decision as to whether a complaint is sufficiently consistent for it to be admissible must depend on the facts of each case. The complainant said upon mother's arrival at home in the same afternoon she told her mother *everything* that had happened to her during day time. Her mother, Nisha, gave evidence and confirmed that her daughter came to her crying to make the complaint. It was indisputably a 'recent' complaint in the sense that it had been made at the first available opportunity.
23. The Defence does not appear to dispute that the recipient of the complaint, Nisha, is a truthful witness. Their position seems to be that her evidence is not consistent with complainant's evidence that she told everything to her mother. The argument seems to be that, if the complainant had been raped, she should have told her mother that she was raped.
24. The complainant in her complaint had not told her mother that the accused raped her or put his penis in her vagina. The complainant had only told that Mohammed Rizwan got hold of her up in his arms, hugged her, put her on the bed, took off her clothes and that she saw some water on her legs.
25. It is apposite to recite here what the English Court of Appeal had said in *Spooner v R* [2004] EWCA Crim. 1320. 23. Spooner considered the degree of consistency required for the evidence of recent complaint. Thomas LJ said:

The decision in each case as to whether it is sufficiently consistent for it to be admissible must depend on the facts. It is not in our judgment necessary that the complaint discloses the ingredients of the offence; it will, however, usually be necessary that the complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the defendant which could support the credibility of the complainant. It is not, therefore,

usually be necessary that the complaint describes the full extent of the unlawful sexual conduct alleged by the complainant in the witness box, provided it is capable of supporting the credibility of the complainant's evidence given at the trial.

Differences may be accounted for by a variety of matters, but it is for the jury to assess these. For example, in cases of alleged abuse (such as this) by a stepfather or other family member, it would be for the jury to consider whether the difference arises because, as is known to happen on some occasions, the complainant cannot bring herself to disclose the full extent of the conduct alleged against the defendant at the time of the contemporaneous complaint.

26. Spooner was considered by the Fiji Court of Appeal in *Senikarawa v State* [2006] FJCA 25; AAU0005.2004S (24 March 2006). In Seneikarawa, the complainant in her evidence-in-chief had said that she complained to her mother about the rape by the appellant. However, the mother gave no evidence that her daughter complained to her of rape but only of other uncharged acts and that the accused put chillies on her private parts. The mother said that she couldn't recall if her daughter told her of any other sexual assault. She said "she may have told me but I don't recall." The Court took the view that there was no evidence of recent complaint of rape fit to be put to the assessors.
27. The present case in my opinion is different. In this case, the complainant in fact complained of matters relating to sexual assault when she said she was hugged, put her on the bed, her clothes taken off and that she saw some water on her legs. Therefore, I am unable to agree with the contention of the Defence that Nisha's evidence is not capable of supporting the credibility of the complainant's evidence given at the trial. The complainant at that time was a child of 13 years of age. The recipient of the complaint was none other than her mother who, upon being told of the story, had wanted to beat the complainant. The conduct of the mother and the cultural taboos existing in our society that discourage discussions of sexual matters with adults would have prevented the complaint from describing the full extent of the unlawful sexual conduct alleged by her in the witness box. Therefore, I take the complaint made to her mother by the complainant into consideration to weigh the consistency and credibility of the complainant's conduct.

Distressed Condition

28. There is evidence that, at the time the complaint was made to her mother, the complainant was in a distressed condition that is consistent with the conduct of a rape victim. She said she was crying and looked afraid. Her mother confirmed that the complainant came to her crying and she looked frightened.

Motive

29. According to the complainant, she and her family had maintained a good relationship with the accused. Accused was a neighbour who used to come to her house to charge his phone and drink water. Her mother Nisha confirmed complainant's evidence that there was no animosity between her family and that of the accused. Accused's wife used to come to her place to give some clothes for sewing and she even offered to baby sit her kids. The propositions that accused had not allowed his wife to babysit at her place and that the accused was not allowed to work in her husband's farm were denied by Nisha. Complainant's brother, Rehan, also confirmed that the accused used to visit complainant's house to charge his phone and drink water. There is no evidence whatsoever to suggest that there had been any animosity between the complainant's family and the accused prompting the complainant to fabricate such a serious allegation against the accused.

Alleged Inconsistencies.

30. The Defence Counsel pointed at what she called inconsistencies (inter se and per se) in the Prosecution case. However, none of them are capable of effectively discrediting the version of events of the case for Prosecution. There is no material contradiction between 'carried me on his arms' and 'carried on my shoulders'. It is not that material who, whether it was the complainant or her brother, in fact gave water to the accused, even if there is an inconsistency there. Even an adult victim in a rape case would not be in a position to give a photographic account of what actually happened on the day of the incident, particularly after approximately four years. She said her memory was not 'fresh' in her mind when she made the statement to police because she was worried about what had happened.

Alleged Improbabilities

31. The Defence Counsel in her closing submission highlighted some improbabilities in the version of events of the Prosecution case. She argues that it is not probable that the complainant could have felt nothing if she was vaginally penetrated by the penis of the accused. This argument appears to be based on the purported relevant part of complainant's evidence as reproduced in her written submission which I quote below:

She (complainant) was asked by the State Counsel "what did you feel when the penis was inside your vagina?" She replied with "Nothing"

32. A careful review of the transcribed complainant's evidence reveals that the contention of the Defence Counsel is misconceived. The correct version as per the transcription has been as follows:

Q: How did you feel when he had put his penis in your vagina?

A: I didn't like it.

33. Even in cross-examination, the complainant has answered as follows:

Q : So, you could only feel what was happening but you couldn't see or know what exactly happening?

