

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO.HAC 298 of 2018

BETWEEN :

STATE

AND :

WALUSIO KALI FERESI

Counsel :

Ms. W. Elo for the State
Ms. A. Prakash for the Accused

Hearing on :

28th of January 2019 – 31st of January 2019

Summing up on :

31st of January 2019

Judgment :

04th of February 2019

JUDGEMENT

1. The accused, Walusio Kali Feresi is charged with four (4) counts, namely 1 count contrary to Sections 375(1) (a) (i) and (v), 1 count contrary to section 209 and two counts contrary to section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009 for committing Criminal Intimidation, Assault with intent to Commit Rape and Rape on Siteri Lovanatua who was his legally married wife then.
2. He pleaded not guilty to the charges and the ensuing trial lasted for 3 days. The complainant Siteri and Dr. Vuki who examined the complainant afterwards, have given evidence for the prosecution while the accused gave evidence on his behalf.
3. At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the accused guilty to all the alleged counts.
4. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the assessors.
5. Prosecution case was based basically or to be precise, entirely on the evidence of the complainant. Her evidence is that;

- i) Presently she lives in Nabukavesi village.
- ii) Earlier she was married to Walusio Kali Feresi, the accused (sometimes referred to as Walusio) in this case.
- iii) She has a son from the marriage to Walusio, who will turn 9 years this March.
- iv) As they had family problems, she got separated from the accused in January 2013, and the child was with her.
- v) In June 2013, she was working as a special constable of the Fiji Police Service attached to Navua police station.
- vi) On the 1st of June 2013, the officer in charge of the Navua police station did call and ask her to go to her husband and talk.
- vii) She refused as he, the accused always used to assault her. Then the accused called her and told that her son was with him, and then she decided to go. The accused has gone and picked her son from her parents without her knowledge.

6. Speaking of the incident the witness said;

- i) When she went to the accused's home after her work, the accused opened the door and when she went in locked the door after her.
- ii) As soon as she entered he has questioned her whether she is having an extra marital affair, and when answered in the negative, the accused has held her by her collar, pulled her and said "stop lying". There has been an axe and a cane knife already on the floor and the accused has said that he is going to kill her with the axe.
- iii) By that time her son has been sleeping on the bed which was there at about a distance of 25 feet. She was scared and begged the accused to not to do so. Then the accused has asked her to kneel down, which she has done. Then the accused, showing her the axe, which was already sharpened, has angrily threatened her that he will chop her bones, pack it in a sack and ask her relatives to come and pick it. When she still kneeling down, begged him to not to do so, picked up the cane knife.
- iv) She tried to push the hand of Walusio holding the cane knife, and screamed. Her son who was asleep woke up and cried, and she had run to him and hugged him. Then Walusio has come putting aside the cane knife and carried the child and has tried to put him back to sleep.
- v) After putting him back to sleep Walusio has come back and grabbed her by her wrist and taken her to the adjoining room. There has been another bed there and Walusio taking off his pants has held her by the hair and forced her to suck his penis.
- vi) She was scared and done whatever he wanted her to do, and when she pushed him Walusio has started to punch her on the head. Thereafter he has pulled her up and has started to love bite her neck, and said "let the boys see what's on your neck".
- vii) Thereafter, Walusio has pushed her on to the bed face downwards, and pulled up her skirt and pulled down her panty, and inserted his penis into her anus. She was on the edge of the bed and he was pressing one hand on her back and it has

been painful to her. She has screamed in pain and hearing her, the son has woken up and cried "mummy, mummy". Then Walusio has stopped what he was doing and putting on his clothes, and walked towards her son.

- viii) She has pulled up her panty and jumped out of the house opening the back door, and run towards the village. She has heard Walusio calling her. Thereafter she has come to the Navua town and gone to the police station. She has seen the officer who asked her to go to the husband's house, but has not spoken to him as he has not taken any action on her earlier complaints. Whenever she complained, he turned a blind eye and categorized them as trivial and settled and did not put before the courts. He did it because Walusio is well known to him as an ex-police officer.
 - ix) Thereafter on Monday the 3rd June, she has gone to the Draunibota DPC's office and complained. Having referred the matter to the Sexual offences unit at Totogo, she has gone there and having medically examined by a doctor, has made the complaint on the 4th of June 2013.
 - x) She recognizes the accused as Walusio, her ex-husband to whom she was married for 5 years.
7. In answering the cross examination, the PW1 said;
- i) She is the 3rd wife of Walusio, and he is about 17 years elder to her. She has joined the police force in 2008, and as for the directives in the police force the officers are required not to have extra marital affairs.
 - ii) Walusio punched on the sides and the back of her head and made love bites on the front half of her neck.
 - iii) She recognized the statement made by her to the police on the 04th of June 2013. She agreed that she has not mentioned the things Walusio alleged to have said at the time of the incidents, in her statement.
 - iv) The defense successfully points out a contradiction between her evidence and the statement in regards to the place where she put on her underwear back after the alleged incidents, when running away.
 - v) Further the defense points out few omissions in her statement to the police in respect of what Walusio is alleged to have said and also in respect of returning back to the Navua police station on the day of the incidents.
 - vi) When queried of her son's physical custody after her separation from Walusio, the witness affirms that the child was with her, but Walusio has without her knowledge, has carried him away from her parents, just before the alleged incidents.
 - vii) On the instructions of the accused it was suggested that when Walusio queried her on the alleged extra-marital affair, the witness's response was "who told you", and the witness concedes.
 - viii) When suggested that day she came to Walusio's house wearing someone else's blue t-shirt, the witness denied.
 - ix) When it was suggested that she has made these allegations because of fear of Walusio informing her extra-marital affair to her superiors, the witness denied

such. I note as revealed later in the proceedings, that she was aware of Walusio suspecting her of an extra-marital affair before. If she had had such a fear, she wouldn't have waited for about 5 months, until this day. Therefore, it does not carry sufficient impetus for her to make a false allegation much later.

8. In re-examination the witness said, she did not remember to put everything in to the statement as she was still in fear. She reaffirms that the evidence she gave is true and correct.
9. The Second witness for the prosecution was Dr. Vuki, the PW2.
 - i) Having concluded his MBBS in the year 2000, he worked at the CWM hospital until 2015, when he retired. He was the head of the Emergency Medicine Department, in the year 2013.
 - ii) The medical report subsequently marked and produced as PE1, was prepared by him, on the 04th of June 2013. (PE1 refers to the patient Siteri Lovonatua, the PW1.)
 - iii) When examined the patient, she had 2 love bite marks on the left neck. In addition she complained of headache in the back half of her head. She complained of the pain in the anus and when examines, he noted a laceration of 1cm at 12 O'clock position. The laceration has happened due to a sexual abuse and it could have happened on or after the 1st of June 2013.
 - iv) the injuries to the back half of her head may have cause by blunt force and punching may cause such injuries.
 - v) The medical findings of his are consistent with the history given by the patient.
 - vi) When cross-examined the witness admits that it is also a possibility of injuries observed happening after the 1st of June 2013. However, I note that it was never suggested from the earlier witness PW1, whether those injuries happened subsequently.
10. I am quite aware that only evidence which relates directly to the alleged incidents is the evidence of the PW1. Therefore, the ultimate question is whether her evidence is trustworthy and reliable.
11. Another important factor would be the delay in making the complaint to the police. It is that the assessors accepted the explanation given by the PW1 in relation to the delay and decided the veracity or credibility is not affected by such delay.
12. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence pertaining to all the elements of the alleged offences, acting under the virtue of section 231(2), of the Criminal Procedure Decree, called for a defense explaining and giving his due rights to the accused.

