

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 190 OF 2016

STATE

v

ANDREW MARK ROD

Counsel: Ms. R. Uce for State

Ms. K. Vulimainadave with Ms. J. Manueli for Accused

Date of Summing Up: 22nd March, 2018

Date of Judgment: 26th March, 2018

JUDGMENT

1. The Accused is charged on the following Information and was tried before three Assessors.

First Count

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, unlawfully and indecently assaulted **VINAISI NIURUA**.

Second Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, inserted his finger into the vagina of **VINAISI NIURUA** without her consent.

Third Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ANDREW MARK ROD on the 07th day of September, 2016 at Lautoka in the Western Division, inserted his penis into the vagina of **VINAISI NIURUA** without her consent.

2. After a lengthy deliberation of one and half hours, Assessors unanimously found the Accused 'not guilty' on all counts.
3. I retired over the weekend to deliberate on my Judgment. Having reviewed my own summing up and the evidence led in the trial I have decided to accept the version of the Prosecution. Having disagreed with the unanimous opinion of Assessors, I proceed to give my reasons as follows.
4. The Prosecution called two witnesses and relied substantially on the evidence of the Complainant. At the end of the Prosecution case, Accused elected to give evidence.

5. There is no dispute as to the identity of the Accused. It was agreed that the Accused was known to the Complainant before the alleged incident.
6. The Accused completely denies all the elements of first two counts. He denies licking the vagina of the Complainant. He also denies penetrating the vagina of the Complainant with his finger without her consent. In respect of the third count, Accused admits having had sexual intercourse with the Complainant. However, he denies that he did it without her consent. Therefore, the only dispute in respect of the third count is with regard to consent.
7. The Complainant was only 18 years old at the time of the offence. She was still schooling at the Lautoka Central College. At the material time she resided at Waiyavi, Lautoka with her uncle and aunt. She is originally from Nokonoko Village in Ra and came to her uncle's place to attend school in Lautoka. The Accused is a close friend of the Complainant's uncle. He used to visit Complainant's uncle's house to repair uncle's vehicle. The Complainant and the Accused used to attend the same church.
8. On the 7th of September, 2016 at about 10 a.m., the Complainant left home to buy detergent from Anil's Shop. On the same day, the Accused was driving a twin cab with one Saimoni Dua. All those facts are not in dispute.
9. The Complainant in her evidence admits that she boarded the twin cab driven by the Accused on her own free will. She boarded the twin cab for the expressed purpose of going to Anil's shop to buy washing powder. The Complainant said that she knew the Accused for five months and, when offered a lift to the shop, she boarded the vehicle without any hesitation. The man seated at the back, Saimoni too was no stranger to her. In Fiji, it is not uncommon phenomenon for a girl to board a vehicle of even a stranger and therefore, her getting into Accused's vehicle to go to the nearby shop to buy washing powder is quite natural.
10. The Accused did not stop at the shop although he knew very well that the Complainant boarded the vehicle on the agreement that she will be dropped at the shop. When the Accused went past the shop Complainant kept on reminding the Accused that she wanted to buy washing powder from the shop. Even the Accused admits that the Complainant had renewed her demand to buy washing

powder from the shop, when he went past the shop. Despite her repeated demands, Accused drove the cab to the town on the pretext that they are going to buy washing powder in town.

11. At Ravouvou Street, Saimoni got off and another lady boarded the vehicle and sat in the front seat. Then they went towards town. Cruising around and making 3-4 rounds in town, Accused then proceeded to drop the lady off. After dropping off the lady he proceeded towards Saru Flame Tree Road and went past a bridge and stopped the vehicle.
12. There is not much a difference between the two versions up to this point except Accused's two assertions firstly that he had informed the Complainant at the time of her boarding that he will drop Saimoni first at Anupam, and then they will buy the soap powder in town and, secondly that, after dropping Saimoni and having made three rounds in town, they had bought washing powder, before meeting Accused's friend (the lady customer).
13. Both said assertions of the Accused are not credible and believable. Firstly, if the Complainant had known that the Accused was going to drop her at the shop after dropping off Saimoni at Anupam, then she would not have renewed her demand to buy washing powder when they were already in town. Secondly, she would not have boarded the twin cab had she known that the Accused was first going to Anupam as the Anil's shop was only five minutes-walk away from home.
14. Accused's assertion that they had bought washing powder in town before his friend (lady customer) boarded the vehicle is not consistent with his Counsel's stance in her cross examination. It was never put to the Complainant that they had bought washing powder in town.
15. The Defence argues that the Complainant could have complained to the lady who boarded the twin cab if she was being driven by the Accused against her will.
16. It is clear that until the lady was dropped, the Complainant had nothing much to complain because the Accused had told her that he would take her to a shop in town to buy washing powder.

17. Both the Complainant and the Accused agree that, after dropping the lady off, the twin cab was parked near a bridge in Saru Flame Tree Road. However they dramatically differed in their respective stories. According to Complainant's evidence, Accused had got off from the driver's seat and boarded at the back of the cab and started kissing her making a 'love bite' on her neck. She said she did not like it. She was also scared. She tried to push him away but she couldn't. When the three Fijian boys were peeping at them Accused was disturbed and went back to the driver's seat.
18. According to Accused's version, he had gone to Flame Tree Road to wash the vehicle. Near the bridge, he had reversed the vehicle towards the river and opened the door, removed the mat, opened the backdoor, and started talking to her for 20 minutes while she was still seated in the van. At this stage Accused informed her that, after washing the vehicle, they will go back to Abaca. However, Accused did not wash the vehicle. He suddenly changed his mind and informed the Complainant that they will go direct to Abaca.
19. Saru Flame Tree Road incident which included kissing is the first incident that would have sent a clear message to the Complainant as to Accused's actual intention. Accused did not dispute the facts that he started kissing the Complainant, made a 'love bite' on her neck and three Fijian boys arrived in a cab. He attempted to portray the picture that the kissing took place with her consent. To support his claim, Accused said the Complainant could have protested and conveyed her dissent to the three Fijian boys if she did not like it.
20. It was argued for the Defence that Complainant could have yelled or demonstrated her displeasure in any other form, when she saw the iTaukei boys in the white cab, if she was not consenting to the improper advances made by the Accused.
21. In her explanation, the Complainant said that she could do nothing as the Accused was on top of her. She further said that all the doors and windows of the cab were closed. She further said that the cab was moving slowly and if it had stopped, she could have raised alarm. Complainant's version is probable and believable.

22. Accused's version as to Saru Flame Tree Road incident is not credible. According to him, the very purpose of him going to that place was to wash the vehicle. Nevertheless, he admits that no washing took place, although he took a mat out from the cab. Accused failed to explain why he suddenly changed his mind and decided to go to Abaca without washing the vehicle. It appears that the version of the Accused is a fabrication aimed at countering the version of the Prosecution.
23. The Complainant in her evidence did not mention that they had ever gone to a petrol bowser at Tavakubu. Conversely, the Accused in his evidence revealed for the first time that he proceeded towards Tavakubu Roundabout, and filled diesel at the bowser and spent there 20 minutes before proceeding to Abaca. However, when the Complainant was giving evidence, it was never suggested to her by his counsel that they had gone to a petrol bowser in Tavakubu. Accused later admitted that there is no petrol bowser at Tavakubu Roundabout. Even if there was a bowser at Tavakubu Roundabout it is hardly believable that the Accused was kept waiting at a bowser situated in a remote place like Tavakubu for such a long time for him to fill diesel. Quite surprisingly, Accused could remember even the number of vehicles and number of people he saw at the petrol bowser. I believe that the Accused fabricated this story to show that the Complainant had ample opportunity to raise alarm while waiting at the petrol bower.
24. It was strenuously argued by the Defence that the Complainant had an ample opportunity to raise alarm and even escape from the house at Abaca. Complainant explained how helpless and vulnerable she was on her way and in that house in Abaca. On their way to Abaca, Accused had accelerated the speed of the twin cab as he went past the Tavakubu Police Post. She said she did not want to interrupt his driving and risk an accident. She said that when they went past the bridge she was shouting and asking for help, but no one responded. She said she didn't make any attempt to escape from the house because she was feeling weak. While the Accused was away, she could not see anybody around the house and that place was also new to her.
25. The house she was taken to was situated in an isolated interior part of Abaca. Complainant said that she could not see any house or any sign of human habitation around the house. She saw only rocks. According to Kalesi (PW.2)'s

evidence, this house is situated approximately 2 kms away from Abaca, the closest settlement, and 11 kms away from the Tavakubu Police Post. Screaming and yelling would not have helped her.

