

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 96 of 2015

STATE

V

BIU CABEBULA

Counsel : Ms. S. Naibe for the State.
: Mr. S. Kumar [LAC] for the Accused.

Dates of Hearing : 2, 8, 9 March, 2018
Closing Speeches : 12 March, 2018
Date of Summing Up : 13 March, 2018
Date of Judgment : 15 March, 2018

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) & (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

BIU CABEBULA between the 9th of July, 2012 to the 31st of July, 2012 at Sigatoka in the Western Division, penetrated the vagina of “**AB**” with his penis without her consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

BIU CABEBULA on the 6th day of July, 2012 at Sigatoka in the Western Division, unlawfully and indecently assaulted “**AB**” by caressing her breast.

2. The three assessors had returned with unanimous opinion that the accused was guilty for the first count being representative count of rape. For the second count of indecent assault the assessors returned a majority opinion (by two is to one) that the accused was guilty.
3. On the evidence before this court it was open to the assessors to reach such an opinion.
4. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called two (2) witnesses while the defence called three (3) witnesses.
6. The complainant in the year 2012 was 15 years of age and a Form 4 student.

7. On 6 July, 2012 at about 7.30pm the complainant went to attend a church service at the Pastor's house in Sigatoka Village. After the church service finished and as the complainant and her youngest sister were about to leave for home, the accused came and offered to drop them.
8. The complainant refused the offer but the accused insisted. Whilst walking the accused told the complainant that he wanted to have sex with her. The complainant refused reason being the accused was much older than her and she was very young.
9. Upon reaching home, the accused told the complainant's sister to go and watch movies at her uncle's house. The complainant also wanted to go with her sister but the accused stopped her by forcefully pulling her arm.
10. The complainant repeatedly told the accused that she could not have sex with him. After the accused let go of her hand she entered her house through the front door. After locking the door she went out through the back door to bring her sisters home. When they were returning home the complainant saw the accused standing outside their kitchen. The complainant was shocked to see the accused she then told her sisters to go inside the house, while telling her sisters to go inside the house the accused came and pulled her hand and took her inside the kitchen which was outside the main house.
11. In the kitchen the accused forced the complainant to sit on the floor and started touching her breast. The complainant ran away and went inside the house. Before going into the house the accused had told the complainant not to tell anyone about what had happened.

12. When the accused was touching her breast the complainant was afraid because this was the first time someone had done this to her. At this time the complainant's father was at the Pastor's house and her mother was working night shift.
13. The complainant did not tell her parents about what the accused had done to her since she was afraid that her father would beat her up because her father had warned her on a previous occasion that if anything happened to her he will beat her since her mother got pregnant whilst at school.
14. On 9 July, 2012 the accused came to the house of the complainant, at home she was with her sisters and a cousin Ana who had come from Suva. After a while the complainant's cousin wanted to eat some chaser, as the complainant was about to go to the nearby shop the accused said he was also leaving for home.
15. When the complainant was going home from the shop on the way she heard the accused calling her from a dark spot, she did not bother but continued walking home. After a while the accused came into her house the complainant was shocked to see the accused.
16. After the grog session finished, at about 1 am the next morning the complainant's mother came home from work and the accused said that he was leaving. The complainant locked the house and went to sleep with her mother and other siblings in one bedroom while her cousin Ana slept in another bedroom.
17. While sleeping the complainant felt someone tapping her leg and also pulling it, when she woke up she saw the accused standing beside the bed in the bedroom. The complainant was shocked to see the accused in her bedroom.

18. The complainant told the accused to go inside the house since her mother was sleeping. In the living room she asked him how he was able to come inside the house.
19. The accused then pulled her hand and in the sitting room he laid the complainant on the bed took off her pants and also his pants he then inserted his penis inside her vagina and had sexual intercourse for three (3) minutes.
20. When the accused was on top of her having sex, she felt pain all over her body especially her thighs. The complainant did not shout or raise alarm because she was frightened her mother would wake up and think that she was consenting to what the accused was doing to her. The complainant was really frightened when the accused had pulled her hand since he was a big man and she was a small girl.
21. The complainant did not consent to what the accused had done to her. After having sex the accused stood up got dressed and before going away he told the complainant not to tell anyone about what had happened.
22. After the accused left, the complainant went to the bathroom and she saw blood coming out from her vagina.
23. The complainant also informed the court about another incident in the same month that is July. At about 9pm after locking the doors of the house the complainant was sleeping in the bedroom with her sisters when she felt someone tapping her leg. When she woke up she was shocked to see the accused standing beside her bed.