A : Yes.

34. The complainant in her evidence has told this Court that she could feel what was happening at the lower part of her body and that she did not like what she felt when the accused put his penis in her vagina.
35. The Defence submits that the complainant's evidence on the posture and the manner in which she was being held and overpowered by the accused is unrealistic and implausible. The complainant was recollecting an accident happened four years ago. What she said in her evidence as to how she was overpowered and silenced in my opinion is not unrealistic or not implausible. She was looking up at the ceiling as the accused had come on top of her. Being placed in such a posture, it is natural that she could not see what was happening at the lower part of her body. She said she felt what was being done to her which she disliked. Complainant admitted that she was having menstruation and it had just started being the second day of the cycle that lasted seven days. She said she was not bleeding heavily as suggested by the Defence Counsel. In those circumstances, it is not impossible not to have blood stains in the bed sheet despite her menstruation.

Corroboration

36. It is trite law in Fiji that no corroboration of complainant's evidence is necessary for an accused to be convicted of an offence of sexual nature (S 129 of Criminal Procedure Act 2009). Still, the Prosecution called complainant's eldest brother to corroborate the complainant's evidence. Corroboration is evidence coming from an independent source that

implicates the accused. Prosecution appears to say that this is a rare case where an eye witness account is available to implicate the accused in a rape charge so that Rehan's evidence should be accepted as having a corroborative effect on complainant's evidence.

37. Rehan said he saw Ridu, when he (Ridu) went inside the house to keep the glass, kissing and touching Bubu (the complainant) on her shoulder. Bubu was saying *move, move, don't do it*. Ridu got hold of Bubu and took her to the bedroom while Bubu was crying. Ridu closed the door and took off Bubu's clothes and his clothes. Ridu climbed on Bubu and started kissing Bubu. He saw Ridu jumping on top of Bubu. He saw all these things from the back door and a hole on the room wall. Rehan however was not able to say whether Ridu, whom he said he saw with his sister on that particular day, is in Court.
38. The Defence did not cross-examine Rehan for the obvious reason that this witness failed to identify the accused in Court. However, Rehan's inability to identify the accused in Court as the culprit does not allow me to throw his evidence completely away from my assessment. Rehan's evidence in general is consistent with what the complainant said in Court. The inconsistencies highlighted by the Defence between the two versions are not that material to the crucial issue. Both the witnesses told more or less the same story in Court. Although one can say he, being the brother of the complainant, is an interested witness in the Prosecution case, his evidence, that stood unchallenged, cannot be rejected as being untruthful.
39. Rehan was giving evidence of an incident that took place approximately four years ago. He was only 10 years old at that time. It can be assumed that Ridu had stopped visiting Rehan's house and kept himself away from Rehan's view after the allegation arose. In that setting, Rehan's inability to identify Ridu in Court after four years could be attributable to his fading memory. Rehan knew Ridu as he used to come home twice a week to charge his phone and take bottle of ice. Ridu was from the same village and at that time his neighbor. When Ridu comes home at times, he used to talk to him. His identification evidence is consistent with that of other family members who gave evidence. Complainant also described Ridu as a person who visited her place to charge his phone and ask for water. Their mother's description of Ridu is not different from that of her children. She knew Rizwan as he worked in nearby farms. She confirmed that Mohammed Rizwan is known in the area as Ridu.

40. It should be noted that even the Defence Counsel cross-examined Nisha on the basis that her client and the complainant's family were not in good terms due to various reasons. It is an admitted fact that the accused Mohammed Rizwan is also known as 'Rizu'. All the witnesses for Prosecution except Nisha referred to this person as Ridu. Complainant was not sure how Ridu's name should be spelled correctly. Both names carry almost similar tones. I am convinced that Rehan was referring to the accused when he referred to that person as Ridu although he was not able to make him out in Court after so many years. I accept the evidence of Rehan as truthful and reliable. His evidence supported the evidence of the complainant.
41. Even in the absence of Rehan's evidence, I am satisfied that the Prosecution established that the Complainant is an honest and truthful witness. I observed the demeanour of the complainant. She was straightforward and not evasive. Her conduct in Court is consistent with that of an honest rape victim. I accept the evidence of the complainant as being truthful and reliable.
42. Accused had been no stranger at complainant's house. Based on the evidence, I have already described how he was known to the complainant and her family. The incident happened in broad daylight. There was a proper foundation for a dock identification. In court, the complainant recognized the accused as the culprit. Prosecution established the identity of the accused.
43. The accused had touched complainant's necked body after removing her clothes. He had kissed her lips and vagina. She did not like what the accused did to her. The act of the accused is unlawful. He had no lawful excuse to do such acts on the complainant who was a child. No right minded person would consider his acts as 'decent'. I am satisfied that the Prosecution established the elements of the offence of Sexual Assault.
44. The accused had put his penis in complainant's vagina. He took the penis out and fell the 'water' on the rug. I am satisfied that the accused penetrated the complainant's vagina. Accused had put her hands on her moth and held her tightly to prevent her movements. She did not like what he was doing. She was trying to kick him desperately when he overpowered her. Penetration without her consent is established. He did not care her call to leave her. The way the complainant had reacted to the accused's aggression is enough for

the accused to comprehend that what he was doing was without her consent. I am satisfied that the Prosecution established all the elements of Rape as charged beyond reasonable doubt.

45. I find the accused guilty on each count.

46. The accused is convicted on each count accordingly.



Aruna Aluthge

Judge

10 February 2023

At Lautoka

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence