

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 84 of 2022

STATE

V

SAKIUSA NAMOCE

Counsel : Mr. J. Nasa for the State.
: Ms. A. Sharma and Ms. L. Naikawakawavesi for
the Accused.

Date of Hearing : 06 September, 2023
Closing Speeches : 07 September, 2023
Date of Judgment : 08 September, 2023

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 11th August, 2022:

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: contrary to section 209 of the Crimes Act 2009.

Particulars of offence

SAKIUSA NAMOCE on the 14th day of February 2022 at Natamusu Settlement, Ba in the Western Division, assaulted “M.N” with intent to rape the said “M.N”.

2. This matter was transferred to the High Court from the Magistrate’s Court after the accused elected High Court trial. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for one count of assault with intent to commit 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. To prove the above count the prosecution must prove the following elements of the offence of assault with intent to commit rape beyond reasonable doubt:
 - (a) The accused ;
 - (b) Assaulted the complainant;
 - (c) With intent to commit rape.

5. Assault is the unlawful use of force on the complainant by the accused with intent to commit rape.
6. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. Intention can be decided by considering what the accused did, by looking at his actions before, at the time of, and after the act.
7. In this trial, the accused denied committing the offence of assault with intent to commit rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had assaulted the complainant with intent to commit rape.
8. This court must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for this court to find the accused guilty of this offence. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.

ADMITTED FACTS

9. 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.

10. 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

11. The complainant informed the court that the accused is her paternal uncle. In the morning of Monday 14th February, 2022 the complainant was at the house of her aunt Makelesi Tumalevu. When she was outside her aunt's house smoking cigarette with her cousin one of her uncle's Siliveno at around 10am called her to her uncle Jese's house.
12. The complainant responded that she will come after smoking when she went to uncle Jese's house she saw her uncles Siliveno, Jese and her paternal uncle the accused drinking beer. The complainant was asked to serve the drinks, which she did and she also starting drinking.
13. The room in which they were drinking was a kitchen with a fridge and a bed. After the drinks finished the complainant was sent by her uncle Jese to buy some more beer. The complainant obliged and bought the drinks into the room after this the complainant went into uncle Ratu's bedroom and took her uncle's sunglass and wore it.
14. When the complainant went back into the room where the drinking was continuing uncle Jese scolded the complainant for wearing uncle Ratu's sunglass. The complainant gave the sunglass to uncle Jese and sought forgiveness. Uncle Jese took the sunglass into the sitting room, in the meantime the accused started to harass her by trying to pull down her

pants. The complainant realized that the accused wanted to have sex with her she refused at this time the accused punched her thigh with his fist. The complainant told the accused not to punch her.

15. When asked to explain how the accused was trying to pull down her pants. The complainant said *"I was lying on the bed, he laid beside me and he was trying to pull my pants with one hand but I was moving away from him."* According to the complainant the accused was able to pull her pants down a little. The accused continued to pull down the complainant's pants and was punching her.
16. At this time uncle Jese came into the room and stopped the accused. The complainant left the room and went to the washroom. In the washroom when the complainant was pulling down her pants to "pee" the accused entered. She had not locked the door but had pushed the door to close. The complainant quickly pulled up her pants the accused came and pushed her and said *"go in there so I can fuck you."*
17. Thereafter the accused punched the complainant on her abdomen and thighs and then pulled down her pants and underwear to her thighs. The complainant pushed the accused and came out of the washroom the accused followed and threw the complainant into the bathroom which was beside the washroom. At this time the accused punched the complainant's right eye resulting in black eye.
18. The accused continued punching her and was forcefully pulling down her pants and at the same time repeatedly saying that he will fuck her. The complainant started to shout and scream on top of her voice while coming out of the bathroom. The accused followed the complainant out of the bathroom and pushed her on the floor and kept punching and kicking her. Jese came and stopped the accused, the complainant's aunt Fatai

came and took the complainant into the house and also put ice water on the complainant's eye.

19. The complainant went home, the matter was reported to the police and the complainant was taken to the hospital the next day. The complainant identified the accused in court.
20. In cross examination the complainant stated the house of her aunt Makelesi was near to the house of her uncle Jese. The complainant denied that when uncle Jese was questioning her about the sunglasses she was assaulted by Jese. When suggested that the accused had assaulted the complainant on the right hand side of her body the complainant agreed and stated that she was punched by the accused after she had returned the sunglasses.
21. The complainant denied that uncle Jese had also assaulted her that day. The complainant maintained that the accused had entered the washroom and had tried to pull down her pants. She also maintained that she had screamed in the bathroom even though nobody had responded. The complainant denied the suggestion that the assault on her eye and on her body was done by her uncle Jese.
22. The final witness Dr. Varanaisi Talai informed the court that she graduated with an MBBS degree from the University of Fiji and this is her 9th year as a Medical Officer. She is currently based at the Ba Aspen Hospital.
23. On 15th February, 2022 the witness had examined the complainant the Fiji Police Medical Examination Form of the complainant dated 15th February, 2022 was marked and tendered as prosecution exhibit no.1.

24. The specific medical findings of the witness were:
- (a) Bluish black discoloration of the skin around the right eye, mild peri orbital swelling;
 - (b) Both sides of the abdomen tender to touch but no bruises or swelling noted;
 - (c) Tenderness noted at the centre of the head but no swelling or cut was noted.
25. The witness had illustrated her findings at appendix 1, she explained that in respect of (a) above the causes could be by blunt trauma or hit by an object or human or wood. In respect of (b) and (c) the witness said it could be caused by trauma or fist or kick to the head or abdominal region.
26. The witness further stated the hymen was intact and the patient was having her menses.
27. In cross examination the witness agreed that the history related to her may not be a true reflection of what had happened.

DIRECTION ON EXPERT EVIDENCE

28. This court has heard the evidence of Dr. Talai who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.

29. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.
30. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
31. This was the prosecution case.

DEFENCE CASE

32. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
33. From the line of cross examination the defence took the position that the accused had only punched the complainant once when her uncle Jese was questioning her why she had taken the sunglasses of uncle Ratu. The complainant did not tell the truth in court that the accused had assaulted her once as a measure of discipline not to steal. The complainant made up a story to falsely make an unsubstantiated allegation against the accused which does not make sense.
34. The complainant said she was screaming in the bathroom when her uncle Jese, her aunt Fatai and two of their daughters were at home should not be believed.

35. The accused did not assault the complainant or say to her that he wanted to fuck her. The complainant made up a false story as a means to implicate the accused. In all honesty it was Jese who had assaulted the complainant and not the accused.
36. The complainant did not tell the truth in court of what had happened that day. The complainant also did not tell the truth to the doctor.
37. This was the defence case.

ANALYSIS

38. The prosecution states that the complainant and the accused are known to each other, the accused is the paternal uncle of the complainant. On Monday 14th February, 2022 the 17 year old complainant was at the house of her aunt Makelesi when one of the complainant's uncle Siliveno called from the complainant's uncle Jese's house. Both houses were near to each other, shortly after the complainant went and joined her uncle Jese, Siliveno and the accused in drinking beer.
39. As the drinking continued the complainant was sent by her uncle Jese to purchase more beer which she did. After putting the beer in the room (where drinking was taking place) the complainant went into the bedroom of her uncle Ratu and wore his sunglasses.
40. When the complainant went back into the room uncle Jese saw the sunglasses and scolded the complainant for taking the sunglasses from Ratu's bedroom. The complainant sought forgiveness and gave the sunglasses to her uncle. After Jese left the complainant went and lay beside uncle Siliveno who was sleeping on the bed in the room.

41. The prosecution alleges that the accused went onto the bed where the complainant was lying and he tried to pull down her pants. When the complainant resisted the accused punched her thigh. The complainant told the accused not to punch her, from the behaviour of the accused the complainant realized that the accused wanted to have sex with her. At this time the accused managed to pull down the complainant's pants a little.
42. The accused continued to pull down the complainant's pants and was punching her. Jese came into the room and stopped the accused from what he was doing to the complainant. At this time the complainant left the room and went into the washroom to relieve herself. The accused followed, pushed open the door of the washroom and then pushed the complainant and said *"go in there so I can fuck you"*.
43. The accused punched the complainant on her abdomen and thighs and pulled down her pants and panty to her thighs. The complainant pushed the accused and went out of the washroom. The accused also came out and threw the complainant into the bathroom and punched her right eye causing a black eye.
44. The accused continued punching the complainant and was forcefully pulling down her pants and repeatedly saying that he will fuck her. When the complainant came out of the bathroom the accused pushed her on the floor in the passage of the house and kept punching and kicking her. The complainant's uncle Jese came and stopped the accused and the complainant's aunt Fatai came and took the complainant away and poured some ice water on the eye of the complainant.
45. Finally, the prosecution submitted that the matter was reported to the police and the complainant was medically examined the next day. The

doctor found injuries and tenderness on the complainant's head, right eye and both sides of the abdomen which was consistent with trauma.

46. On the other hand, the defence says the allegation is a made up story against the accused. He did not do anything to the complainant as alleged. What the complainant narrated in court was not possible and/or probable and therefore she should not be believed. The accused had only punched the complainant once when Jese was questioning her why she had stolen her uncle Ratu's sunglasses. The complainant even apologized to her uncle Jese and the accused for stealing uncle Ratu's sunglasses.
47. The defence is asking this court to consider the fact that had the complainant screamed her uncle Jese, aunt Fatai and their two daughters would have come to her rescue. Nobody came because the complainant did not shout or scream since nothing of the sort narrated by complainant had happened.
48. The defence further submits that the accused did not do anything as alleged he did not say that he wanted to fuck the complainant or had assaulted the complainant in the manner mentioned by her. The narration of punching and kicking attributed to the accused in the room where drinking took place, washroom, bathroom and passage of the house is an overstated account of what had happened. The accused maintains he assaulted the complainant once only which was to discipline her for stealing and other than that he did not do anything to the complainant as alleged. There is no evidence that the accused had touched the private part of the complainant hence there is nothing to suggest that the accused had the intent to commit rape.
49. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court

not to believe the complainant who is making an unfounded and baseless allegation against the accused.

DETERMINATION

50. 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.
51. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the allegations raised by her. She was steadfast in what the accused had done that day at different places in Jese's house.
52. The defence did not raise any motivation on the part of the complainant to falsely implicate the accused or that the injuries were self-inflicted. The argument raised by the defence is that it was Jese who had assaulted the complainant which resulted in those injuries in the medical report. The accused had only assaulted the complainant once to discipline her and he had no intention to rape the complainant. Upon a review of the evidence I reject this assertion by the defence as unbelievable.
53. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. I also accept the opinion of the doctor that the injuries and tenderness seen on the complainant's right eye, head and both sides of her abdomen could have been caused by

blunt trauma which supported the evidence of the complainant. I accept the complainant had resisted the approaches of the accused and she had promptly reported the matter to the police.

54. From the evidence adduced it was the accused who had assaulted the complainant with the intention to have forceful sexual intercourse with her. The description given by the complainant of the manner in which the accused had conducted himself, assaulted her and kept saying “*I want to fuck you*” shows intention on the part of the accused to have forceful sexual intercourse with the complainant.

LESSER OR ALTERNATIVE OFFENCE

55. I have also directed my mind to the lesser or alternative offence of assault causing actual bodily harm. The law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser or alternative offence, the court may find the accused guilty of that lesser or alternative offence (section 162 (2) of the Criminal Procedure Act). In this regard, I direct myself that if this court finds the accused not guilty of assault with intent to commit rape then it should consider the offence of assault causing actual bodily harm.
56. I have once again carefully examined the evidence and I am satisfied that considering the evidence before, at the time of and after the conduct of the accused it is obvious to me that the accused had assaulted the complainant, followed by his utterances that he wanted to fuck her and was pulling down her pants is a clear indication that he intended to have forceful sexual intercourse with the complainant. In the circumstances, this court is satisfied beyond reasonable doubt that there is evidence to sustain the charge of assault with intent to commit rape.

57. I reject the defence of denial by the accused as not plausible on the totality of the evidence. The defence assertion that the accused had not done anything to the complainant other than one punch to discipline her is unworthy of belief. The defence was also diverting attention away from the accused onto Jese by raising the proposition that Jese had assaulted the complainant is not convincing in view of the evidence adduced.

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

CONCLUSION

58. This court is satisfied beyond reasonable doubt that the accused on 14th February, 2022 had assaulted the complainant with intent to commit rape.

59. In view of the above, I find the accused guilty of one count of assault with intent to commit rape as charged and he is convicted accordingly.

60. This is the judgment of the court.

 
Sunil Sharma
Judge

At Lautoka

08 September, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.