

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 16 OF 2013

STATE

v

SAJNEEL RITESH RAO

Counsel: Ms. S. Kiran for State

Mr. D.S. Naidu with Mr. J. Prakash for Accused

Date of Summing Up: 3rd April, 2018

Date of Judgment 4th April, 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) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SAJNEEL RITESH RAO alias ASHNEEL on the 16th day of January, 2013, at Nadi in the Western Division, unlawfully and indecently placed his hands on the breasts of KARTIKA NAIR, without her consent.

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

SAJNEEL RITESH RAO alias ASHNEEL on the 16th day of January, 2013, at Nadi in the Western Division, inserted his finger into the vagina of KARTIKA NAIR, without her consent.

2. After a lengthy deliberation of one and half hours, Assessors, in their majority opinion, found the Accused 'guilty' on all counts.
3. I adjourned overnight to deliberate on my Judgment. Having reviewed my own summing up and evidence led in the trial I have decided to accept the majority opinion of Assessors. I proceed to give my reasons as follows.
4. Prosecution called two witnesses and based their case substantially on the evidence of the Complainant. There is no dispute as to the identity of the Accused. It is not in dispute that, at the time of the alleged incident, the Accused was present home with the Complainant when her husband, Sanjay, left for work.
5. Each element of Sexual Assault and Rape are disputed by the Accused. The Defence case is one of denial. They say that the Accused did not commit any of the alleged sexual acts.
6. Having heard evidence adduced by both parties, I am satisfied that the evidence Complainant gave in Court is truthful and believable.
7. Prosecution relies on recent complaint evidence of Complainant's husband, Sanjay, to prove consistency of the Complainant. Complainant made a prompt

complaint to her husband the same night and then to police on the following day.

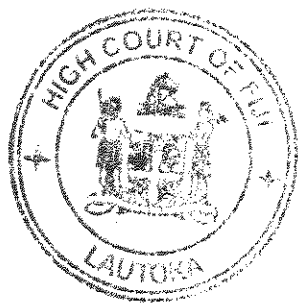
8. Recent complaint evidence was challenged by the Defence. It was argued that if the complaint was true, Complainant could have relayed the incident to Sanjay over the phone and that they could have gone to the police station on the same night of 16th January, 2013.
9. The alleged incident occurred around 8.00 a.m. on the 16th January, 2013. Evidence of the Complainant is that, when her husband left home at 7.30 a.m., only the Accused was home with her and the Accused came to her room and he sexually assaulted and raped her.
10. Sanjay was not on a mobile phone and therefore, soon after the incident, the Complainant had tried to contact Sanjay by calling him on the phone of one of Sanjay's workmates. However at that time, Sanjay was not with the workmate and he was told that Sanjay had gone on deliveries. She left the message with the workmate and asked him to inform Sanjay that she wanted to speak to him as soon as he comes. According to Complainant's evidence, she managed to contact Sanjay around 3 p.m. when Sanjay called her. She said she told everything and, when Sanjay returned home around 4 p.m., she told Sanjay everything in detail.
11. Complainant's evidence was affirmed by Sanjay in his evidence with slight variations. According to Sanjay, he had not gone on deliveries on that day but was attached to Nadi Town Branch and therefore he received Complainant's message around 8 p.m. when his workmate who worked at Jet Point Branch met him. When he called the Complainant around 8 p.m., she informed him to come home early because there is a 'problem'. However, she did not inform what the problem was. Sanjay managed to come home around 10.30 p.m. after unloading a lorry. Upon his arrival, Complainant relayed the full story to him in detail.
12. Basically both witnesses told the same story. Complainant differed as to the time she managed to contact Sanjay and as to the time Sanjay returned home. Under cross examination, Complainant basically agreed with the version of Sanjay. The Complainant gave evidence nearly five years after the incident and she will not have video graphic memory. Therefore, I do not consider those variations to be material to discredit her version.

10. Complainant had not told anything sexual in nature when she first called her husband on the phone. According to Sanjay's statement to police, Complainant had told him to come straight as there is very 'important thing' to tell him. Complainant later admitted that the version of her husband is true and explained that she did not tell everything over the phone because she was calling on somebody else's phone. That explanation is acceptable to this court.
13. Defence Counsel highlighted number of inconsistencies in Complainant's evidence with her previous statement to police. Those inconsistencies which I have referred to in paragraphs 40 and 41 of my Summing Up, in my opinion, are not significant or peripheral to the real issue at hand. Therefore, I do not consider them to be material enough to discredit the version of the Complainant.
14. Complainant had told police that '*I felt his second finger in her vagina*'. Whereas in her evidence in Court, she said that Accused put his hand or four fingers in her vagina. When asked to clarify, the Complainant said she felt all his fingers in her vagina. Here there is a slight variation in her two versions. The Court has to appreciate the fact that her evidence is not based on what she saw but what she felt. She had not actually seen how many fingers had gone in. Therefore in my opinion, this variation is not material. What is material is whether or not the Accused had inserted at least one of his fingers and penetrated her vagina at least slightly. I am satisfied that Accused had penetrated her vagina with his finger.
15. Prosecution also relies on Sanjay's evidence that Accused had made an admission as to the alleged offences. Sanjay was subjected to lengthy cross examination. However, his evidence was not shaken. His evidence is consistent and believable. I accept his evidence and the admission Accused made to him after the incident as being true.
14. I observed Complainant's demeanor in court. I am satisfied that she is an honest and credible witness.
16. Defence took up the position that the Complainant and her husband fabricated this allegation against him. Accused said that the Complainant had stolen his money and when she was implicated in the theft, she and her husband fabricated this allegation against him in order to counter the theft allegation made against

her. The Complainant vehemently denies that she had stolen Accused's money. She also denies that such a theft allegation had ever been made against her by the Accused on the 16th or any time before her going to police to lodge the rape complaint.

17. Accused had not made any complaint to police with regard to the alleged theft of \$ 200. He should have reported the theft allegation to police, if it were true.
18. Accused said in his explanation that he did not report the theft to police because they were his family and he only wanted them to return the money back. He further said that when he was taken to police station to record his statement with regard to rape allegation, he reported the theft to police, but officers did not want to listen to him. However, Accused admitted that he did not complain to any higher authority against police officers who refused to record his complaint. I am therefore of the view that the theft allegation was fabricated by the Accused to save his own skin.
19. Accused was not consistent in his evidence when he said that he had asked Complainant to vacate the premises because they had failed to pay the rent. He said : *'you people didn't pay the rent then why don't you look for a house for rent and vacate the house'*. However, he later denied having said so when he realized that his own evidence that *'they had not given their share of the rent because it wasn't yet one month'*.
20. Defence also called Accused's ex- *de facto* partner Ranjita (DW.2) to buttress their case and to show that Complainant had visited Ranjita on the very same day of the alleged incident (that is 16th January, 2013), still Complainant had never relayed such an incident to her friend Ranjita.
21. Complainant denies that she had visited Ranjita on 16th January, 2013, the day the incident happened. Her evidence was that she visited Ranjita on the 15th January, 2013, on the previous day. Ranjita admitted that she came to know about the rape allegation against the Accused when the Accused was released from remand three months after the incident. It is not possible for her to recollect the exact date the Complainant had visited her unless something significant happened on that particular day. Merely because her husband used to draw his wages on the 16th of the month, she cannot be expected to recollect such an

21. I am satisfied that the Accused indecently touched Complainant's breasts and inserted his finger into Complainant's vagina without her consent. Prosecution proved the case beyond reasonable doubt on each count.
22. I adopt the majority opinion of Assessors and find the Accused guilty of Sexual Assault and Rape.
23. Accused is convicted on both counts accordingly.
24. That is the judgment of this Court.



Arund Aluthge

Judge

AT LAUTOKA

4th April, 2018

Solicitors: Office of the Director of Public Prosecution for State
 Pillai, Naidu & Associates for Defence