

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 28 OF 2019

STATE

v

RAJNEEL NARAYAN

Counsel: Mr M.I. Rafiq for State
Mr J.K. Singh with Ms K. Kumar for Defence

Dates of Hearing: 26 March 2024 & 5 April 2024

Date of Judgment: 15 April 2024

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

JUDGMENT

1. The Accused is charged with three counts of Rape and one count of Indecent Assault on the following information filed by the Director of Public Prosecutions:

COUNT 1
Statement of Offence

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

Particulars of Offence

RAJNEEL NARAYAN on the 4th day of February 2019 at Sigatoka in the Western Division unlawfully and indecently assaulted LD by fondling her breast.

COUNT 2
Statement of Offence

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

Particulars of Offence

RAJNEEL NARAYAN on the 4th day of February 2019 at Sigatoka in the Western Division penetrated the vagina of LD with his finger without her consent.

COUNT 3
Statement of Offence

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

Particulars of Offence

RAJNEEL NARAYAN: on an occasion other than in Court 2 at Sigatoka, in the Western Division, penetrated the vagina of LD with his finger without her consent.

COUNT 4
Statement of Offence

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

Particulars of Offence

RAJNEEL NARAYAN on the 4th day of February 2019 at Sigatoka, in the Western Division, had carnal knowledge of LD without her consent.

2. The Accused pleaded not guilty to the above charges. At the ensuing trial, the Prosecution presented the evidence of the Complainant and two other witnesses. 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 each 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

PW1 – LD (The Complainant)

9. In February 2019, LD was 19 years old and residing in her mother's house at Naivarogo, with her parents, four younger siblings, aunt's family and her grandmother. She was about to go to study at FNU in Namaka.
10. She used to sell 'ota' (wild ferns) in the market to help her in collecting her bus fare to go to Namaka. On 4 February 2019, LD was home in the morning and was preparing to pick 'ota'

from the jungle in Nakoka, roughly 6 kms away from home. She goes to the jungle by horse but on that particular day, she just walked. When she left home her uncle, grandmother and parents were home, and they were informed about the purpose of her visit. Just before she left home, she saw Waqa, and her uncle talking to each other beside the road and her uncle asked her where she was going. She told him that she was going to get 'ota'.

11. She reached Nakoka at around 8.30 a.m. When she just started to collect 'Ota', she could feel a man smacking her from the back. When she was trying to get rid of him, she couldn't because he was holding her strongly by wrapping his arms on her shoulder. She turned her head and managed to see who this person was. It was Waqa. Waqa is an Indo-Fijian family friend of her uncle Ulaiasi. He used to go with her uncle to the plantation almost every day. She identified the Accused in Court as Waqa.
12. She tried to loosen herself from his grip and run away, but she couldn't because he was holding her very tightly trying to get her lie down. She told him to let her go and started calling out a name of her uncle Timoci, who used to come to the forest, expecting him to come to help her. Waqa then covered her mouth and told her not to call anyone.
13. Then Waqa managed to make her lie down and laid himself on top of her. Then he started to squeeze her boobs (breasts) on top of her bra. Then she could feel that his hands touching her private part. She was wearing a sulu (wrap around), with a $\frac{3}{4}$ loose pants and a panty. He put his hand inside her $\frac{3}{4}$ pants and panty and was touching her private part. She tried to get away from him. He then inserted his finger inside her vagina. She could feel pain inside her vagina. She was struggling to be free from him and run away because she did not like what he was doing to her. She was frightened.
14. When she was struggling to be free from him, one of her boots went out. She managed to get hold of it and smacked him with it. But, he kept trying to get on her while she was calling her uncle. She then told him that her uncle was there pretending that her uncle had been there. He stood up to go and see if it was true. When he stood up she tried with all her might to run away down to the river.

15. He gave a chase and managed to get hold of her beside the pool. He pulled her back to a muddy place and managed to make her lie down. He removed her pants and underwear and inserted his fingers again in to her vagina for a few minutes. She could feel the pain. She was really scared. Her body was shaking and she could not speak. She was trying to push him away but she could not as he was lying on top of her. He started kissing her neck and bit it. Then he tried to kiss her on her lips. She moved away. When she moved away, she hurt her lips. She was not able to do anything because she was lying down and very scared. After he took off his pants, he pulled her legs up and inserted his penis inside her vagina for about five minutes while she was still lying down facing up. She did not want him to do what he was doing.
16. She was very weak and feeling pain in her vagina. While he was doing that to her, she managed to turn and she saw a stick beside her which she got hold of. She hit his head with the stick so as to weaken him. She then stood up and ran down to the river.
17. After this incident, she ran home and started calling out. Only her grandmother was present at home. She ran to her grandmother and told her what Waqa had done to her in the forest. (Her grandmother Daina passed away recently). The grandmother then started to call her mother who had gone fishing. When her mother Venaina came, she told her mother what Waqa had done to her in the forest. Her mother called her father over the phone and then one of her grandmothers whose husband was a police officer. On the same day, the matter was reported to Sigatoka Police Station. The police officers took her to the hospital where she was medically examined on the same day. She relayed the incident to the doctor. After the medical examination, she came back to the police station and lodged a report.
18. Under cross-examination, she agreed that '*ota*' is grown along the river banks. The place she was picking '*ota*' was not that muddy but had gravel. She denied having had a conversation with Rajneel before the incident and been offered money. She denied planning to go to town with Rajneel to drink and have sex. She denied that she got on the horse back with Rajneel and proceeded towards her house. She denied that, while on the horse, Rajneel turned around

and bit her neck leaving love bites on her neck. She denied that she was dropped off about 1km away from her home just next to the road. She denied that when she was preparing to go to town, her family spotted the love bites on her neck, which made them angry. She denied that she got scared that she will get a beating and made up the story that Rajneel had raped in order to save herself. She denied that, when she informed her family, they went to Rajneel's house and when they met Rajneel on the road, they tied him and beat him up. Her uncle and father were both at home and went to the police station with her.

PW2 Venaina Nauga

19. Venaina is the mother of the Complainant. She went fishing on 4 February 2019 morning probably 100 to 200 meters away from home. While she was fishing, she heard her mother Diana calling out her name. When she came home, she saw her daughter, LD crying. Then she asked LD what had happened and they both told her that Waqa had held LD from her back in the jungle and said what he had done to LD. Waqa had done a mark on LD's neck, removed her pants and put his finger inside her and then had sex with her. She called LD's dad and his uncle to come and to take LD to the police station. His uncle and aunt then came home and took LD to the police station. She knew Waqa, as he used to come home and plant together with her children's uncle.
20. Under cross-examination, Venaina agreed that her mother had called her and complained that LD had love bite marks on her neck. She agreed that she was angry because of what she heard of and when she actually saw the love bites marks. In that anger she asked LD as to what had happened and, at that time, LD told her that Waqa had raped her. Both LD and her mother were both crying when LD was telling what Waqa had done to LD. She was angry because of what she saw on LD's neck, and her clothes that were all so wet and muddy. She was angry at the person who had done that to LD.

PW3 Dr Sera Sadranu

21. On 4 February 2019, Dr Sera examined LD at Sigatoka Hospital. She tendered in evidence the medical report she prepared (PE1) upon examination of the Complainant. The doctor said that the patient was a little shaken up and was in a state of shock. The vest and the $\frac{3}{4}$ pants the patient was wearing were covered with mud. Both of her feet were also covered with dry mud. In D11, she noted down the following specific medical findings. Ten bruises were noted around the neck (love bites about 10 of them, 2x2cm approximately). On vaginal examination, blood was noted around thighs and around the vulva, redness around the vaginal opening with bleeding. The patient's hymen was not intact.
22. The bruising is an indication of some pressure that is applied to that particular area to cause the vessels underlining the skin to be ruptured. The love bites, by their shape, would have been made by the two front teeth. The blood around the thighs, redness around the vulva and the hymen being not intact are consistent with a sexual intercourse but unable to comment if it was forceful. The history related to her, and her findings seemed consistent.
23. Under cross-examination, doctor said that the history was provided by the patient. The patient said that the person who was chatting with her uncle at home had followed her and raped her. She agreed that if a struggle happened on a rough surface, she would expect to see injuries on the patient's body, at least some lacerations around her back and her arms. In this case, she did not notice anything like that. But she did not put a question mark on the history provided to her. Redness around vaginal opening with bleeding could have been due to many causes. She agreed that the presence or the absence of hymen is not a conclusive factor to determine whether a penetration occurred. Absence of lacerations does not conclusively prove that the patient was never raped. Doctor agreed that she would have expected more injuries around the vaginal area given the history.
24. Under re-examination, the doctor agreed that absence of lacerations on patient's body could have been due to the reason that the alleged incident happened on a muddy surface. The

hymenal injuries are more consistent with the history provided by the patient than with those caused by horse riding.

Defence Case

DW 1 - Rajneel Narayan

25. Rajneel is staying in Nadeva with his family. He worked for the farm that belonged to LD's family. On 4 February 2019, in the morning at around 7 o' clock, he went to Varogo by horse to tie up the cattle. From there he went to LD's uncle's place to get a rope. LD was not there at that time. From there he went to Nakoka by horse to locate his other horse. He met LD who was picking *ota* beside the creek that consisted of gravels. LD told him that she had no money to go to school. He promised to give her money because they used to help him in the farm.
26. Both of them agreed go to town to drink beer and have sex in a room. LD agreed because she needed money. She gave her phone contact which he wrote in a wood. Then they came together on the horse back. He was sitting in front, riding the horse while LD was sitting at the back. They came to a Y junction where he dropped her off. He went home, dressed up and took money to go to town.
27. He went to the roadside to catch a van to go to town as she agreed to meet LD. He met LD's uncle Ulai on the way. Ulai tied him up with a rope and started assaulting him blaming that he had raped LD. Ulai made him lie on the ground and started stepping on his chest. He denied raping LD but Ulai didn't not listen to him. A lot of people gathered there. His brother came and took him to Sigatoka Police Station to lodge a report against Ulai. At the police station, he was arrested and locked up. He did not know why he was arrested. He saw LD's family at the police station.
28. Being asked about the love bites noted in the medical report, he admitted biting LD's neck whilst on the horseback. He demonstrated how he turned back and placed the love bites on

her neck. He denied touching LD's breast and vagina and inserting his fingers into her vagina twice and penetrating her vagina with his penis on 4 February 2019 as alleged by the Complainant.

29. He did not have any animosity with LD but had issues with her father after they had hit his goats with a knife.
30. Under cross-examination, he agreed that there was nothing stopping him from sleeping with LD in the jungle itself, if she was consenting. He said they decided to go to town because she wanted to have drinks before having sex.

Analysis/ Evaluation

31. The identity of the Accused is not disputed by the Defence. The Accused admitted that he met the Complainant on the morning of 4 February 2019 in the forest at Nakoka when she was picking *ota* beside the river. The Complainant referred to the Accused as Waqa whom she had known as the Indo Fijian farmer who worked in their farm. The Accused admitted that he was working for the farm belonged to the Complainant's family. The alleged incident occurred in broad daylight. There was a solid foundation for a dock identification. The Complainant positively identified the Accused in Court as the person who raped her.
32. The Complainant said that the Accused forcefully fondled her breast and inserted his finger twice in her vagina and that he penetrated her vagina with his penis without her consent. The case for the Defence is one of complete denial. The Defence having denied the allegations took up the position that the Complainant made up the allegations to save herself when she was caught with love bites on her neck.
33. Let me first analyse the evidence of the Complainant to see if she told the truth in Court. According to the Complainant, she had run home straight after the alleged incident and complained to her grandmother as her mother was not home. When her mother came home she complained to her mother and told what the Accused had done to her. The mother of the

Complainant testified and confirmed that she received the complaint of sexual assault from the Complainant.

34. The Defence contended that the Complainant made the complaint of sexual assault only when her mother questioned her about the love bite marks that were seen on the Complainant's neck. In her evidence-in-chief (EIC), the Complainant clearly said that when she came home only her grandmother was present and she ran to her grandmother Diana and told her what Waqa had done to her in the forest. When her mother Venaina came, she told her mother what Waqa had done to her in the forest. It is clear that the first person to have received the complaint was Diana, the grandmother who is now dead and therefore not available to testify to what actually she heard from the Complainant.
35. Since the grandmother is no longer among the living, the Prosecution called the Complainant's mother Venaina. Venaina's evidence was that when she came home, she saw the Complainant and her mother crying. By then the Complainant had already complained to her grandmother. Then Venaina asked the Complainant what had happened and they both told her what Waqa had done to the Complainant.
36. Venaina in her EIC did not say that the complaint of sexual assault was made only when she was being questioned about the love bites seen on her neck. The Defence Counsel's cross-examination was aimed at getting the answers that he wanted by putting the answer in the mouth of the witness. He was putting the questions to Venaina on the premise that she was angry because she saw the love bites marks; and in that anger she asked the Complainant as to what had happened; and, at that time, the Complainant told that Waqa had raped her. Venaina clarified that she was angry at the person who had done that to the Complainant.
37. I am satisfied that the Complainant complained about the sexual assault at the first available opportunity to her grandmother and then to her mother. The complaint was lodged soon thereafter with the police and the Complainant told the same story to the doctor on the same day as the incident. The recent complaint of the Complainant is consistent with the conduct of a genuine rape victim. I am unable to accept that the Complainant made up such a

comprehensive allegation that consisted of three rape allegations in such short time to save herself merely because her mother had seen love bites on her neck.

38. The Complainant said that she struggled with the Accused and resisted the attack with her full might. The Defence contended that had she been struggling, she would have received lacerations in her arms and her back. That contention appears to be based on the premise that the incident took place on a rough surface with gravel or stones. The doctor confirmed that the Complainant had no lacerations on her body. However, absence of lacerations does not conclusively prove that the patient was never raped.
39. The Complainant did not say that the incident took place on a rough and gravel surface. What she said under cross examination was that '*ota*' is grown along the river banks and that the place she was picking '*ota*' was not that muddy but had gravel. She in her EIC said that the Accused pulled her back to a muddy place and managed to make her lie down. Therefore, the incident that involved the struggle had taken place on a muddy surface. The doctor had observed mud in the Complainant's clothes and both of her feet. The doctor having agreed under cross-examination that she would have expected to see some lacerations around the Complainant's back and her arms if a struggle took place on a rough surface, she also agreed under re-examination that the absence of lacerations on the patient's body could have been due to the reason that the alleged incident happened on a muddy surface.
40. The Complainant said that the Accused started kissing her neck and bit it. The medical evidence is consistent with the evidence of the Complainant. The doctor had observed ten bruises around the Complainant's neck, which by their shape, would have been made by the two front teeth.
41. The Accused admitted that the love bites were made by him. His version was that they were made while both of them were on horseback. He was driving the horse in the front while the Complainant was sitting at his back. He demonstrated in Court how he bit her neck turning his head back. It is hard to believe that the Accused was able to bite the Complainant's neck and leave ten bite marks whilst on horseback in the manner he demonstrated in Court.

42. According to the doctor, the blood around the thighs, redness in and around the vulva and the hymen being not intact are consistent with a sexual intercourse. Although she was unable to comment if it was forceful, she agreed that the history related to her by the Complainant was consistent with her medical findings. It was the position of the Defence that a sexual intercourse never took place between the Accused and the Complainant. Then who was responsible for that? There was no suggestion that the Complainant was penetrated by someone else between the time they met in the forest and she was examined by the doctor in the afternoon. I am sure it was the Accused that had penetrated the Complainant.
43. The Complainant's distressed condition is consistent with that of a rape victim. The Complainant was crying when her mother arrived home soon after the alleged incident. The doctor observed the Complainant to be shaken up and was in a state of shock. I am sure that the distressed condition was directly linked to the sexual assault that the Complainant was subjected to.
44. I carefully observed the demeanour of the Complainant. She was straightforward and not evasive in answering the questions. Her conduct after the alleged incident and in Court is consistent with that of a genuine rape victim. I find her to be a truthful and reliable witness.
45. The Accused came up with his side of the story under oath. Bearing in mind that the Accused has nothing to prove in this case, I analysed his evidence to see if it creates a reasonable doubt in the version of events of the Prosecution case. Even if I find him not to be credible, still the Prosecution has the overall legal burden to prove their case beyond reasonable doubt.
46. According to the Accused, the Complainant agreed to go to town with him to drink and have sex with him because she needed money to go to school. If she really wanted to make money by selling her body, she could have easily done that, without taking pain in walking nearly six kilometres into the forest to pick *ota*, because she knew the Accused was working for the farm that belonged to her family. Further, he could have exchanged his money for sex in the forest itself without going to town if she really needed money.

47. As I said before, I am unable to accept that the Accused made love bites while on the horseback. The version of the Accused is also inconsistent. He said that he was assaulted by Complainant's uncle Ulai for raping the Complainant. If he went to the police station on his own to lodge a complaint against Ulai, why then was he arrested and locked-up without any reason? He knew that he was being alleged for raping the Complainant even before he went to the police station. However he pretended that he was arrested and locked up by police without him being informed of the reason for arrest. His evidence is not plausible. I am sure the Accused was arrested and locked up by the police because of the complaint they had received from the Complainant.
48. The Accused was not straightforward in his answers. He changed his evidence when he realised that the answer he had already given was not favourable to him. He said that it was the Complainant that agreed to go to town and have sex with him. Then he admitted that both of them agreed to go to town.
49. The evidence of the Accused is not appealing to me. I reject the evidence of the defence. It failed to create any doubt in the version of events of the Prosecution case. I know the rejection of Defence evidence does not mean that the Prosecution has proved its case. Having considered all the evidence led in trial, I am satisfied that the Prosecution proved the elements of each charge beyond reasonable doubt.
50. I am sure the Accused penetrated the Complainant's vagina with his finger twice and once with his penis without the Complainant's consent. By her conduct and the words, the Complainant indicated to the Accused that she was not consenting to have any form of sex with the Accused. Having known that the Complainant was not consenting to have sex with him, the Accused proceeded to penetrate the Complainant's vagina with his penis and twice with his fingers. The Prosecution proved all the elements of Rape as charged in the information. I am also sure the Accused touched the breast and the vagina of the Complainant without her consent. The elements of Indecent Assault are also satisfied.

51. The Prosecution proved all the charges beyond reasonable doubt. I find the Accused guilty of Rape and Indecent Assault as charged. The Accused is convicted accordingly.



Aruna Aluthge

Judge

15 April 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State

J K Singh Lawyers for Defence