13. The accused elected to give evidence on his behalf. His evidence was that;
- i) He lives in Raiwaqa with his two sons from an earlier marriage.
 - ii) He has a son from the marriage to Siteri, the PW1, who may be about 7-8 years old. He married Siteri in 2009 and the child was born on the 10.03.2010.
 - iii) He and Siteri separated in January 2013 and were living separately since then. The 2 year old child was with him, since then throughout the time of the alleged incidents.
 - iv) On the 1st of June 2013, he has called the officer in charge of the Navua police station, and inquired of the whereabouts of Siteri. They informed him that she has already left work at about 3 O'clock. Then he called her on her mobile and she told him that she is doing bar patrol, and when he asked her to come home, she has said that she will be coming. Then the time was about 4 O'clock in the evening.
 - v) After speaking to Siteri, he has spoken to her parents. He has called them to know where Siteri is. Thereafter he has tried many times to call her to say that her son wants to see her, but could not get at her. Later Siteri came to his place at about 9.00pm.
 - vi) When she came he opened the door and asked her to come in and sit down to ask about something. Then he asked her whether she was carrying on an affair, and she has said, no.
 - vii) Answering a question by the Court, he states that, though she was not asked to come home to discuss an issue, he asked about it since he heard rumors of her having an affair. At that time the son was sitting on the bed and he was standing about 3 feet away from the bed while Siteri was seated on the floor, in front of him at just an arm's length.
 - viii) He further states that when he queried Siteri of her extra marital affair, his emotions were normal and he was speaking in a soft voice. Then Siteri started crying and admitted of having an affair. I note that his earlier answer was that she denied having an affair. But he later contradicts his stance by stating that straightaway; she started crying and admitted such affair. When queried whether he could recall that moment well, the witness says "yes". When asked whether she asked anything before admitting to have an affair, the witness says "no".
 - ix) When reminded him of the questions asked by the defense counsel on his instructions, the witness, changing his stance says that she asked back 'who told you', and admits what he said in evidence, and what he said he is sure of before, is wrong.
 - x) The witness further states that he saw love bites on her neck, and that conformed his suspicion. If Siteri has admitted of having an affair, would one look for more confirmation?
 - xi) His evidence is, and then she, all of a sudden pulled down his pants and started sucking his penis. The accused is saying this of a mother of a 3year old child admittedly came only to see the child, while the child is wide awake and watching, did such an act.

- xii) He further states that then their son came there and he pulled his pants up and asked her to have a shower and come, and gave her a towel and a sulu. Then she just went in to the bathroom, and after about 10-15 minutes his son went to call her. Then after having gone the child has come back and told him that she was still having a shower. Again, after waiting for a while, he has asked the son to go and see. Then also son has come back and told him that she is still having a shower. Again after about 15 minutes he has gone and checked in the bathroom to find out she is not in. Thereafter, as for his evidence, he has gone into the house with the son locked the door and slept. Is it the natural behavior of a person as for him, who believed that everything was settled?
 - xiii) The witness states that thereafter on the following day together with her parents, he went to Seiniki's house and he saw Siteri there. It should be pointed out that such a suggestion was never made on the instructions of the accused when Siteri gave evidence.
 - xiv) The crux of his evidence is that the accused denies the allegations leveled against him.
14. In response to the cross examination, the witness states;
- i) Subsequent to the separation, their son was with him. Now the son is with Siteri since he has handed him over to Siteri's mother in 2014.
 - ii) He has called Siteri and asked her to come to his place only on the insistence of the son. He further states though they were separated he wanted to know her exact whereabouts and for that purpose gave calls to many others.
 - iii) When suggested the witness denies that he lured her to come to his place by bringing the child from her parents that day.
 - iv) Though he was aware of the rumors since January, he did not query her before, when she came every week for more than 20 times, to see the child. The witness admits that he was in the police service and was interdicted due to an issue with Siteri, and having served at Navua police station from 2000 to 2009, had many comrades there close to him.
 - v) He states that though he loved Siteri, she wearing a T-shirt which he assumed to have belonged to Senitiki did not made him angry. However the accused denies the allegations leveled against him.
15. The assessors have found the evidence of prosecution as truthful and reliable, as they unanimously found the accused guilty to all the counts. They were directed in the summing up to evaluate the probabilities of the version of events as presented by the parties. The inconsistencies of the evidence were also highlighted with suitable cautions.
16. The three assessors have obviously rejected the denial of the accused on the counts. It was a matter of accepting the evidence of the complainant or not.
17. In my view, the assessor's opinion was not perverse. It was open for them to reach such conclusion on the available evidence. I concur with the opinion of the assessors.

18. I am also satisfied that evidence of the prosecution presented through the complainant is to establish the elements of the offences.
19. In the circumstances, I convict the accused, to all the counts;
Namely 1 count of Criminal Intimidation contrary to Sections 375(1) (a) (i) and (v), 1 count of Assault with intent to Commit Rape contrary to section 209 and two counts of Rape contrary to section 207(1) and (2) (a) of the Crimes Decree No. 44 of 2009.
20. This is the Judgment of the Court.


Chamath S. Morais
JUDGE



Solicitor for the Prosecution : Office of the Director of Public Prosecution, Suva
Solicitor for the Accused : Legal Aid Commission, Suva