24. The accused pulled her hand and took her to the last bedroom and inside the room he forcefully took off her clothes and inserted his penis into her vagina and had sexual intercourse for 10 minutes. The complainant was scared and tried to get away from the accused because this was not the first time he had done this to her.
25. The complainant wanted to shout but the accused had blocked her mouth with his hand and also told her not to shout. She tried to get away from him by pushing and kicking him but could not since he had held her tightly and continued to have sex with her.
26. The complainant felt weak all over and couldn't do anything, her sisters were sleeping inside their bedroom and her mother was not at home. Before leaving, the accused told the complainant not to tell anyone about what had happened.
27. The complainant did not tell her parents because she was frightened and also ashamed she did not know what to tell them or explain to them. The complainant always looked upon the accused as her brother since whenever he used to come home her parents always welcomed him.
28. On 27 February, 2013 the complainant went to the hospital with her aunt since she was sick, on this day she came to know that she was 7 months pregnant. A Doctor from the hospital reported the matter to the police.
29. At the Police Station the complainant told the police officers everything the accused had done to her, it took her so long to tell anyone because the accused had warned her if she told anyone about what he had done to her he will do something to her.

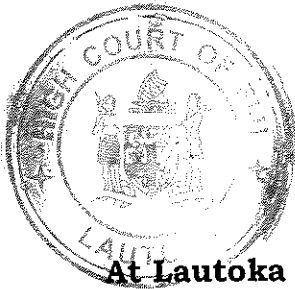
30. The final prosecution witness was Wati Naivalurua the aunty of the complainant, she confirmed the evidence of the complainant of what had transpired on 27 February, 2012. In addition to this, the witness informed the court that since the complainant was scared of her parents she informed the parents of the complainant about the complainant's pregnancy.
31. The accused in denying all the allegations states that he had consensual sex with the complainant on two occasions only. The accused further states that he was in a relationship with the complainant who was his girlfriend.
32. In respect of the count of rape the accused maintains that he had not forced the complainant at any time and that she had the opportunity to shout or raise alarm but she did not because she had consented to have sex with him. The accused also states that the complainant cried rape after it was revealed that she was pregnant and it took her 7 months to lodge a complaint against him when she had all the opportunity to do so earlier.
33. In respect of the count of indecent assault the accused states that the complainant had willingly come into the kitchen where he was waiting for her. The accused did not touch the complainant's breast at all but had sexual intercourse with her consent.
34. Finally the accused says the complainant had made up the allegations against him after it was revealed that she was pregnant.
35. The two (2) defence witnesses did not see the alleged acts but informed the court of their observations that the accused and the complainant were in a relationship with each other and that it was

the complainant who would frequent the house of the accused and both were seen together.

36. I accept the evidence of the complainant as truthful and reliable. The complainant was able to recall what had happened to her and was forthright in her evidence. The complainant was also able to withstand cross examination.
37. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty.
38. The fact that the complainant did not shout for help or wake any members of her family does not in any way affect the reliability of the complainant's evidence. There is no need or a requirement for a victim to shout or raise an alarm when faced with circumstances as described by the complainant.
39. I accept the reasons given by the complainant that she was frightened and did not know what to do. I also accept that the complainant told the Police everything the accused had done to her when the matter was reported. Although the complainant was late by 7 months, this delay does not cast any doubt on the reliability of the complainant's evidence.
40. I do not believe the accused told the truth in court when he stated that the complainant was his girlfriend and both were in a relationship. The accused also did not tell the truth when he said that he did not have sexual intercourse with the complainant in her house but in the outside kitchen with her consent and that he had not caressed or touched her breast.

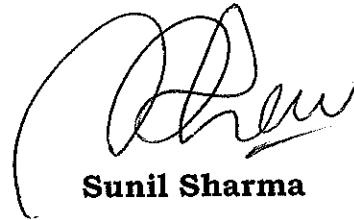
41. From the evidence adduced in court it was obvious that the accused was regularly visiting the house of the complainant and was very much trusted by the complainant and her family. As stated by the complainant the accused knew every corner of the complainant's house accordingly, I have no doubt that the accused had entered the house of the complainant on the two occasions described by the complainant and had penetrated the complainant's vagina without her consent. I also have no doubt that the accused had caressed the breast of the complainant on 6 July, 2012.
42. I also do not believe the two defence witnesses who were very closely associated and/or related to the accused by way of friendship and being the sister of the accused.
43. The defence witnesses also did not tell the truth in court their demeanour gave me the impression that they were protecting and/or saving the accused from any wrongdoing and were not forthcoming in their evidence.
44. I reject the evidence of the accused and the two defence witnesses as unreliable and untruthful.
45. I am satisfied beyond reasonable doubt that the accused between the 9th July, 2012 to the 31st July, 2012 had penetrated the vagina of the complainant with his penis without her consent.
46. I accept that the accused knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.
47. I am also satisfied beyond reasonable doubt that the accused on 6 July, 2012 unlawfully and indecently assaulted the complainant by caressing her breast.

48. I agree with the unanimous opinion of the assessors that the accused was guilty of the representative count of rape. I also agree with the majority opinion of the assessors that the accused was guilty of the offence of indecent assault as well.
49. In view of the above, I find the accused guilty as charged for the representative count of rape and for the count of indecent assault.
50. I therefore convict the accused as charged.
51. This is the Judgment of the Court.



At Lautoka

15 March, 2018



Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.