26. It seems that in such a scenario the Complainant had no other option but to succumb to whatever the Accused had asked her to do. She got off from the cab when she was asked to do so. She had to cook for them although she was weak. She had to remain in the house when he said he is going to bring down a transport.
27. There is no iota of doubt in my mind that the Accused took the Complainant to the house at Abaca against her will.
28. According to the evidence of the Complainant, immediately prior to the sexual intercourse, Accused was informing her about his unsuccessful family life that he was separated from his wife and that he was paying maintenance. Accused also in his evidence said that they were talking about his private life and that he had informed the Complainant that he had divorced from his wife. While they were talking, the Complainant was insisting that she wants to go back home. He then informed her, *don't worry you will go back home*. After that he informed her that he will go home and bring her clothes. She did not say or do anything, she was staring at him. She said that he was trying to show that he wanted her to stay with him.
29. Complainant in her statement to police had told that she was in Abaca with one Adriu and, after two days, he just left her in Abaca and ran away. She admitted that she was awaiting Accused's return and when she heard someone calling she thought it was the Accused.
30. In view of this, one can argue that, although the Complainant was taken to Abaca against her will, she had eventually changed her mind and consented to have sexual intercourse with the Accused. However, the circumstances under which the sexual intercourse took place do not permit me to draw such an inference.
31. Complainant said that she was screaming and kicking when the Accused was trying to have sexual intercourse, but no one came to help her.

32. Consent, if it were to be real, should have been given freely and voluntarily. Consent given under circumstances of pressure or duress is not consent at all. Furthermore, consent should be an informed one. If the consent was obtained by false and fraudulent representations about the purpose of the act, it is not consent within the meaning of Section 206(2) of the Crimes Act.
33. The Complainant did not say directly that she was persuaded to live with him in cohabitation. She in her evidence only said that Accused was trying to show that he wanted her to stay with him. Having told about his unsuccessful family life, Accused, apparently in his attempt to convince the Complainant to have sexual intercourse, informed her that he will go home and bring her clothes. She did not say anything in reply.
34. If the Complainant had given consent at the last moment to have sexual intercourse under duress or believing the false and fraudulent representation of the Accused about the purpose of the act, namely the representation that he was going to live with her in cohabitation after sexual intercourse, then the consent is not real.
35. I am strongly of the view that Accused was not genuine when he offered to stay together (as husband and wife) with the Complainant and when he offered to bring her cloths from home. These offers in my opinion were advanced immediately prior to the sexual intercourse to convince the Complainant to satisfy his lustful demand for sex. If he was so genuine, he could have spoken to Complainant's uncle, who is admittedly a good friend of him, and inform that he was willing to start cohabitation with the Complainant. In contrast, Accused admitted that he would have called her uncle or relatives but he couldn't call them because he thought they might get angry on him.
36. The Complainant made a prompt complaint to police. Prosecution heavily relies upon this complaint to prove her consistency. Defence on the other hand argues that if she was raped she would have relayed the incident to Kalesi, the first person she saw that night. Complainant said that she informed Kalesi of everything that had happened. However Kalesi, the recipient of the complaint, did not say in her evidence that she had heard anything about a sexual encounter. Complainant had only informed Kalesi that she was coming from an

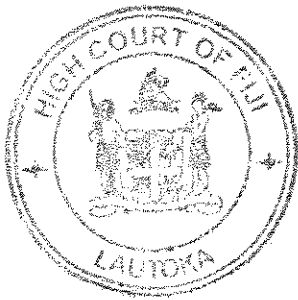
isolated house and that one man had taken her to that house, but she had not informed the name of that man.

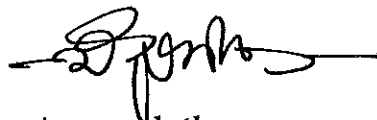
37. Kalesi in her evidence said that Complainant looked dirty and worried and therefore, she informed Complainant to take a shower, change her clothes, and have dinner so that they will call the police for her to give her statement only to the police. Soon thereafter the police team arrived and took her to the Lautoka Police Station. Even though Kalesi did not say anything about a sexual encounter having been relayed to her, she had made all arrangements at her disposal to call the police so that Complainant could make her complaint only to the police.
38. The Complainant had given a lengthy and comprehensive description of the incident to the police. That included licking of her vagina, penetration of her vagina by the Accused with his finger and penis without her consent. Defence was not able to highlight even a single contradiction or omission between her statement to police and her evidence in Court. The Complainant maintained her consistency in telling the story to police promptly after the incident and to the Court after nearly two years. Most parts of her version were confirmed by the Accused himself in his evidence. There was no room for fabrication of such a comprehensive story in such a short time by the Complainant who was only 18 years old at that time, although she had said that she was afraid to tell the truth to police.
39. The argument of the Defence that the Complainant had made the complaint with police not because she was raped but because she was found by police after a missing person report was filed by her aunty and uncle is not tenable.
40. Although the Complainant admitted that her uncle and aunty had lodged a missing person report with the police, she was located by police not as a result of a police raid. Instead, the police team had visited the Complainant during midnight when Kalesi's sister-in-law informed police about her. Kalesi in her evidence clearly said that she informed her brother's wife to call the police. After calling the police they were lying down at home waiting for the police to arrive. While they were sleeping in the middle of night the police team came and took the Complainant to the Lautoka Police Station.

41. Version of the Complainant is probable and believable. I observed the demeanor of the Complainant. She was straightforward and not evasive. I am convinced that the Complainant is a genuine and honest witness.
42. The version of the Defence is not credible and plausible. In addition to what I have already stated about unreliability of Accused's version, I proceed to add further points to justify my conclusion.
43. Accused in his evidence said that he is 28 years old. His evidence is not consistent with his own admission No.2 that he was 28 years old at the time of the alleged offence.
44. Accused said that he was in a boyfriend and girlfriend relationship with the Complainant for two months. Complainant vehemently denies having had such a relationship with the Accused. Despite his claim of romantic relationship, Accused was unable to say which school Complainant was attending. If he was in such a relationship and was talking to her for two months, he would have been able to name the school she was attending. Furthermore, when she was offered a lift, she did not get into the front seat which was vacant at that time, to sit beside the Accused. She boarded from the rear door and sat next to Saimoni who was at the back seat. I do not believe that the Complainant was in a romantic relationship with the Accused.
45. According to Complainant's evidence, as soon as the Accused parked his vehicle in front of the house at Abaca, he had gone to the back of the vehicle. She had seen Accused doing something to it. She inquired from him- *what did you do with the tyre?* Accused said he did not do anything but the tyre was punctured on its own. It is rather a surprising coincidence to note that the tyre becomes flat when the vehicle was parked right in front of the house, which later turns out to be the Accused's destination for that night. I am inclined to believe that tyre did not become flat on its own. It is part of the master plan which the Accused had authored to achieve his object.
46. Having stayed with the Complainant for two nights, Accused left the house leaving the Complainant alone on the pretext of arranging a transport for her. That is what the Complainant was told before he left. Accused had never told her that he was going to look for a tyre. Conversely, Accused in his evidence said

that he had informed the Complainant that he was going to pick a tyre for the vehicle. It is rather surprising to note that the Accused, being a mechanic himself had driven a vehicle without a spare wheel.

47. I carefully observed the demeanor of the Accused. He was evasive and not straightforward. He had ample time to give evidence when the Prosecution closed their case on the second day of trial. However, he wanted to buy time and even sought a sleep over at the police cell giving various reasons including ill health. The Court allowed the postponement but refused to have him kept in a police cell. He came with a well prepared story to counter the arguments of the Prosecution's version of events. However, his version is not appealing to me. His conduct and demeanor is not consistent with honesty.
48. I reject the evidence of the Defence and the unanimous opinion of Assessors. Prosecution proved their case on each count beyond reasonable doubt.
49. I find the Accused guilty on each count. Accused is convicted on the first count of Sexual Assault and second and third counts of Rape as charged. I convict the Accused on each count accordingly.
50. That is the judgment of this Court.




Aruna Aluthge
Judge

At Lautoka
26th March, 2018

Counsel: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused