

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO HAC 31 OF 2020

STATE

V

JOSEVA MARIO

Counsel: Ms S. Prakash for State
Mr V. Anand for Defence

Dates of Hearing: 13, 18 March 2024
Date of Judgment: 25 March 2024

JUDGMENT

1. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (c) of the Crimes Act 2009. The information reads as follows:

Statement of Offence (a)

RAPE: Contrary to Section 207 (1) and (2) (c) of the Crimes Act 2009.

Particulars of Offence (b)

JOSEVA MARIO on the 26th day of September 2014 at Ba in the Western Division, inserted his penis into the mouth of LUSIA LOWAME without the said LUSIA LOWAME'S consent.

2. The accused pleaded not guilty to the above charge. At the ensuing trial, the Prosecution presented the evidence of the complainant and the doctor who examined her after the alleged offence. At the close of the Prosecution case, the accused was put to his defence. Only the accused presented evidence for the Defence. The counsel from both sides tendered written submissions at the end of the trial.
3. Having carefully considered the evidence presented at the trial and the submissions filed by the counsel, I now proceed to pronounce my judgment as follows.
4. I bear in mind that the Prosecution has the burden to prove all the elements of the offence. That burden must be discharged beyond a reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt.
5. 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. Consent obtained by force, threat or intimidation etc. will not be considered as consent freely and voluntarily given.
6. To establish the fourth element of Rape, the Prosecution must 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. In Fiji, there is no requirement for corroboration of the complainant's evidence. Section 129 The Criminal Procedure Act 2009, states that, in relation to sexual offences, no corroboration of the complainant's evidence is necessary for the accused to be convicted.
8. I shall now summarise the salient parts of the evidence led in this trial.

Case for Prosecution

PW 1- Lusia Lowame - (The Complainant)

9. The complainant testified that she was residing at Rarawai Settlement in Ba with one Mohammed Rafiq Khan who was her *de-facto* partner. On 26 September 2014, she came to town with Mohammed Rafiq and asked him to buy her few bottles of beer before he goes to Mosque. Mohammed Rafiq gave her money, and she bought three bottles of Fiji Gold (beer) long neck and four packets of *twisties*. She then started drinking alone at Ba Riverside, close to abandoned Ba Football Club House.
10. At around 3 p.m., she went to urinate and when she was coming back, Mario and two other young men called her. She said 'thank you' and went back to sit where she was drinking alone. When she has finished drinking, Mario came and punched her from the back and said he liked her. The other two boys also punched her. After which they dragged her to the Club House and punched her again. The complainant was struggling whilst these boys were taking off her clothes, her bra and the shirt.
11. She had finished all three bottles, and her head was spinning. When she was sitting down naked Mario asked her to suck his penis. The accused was on her, and when he took his penis out, he said, '*here suck it*' to which she said, '*no, I do not like it*'. She put his penis in her mouth and without sucking it, she bit it. When she bit his penis, he screamed. At the same time, she was able to free herself and run outside towards the river. (The complainant demonstrated how she bit his penis).

12. She stated that she bit his penis as she didn't like the way they punched her. She opened her mouth because she feared that, if she did not, they could do something as she was naked. She put his penis in her mouth just to bite it and free herself.
13. She ran naked towards the river where some fishermen came to her rescue. One of them had called the police and the police officers had come near where the boats park. The police officers took her to the police station and then for medical examination because her face was all swollen and mouth bleeding. So, she could not report this matter on the same day. She had her medication and went to report on the next day.
14. She stated she saw his face clearly on that day and she positively identified the accused in Court. She stated that she came to know the accused's name sometime after the matter was reported when he approached her to seek forgiveness. She said to him she could forgive him outside but couldn't do anything about the matter going on in court.
15. During cross examination, she denied that it was Jone that had assaulted her, and that Mario was the one who tried to save her. She denied drinking with Mario and his friends. She denied she offering one Tevita to have sex with her and that when Tevita declined, she approached the accused for sex. She denied that, in the process of filling the medical form, she had told the police that she was assaulted and raped by four iTaukei men. She denied talking to the doctor. She denied that she consented to have sex with the accused. She denied that she took his penis to her mouth because he could not erect it due to his drunkenness. She maintained that the accused was forcefully penetrating her mouth with his penis. She bit his penis to free herself and ran to the river because they were punching her.

PW-2 Dr Anaseini Maisema

16. Doctor Maisema examined the accused first and then the complainant on 26 September 2014 at the Ba Mission Hospital. She tendered the medical examination report of Lusua Lowame marked as PE 1 and that of Joseva Mario as PE 2.

17. The doctor referred to D (12) of the complainant's medical report and informed the Court of the injuries that she noted on her face. There was swelling on the left side of the upper lip, bruises on the cheeks and on the forehead, laceration in the lips and cut on the lower left side of the lip. All over her face was swollen. She stated that these injuries were fresh and approximately 1-2 hours old. She opined that the injuries are consistent with a blunt impact as if she had been punched by somebody in her face.
18. The doctor was then referred to the medical report of the accused, whereby she stated that there were multiple bite or teeth marks on the shaft of his penis, which are consistent with teeth bites, and blood at the meatus. She stated that the injuries were superficial as the accused was able to urinate.
19. The doctor under cross-examination agreed that the background information in Section A in page 01 of the medical report was filled by the requesting police officer. She said that, at D 10, the history was provided by the patient Lusiana.

Case for Defence

DW1- Joseva Mario (The Accused)

20. Mario said that he was drinking with Tevita and Jone when the complainant brought herself to them. She wanted to crash with them in drinking. Jone was angry and punched her because she wanted to drink for free and she also wanted to have sex with Tevita.
21. When Tevita declined to have sex with her, she then approached him. He asked her, whether she would like to come with him. When she said 'yes', they went together to the football club house. When they were there, he asked her if they could have sex and she said 'yes'. He was drunk and was trying to get his erection, but he couldn't. So, he asked her if she could help him in that. Then she put his penis in her mouth and bit it. He had no idea why she bit his penis; *maybe she was angry*, he said. After that, he ran to the river to wash his penis, because it was bleeding. When he came back, he knocked out. He could only feel

himself again when the police officers were punching and beating him. He asked the police officers to take him to the hospital. He was taken to hospital where he was examined by a doctor.

22. During cross examination, the accused stated that he was fully aware of his actions although he was drunk. Accused further stated that neither he nor his friends assaulted the complainant. He said he just pushed her and ran away when she bit his penis. It was suggested that his evidence was contrary to what he said in his examination-in-chief where he had stated that Jone had punched her.
23. He admitted that when he asked her to suck his penis, he himself took it out from his pants. He put his penis in her mouth because she wanted him to do that. He admitted answering question 27 in the caution interview *where he had told that he approached her and requested her if they could have sex*. Denying any of them having punched her, he said that she already had bruises on her face from other places where she was drinking. He did not tell his counsel that the complainant was pre-injured and the injuries on her face were old. He admitted that he did not make a formal complaint against the complainant for biting his penis.

Evaluation /Analysis

24. The identity of the accused and the act of penetration were not in dispute. The accused admits that he inserted his penis into the mouth of the complainant. The accused says that the penetration was consensual. The complainant says it was not. The case turns on one word against the other. However, it was for the Prosecution to prove beyond a reasonable doubt that the accused penetrated the complainant's mouth without her consent.
25. The Prosecution relies substantially on the evidence of the complainant which it says is the truth. Let me first analyse her evidence. She stated that she was punched by the accused and also by his two friends who stripped her naked. She said she was struggling when her clothes were being removed and dragged to the club house.

26. This evidence is consistent with the injuries Dr Maisema (PW2) had observed on the complainant's body soon after the alleged incident. There was swelling on her left side of the upper lip, bruises on the cheeks and on the forehead, laceration in the lips and cut on the lower left side of the lip. All over her face was swollen. The doctor found those injuries fresh and approximately 1-2 hours old. She opined that the injuries are consistent with a blunt impact as if she had been punched in her face.
27. The accused said that the complainant already had some injuries when she approached them for sex. However, it was never suggested to the complainant during cross-examination that she had old injuries. The accused admitted that he did not advise his present counsel Mr Anand about old injuries. It is reasonable to assume that the accused did not advise his counsel about old injuries, which would have been important for his defence, because they never pre-existed. It is hard to believe that a woman injured to that extent would ever approach men to have sex with them even under the influence of alcohol.
28. There is no dispute that the complainant had bit the penis of the accused and that it had bite marks on its shaft. Upon being bitten, the accused had screamed, pushed the complainant away and run to the river to wash his penis because it was bleeding. The doctor observed multiple bite or teeth marks on the shaft of his penis which are consistent with teeth bites. Although, his penis, according to the doctor, was not internally damaged, the bite marks and the external injures found on the accused's penis which caused him pain are not consistent with a consensual oral sex.
29. The complainant said she did not want to suck his penis and the only reason she opened her mouth was to bite his penis so that she could free herself. Her intention was clear in her conduct-without sucking his penis, she bit it and ran away naked to the river when the accused started screaming and she sought help from the fishermen. Her conduct is clear evidence that she was not consenting to sucking the accused's penis.
30. The Defence Counsel in his written submission has submitted that the complainant admitted putting accused's penis in her mouth willingly. The complainant's evidence in no way suggests that she willingly opened her mouth and put the accused's penis in her mouth

willingly. I accept that she said she opened her mouth. However, she clearly informed that, having been punched and stripped of her clothes by three men who were drunk, she had to do so because she had no other option. She said she feared that they would do something to her if she refused to obey the accused.

31. The Defence further argues that her complaint was belated. Although the complainant had not lodged a report on the same day as the incident, she gave an acceptable explanation for the delay. She was taken to the police station soon after the incident, but the police officers had taken her to the hospital for medical treatments because she had injuries on her face. After receiving medications, she had lodged a report with the police the next morning. This conduct indicates that she is a genuine complainant.
32. The Defence further argues that the complainant is inconsistent in her evidence *vis-à-vis* the medical report where it states at Section A that she was raped by four iTaukei men. She vehemently denied having informed the police that she was raped by four iTaukei men. The doctor confirmed that the background information in Section A in page 01 of the medical form was filled by the requesting police officer. It is clear, that what police officer had written on the medical report is not a previous statement of the complainant which the Defence could use to discredit her.
33. The Defence further argues that the complainant is not consistent with the medical examination report and the evidence of the doctor (PW2) who prepared it. The doctor said the history in D10 was provided by the complainant after a discussion with her. The Complainant denied talking to the doctor.
34. In D10 it is noted that *'she denies ever biting the other iTaukei man's penises*. The word 'other' gives a connotation that she has admitted biting one of them. The complainant gave evidence of an incident that took place nearly a decade ago in 2014. The doctor's evidence was of course based on her own report which refreshed her memory. Therefore, these so-called inconsistencies are not material enough to reject the complainant's evidence. I do not believe that the complainant would have ever denied biting the penis of the accused when she has admitted the same to police and in court. Even if one were to treat it as an

inconsistency, it is not at all material as this particular fact (that the complainant bit his penis) is admitted by the accused himself in Court under oath.

35. Furthermore, the Learned Defence Counsel failed to put to the complainant the alleged contradiction (whether she had told the doctor that she never bit the penis of the accused). Without affording a chance to the complainant to explain the so-called inconsistency, the Defence is not entitled to prove a contradiction.
36. The complainant was straightforward and not evasive. She maintained the consistency of her conduct and evidence. I have no doubt that she told the truth in Court and is a genuine rape victim. I accept her evidence.
37. The evidence of the accused is not appealing to me. He was struggling to save his own skin. It is hard to believe that the complainant approached him and his drinking partners for sex. The accused had in his caution interview told the police that *he approached her and requested her if they could have sex*. The accused contradicted his own evidence when he denied ever punching the complainant by him or his friends while admitting previously that Jone punched her.
38. Although the Accused was not bound to prove anything, he could have called Tevita who is his relative to support his claim that the complainant approached them for sex. He could not explain why the complainant bit his penis to that extent and ran away naked asking for help if she had sucked his penis to help him in getting his erection. He did not explain why she would be angry to bite his penis if she had offered to help him in erecting it. He had not lodged a report against the complainant for biting his penis after agreeing to have oral consensual sex with him.
39. I reject the evidence of the Defence. The mere rejection of defence evidence does not mean that the Prosecution has proved its case. However, upon overall assessment of evidence led in trial I am satisfied that the Prosecution proved beyond reasonable doubt that the accused penetrated the complainant's mouth with his penis without her consent.

40. The evidence is overwhelming to find that the accused knew that the complainant was not consenting to oral sex. The accused and his two friends had assaulted her whilst forcing her to suck his penis and they had taken her clothes off while she was struggling. She indicated to him *'I do not like it'* when he forced her to suck his penis. This shows that the accused was aware that the complainant was not consenting and yet he continued to force her to satisfy his lustful desires. The Prosecution satisfied all the elements of Rape as charged beyond reasonable doubt.

41. I find the accused guilty of rape as charged and convict him accordingly.



Aruna Aluthge

Judge

25 March 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State

Fazilat Shah Legal for Defence