

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 60 of 2021

STATE

V

MOHAMMED IFTIKAR

Counsel : Ms. S. Prakash for the State
: Mr. M.N.S. Khan for the Accused

Date of Subs : 02 November, 2023
Date of Hearing : 03 November, 2023
Oral Arguments : 03 November, 2023
Date of Ruling : 06 November, 2023

RULING ON APPLICATION FOR NO CASE TO ANSWER

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

1. At the conclusion of the prosecution case the defence counsel made an application for no case to answer in accordance with section 231 (1) of the Criminal Procedure Act. The relevant section states:

"When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the

prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or anyone of several accused) committed the offence.”

2. In respect of the phrase “no evidence” mentioned in section 231 (1) of the Criminal Procedure Act, Goundar J. in *State v Ratu Inoke Takiveikata* criminal case no. HAC 5 of 2004 (28 February, 2011) at paragraph 3 said:

“The phrase “no evidence’ has been interpreted to mean that there is no evidence on an essential element of the charged offence (Sisa Kalisoqo v State, Criminal Appeal No. 52 of 1984). If there is some evidence on the essential elements of the charged offence the application for a no case to answer cannot succeed. The credibility, reliability and weight are matters for the assessors and not for the trial judge to consider at a no case to answer stage.”

3. The Director of Public Prosecutions preferred the following Information against the accused:

FIRST COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act 2009.

Particulars of Offence

MOHAMMED IFTIKAR, between the 1st day of August, 2020 and the 31st day of August, 2020 at Varoko, Ba in the Western Division, unlawfully and indecently assaulted “M.K”.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKAR, between the 1st day of January, 2021 and the 31st day of January, 2021 at Varoko, Ba in the Western Division, unlawfully and indecently assaulted “M.K”.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKAR between the 1st day of January, 2021 and the 31st day of January, 2021 at Varoko, Ba in the Western Division, had carnal knowledge of “M.K” without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

MOHAMMED IFTIKAR between the 1st day of March, 2021 and the 7th day of March, 2021 at Varoko, Ba in the Western Division, had carnal knowledge of “M.K” without her consent.

4. The defence counsel filed written submissions and both counsel at the hearing made oral submissions for which this court is grateful.

INDECENT ASSAULT

5. To prove the offence of indecent assault the prosecution must prove the following elements beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by touching her breast and kissing her neck.

SEXUAL ASSAULT

6. To prove count two the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant.

RAPE

7. The elements of the offence of rape are:
 - (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 did not care if she was not consenting.
8. The learned state counsel in her fairness conceded that there was no evidence in respect of the offence of sexual assault in count two which this court agrees. As for the other counts the defence counsel stated that the

prosecution witnesses were manifestly discredited that this court cannot convict on the basis of the evidence adduced.

9. The learned state counsel whilst opposing the application for the other counts stated that the test at this stage of the trial is whether there was evidence in respect of all the elements of the offences the accused is charged with. The law does not provide for the assessment of evidence at this stage of the proceedings. Counsel submitted that there was relevant and admissible evidence in respect of one count of indecent assault and two counts rape as charged and therefore the accused should be put to his defence.

EVIDENCE

10. The prosecution called eight witnesses in support of the charges. The brief summary of evidence of the complainant which is crucial to this application is produced herewith for completeness.
11. One day in August, 2020 the complainant was at home with her younger brother Arman when the accused came into their house. Her father was not at home. Arman had opened the door of the house to allow the accused inside the house. The complainant was in the kitchen doing her chores when the accused came from behind and touched her breast and kissed her neck.
12. The complainant got scared and she did not do anything since this was the first time something like this had happened to her. The complainant was living with her 10 year old brother and father. She did not know what to do and as a result she did not tell anyone about what the accused had

done to her. The complainant's mother was not living with them as well. The complainant did not like what the accused had done to her.

13. Thereafter one day in January, 2021 the accused from outside the complainant's house called the complainant asking her to open the door. The complainant refused at this time the accused threatened the complainant, if she did not open the door he will spoil her life. The complainant got scared and she thought rather than annoying the accused who may tell people against her or about what he had done to her previously the complainant opened the door so that he does not say anything against her.
14. The accused came inside the house and in the sitting room he pushed the complainant on the floor went on top of her held her hand and forcefully removed her pants. She was wearing a top and pants the accused removed his pants and had forceful sexual intercourse with her until he ejaculated on her stomach. The complainant was crying since she was in pain and she did not like what the accused had done to her. She had told the accused that she did not want these things to be done to her. The complainant did not do anything because she was scared.
15. Finally one day in March, 2021 the complainant was at home with her brother since her father had gone somewhere. Her brother was watching T.V in the sitting room and she was sleeping in her bedroom. When she opened her eyes she saw the accused who forcefully came on top of her removed her pants and forcefully had sexual intercourse with her till he ejaculated.
16. The complainant did not like what the accused was doing to her and she was feeling pain. She was crying and she told the accused not to do this

to her. The complainant tried to push the accused but she could not so she did not do anything.

17. The complainant met her boyfriend Salman for the first time in March, 2021 after the last incident away from home and it was here she was able to tell Salman about what the accused was doing to her and as a result she did not want to go back home. The complainant and Salman eventually went to Ba Police Station and it was here the complainant was able to lodge her report against the accused.

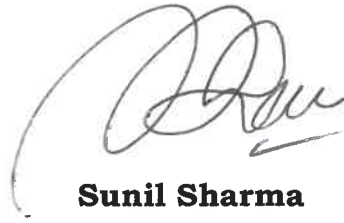
TEST FOR NO CASE TO ANSWER

18. The test for no case to answer at this stage of the trial is whether there is evidence in respect of all the elements of the offences the accused is charged with. The reliability and credibility of the prosecution witness evidence is not relevant at this stage of the trial. If there is relevant and admissible evidence (direct or circumstantial) in respect of all the elements of the offence charged then the case should proceed and the defence be asked to open its case after the accused is given his options.

CONCLUSION

19. Having carefully considered the submissions made and the evidence adduced by the prosecution this court is satisfied that there is evidence in respect of count one for the offence of indecent assault and two counts of rape as charged (counts three and four). There is no evidence in respect sexual assault in count two.

20. In view of the above I find that the accused has a case to answer for one count of indecent assault and two counts of rape as charged and he is put to his defence in respect these counts only.



Sunil Sharma
Judge



At Lautoka
06 November, 2023

Solicitors

Office of the Director of Public Prosecutions for the State
Messrs Nazeem Lawyers, Ba for the Accused