

IN THE MAGISTRATES' COURT OF FIJIAT TAVUA  
CRIMINAL JURISDICTION

Criminal Case No: 81 of 2016

STATE

-v-

SHIVNEEL NISCHAL NARAYAN

For Prosecution: WPC Chand [ Police Prosecution ]

Accused: Ms Henao [ Legal Aid Commission ]

Date of Hearing: 19<sup>th</sup> October, 2018

Date of Judgment: 16<sup>th</sup> November, 2018

**JUDGMENT**

**BACKGROUND**

1. The defendant faces the following charge:

**Statement of Offence**

**ASSAULT OCCASIONING ACTUAL BODILY HARM:** Contrary to section 275 of the *Crimes Act 2009*.

**Particulars of Offence**

**SHIVNEEL NISCHAL NARAYAN**, on the 30<sup>th</sup> day of March, 2016 at Malele, Tavua in the Western Division, assaulted **RESHMI LATA** by biting her shoulder thereby causing her actual bodily harm.

2. The defendant was first produced and granted bail on the 31<sup>st</sup> of March, 2016.

3. A Domestic Violence Restraining Order [ DVRO ] with section 27 standard non molestation conditions was imposed on the defendant on that same day.
4. After securing legal representation, the defendant pleaded 'not guilty' to the charge on the 13<sup>th</sup> of June 2016.
5. The trial was fixed and held on the 19<sup>th</sup> of October 2018.

#### **PROSECUTION'S CASE**

6. Prosecution Witness 1 [ PW1 ] is Ms Reshmi Lata.
7. In her sworn evidence, she says that she is married to the defendant but they are now separated.
8. She and the defendant separated in March 2016.
9. Ms Lata explains that between 2014 and 2016, she and the defendant were happy. After sometime, she says that the defendant then stopped talking to her.
10. The defendant used to tell her that she was deaf, that she is a very poor girl and he doesn't care about her family.
11. He used to threaten that he will assault her and he said that he will throw her clothes outside.
12. Ms Lata thinks that 'someone' was telling the defendant to act like that.
13. Ms Lata recalls one night, the defendant returned from a friend's place and bit her shoulder.
14. The defendant bit her shoulder plenty times, Ms Lata said.
15. Ms Lata was taken to hospital and her medical report was tendered by consent as prosecution **Exhibit 1**.
16. Ms Lata was examined the same day she was bitten.
17. Paragraph D ( 12 ) of her medical report reveals that the medical officer observed multiple bruising to the left arm of Ms Lata, the patient.
18. Teeth marks were noted, the medical officer records.

19. In paragraph D ( 14 ), the medical officer is of the opinion that the 'Injuries are consistent with trauma from a bite, the indentation of the teeth marks indicate that she was bitten within the last 24 hours'.
20. Ms Lata says in evidence that the defendant had never bitten her before and that it was the first time he did it.
21. She was bitten inside the house, inside the bedroom, on the bed.
22. It was at 1am in the morning and she was dressed at the time. The defendant too was dressed at the time.
23. She told the defendant that it was painful but the defendant did not listen to her.
24. She says that she did not consent to him biting her.
25. She told her mother in law in the morning but her mother in law told her that she was lying and that she must be mad.
26. Ms Lata says that she knows what a 'love bite' is but this was not one of them.
27. In cross-examination, Ms Lata said that she married the defendant in November 2015.
28. They were happy in their relationship.
29. Everything was 'ok' she described before the defendant went to his friend's place that night.
30. She said that the defendant never told him why he was biting her.
31. Her in laws told her that she was 'possessed' and that is why she was bitten.
32. She said that the defendant used his teeth and she thought that at some point, the defendant will calm down.
33. She said that the first time the defendant bit her, she told him to stop but he closed her mouth with one of his hand.
34. She says that the defendant pushed her to the bed and bit her.
35. Ms Lata agreed that she and the defendant had consensual sex before and love bites had eventuated.

36. However on that night Ms Lata said that they never had sex and the defendant just came into the house.
37. Ms Lata said that the defendant left all the marks on her shoulder and it was not only 1 bite.
38. She said that the defendant was only verbally abusive sometimes during their relationship.
39. She said that during their relationship, the defendant was good and after sometime he changed.
40. When it was put to her that her allegation is false, Ms Lata said that she wanted her case completed as she is thinking of her small daughter and she just wants the defendant and her to go their own way and settle things.
41. That was the end of the prosecution's case.
42. The court found that there was a case to answer.
43. The court explained the options available to the defendant and after time was given, the defendant chose to remain silent.

#### **ANALYSIS**

44. The defendant is presumed innocent until proven guilty [ section 14 (2) (a) of the *2013 Constitution of the Republic of Fiji* ].
45. The burden is on the party that seek to rebut this presumption. In this case, it is the prosecution.
46. The prosecution rebuts this presumption when they successfully persuade the court beyond a reasonable doubt or make the court sure that the defendant committed the offence [ **Leon Marseu Cornibeer v The State** Criminal Petition Number CAV 0024 of 2017 ( 26<sup>th</sup> April 2018 ) ].
47. The court must rely on evidence. Nothing else will suffice.
48. The defendant has elected to remain silent and not adduce any evidence. That is his right and the court draws no negative inference regarding this.
49. The defendant is charged with assault occasioning actual bodily harm contrary to section 275 of the *Crimes Act 2009*.

50. The elements, all of which must be proved beyond a reasonable doubt are:
- i. **The defendant;**
  - ii. **Commits an assault, that is, doing an act which intentionally or possibly recklessly causes another person to apprehend immediate and unlawful personal violence;**
  - iii. **Which occasioned actual bodily harm to the victim**
51. An assault is an act which intentionally or recklessly causes someone else to apprehend immediate and unlawful personal violence [ Fagan v Metropolitan Police Commissioner [ 1968 ] 3 All E.R 442 ].
52. Section 4 of the *Crimes Act 2009* stipulates:

*"harm" means any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time);*

### **FINDINGS**

53. It is not in dispute that the parties were together and are now separated.
54. There is no issue about identification.
55. Element i. is proven beyond a reasonable doubt.
56. It is the other remaining elements that are to be decided.
57. One would think that if the court accepts the evidence of the alleged victim PW1, then the charge is made out.
58. The defence in the way the cross examined PW1, suggest that the defendant did bite her ( albeit only once ) but that it was in the course of being affectionate to the victim.
59. I accept that PW1 was not bitten once but that she was bitten several times.

60. I accept PW1's evidence regarding the multiple bites and the medical report which reflects the same, although PW1's evidence need not be corroborated.
61. I found PW1 forthright and un-evasive. She was eager to bring closure to this part of her life and told the court that she just wanted to move on and wanted the defendant to do the same.
62. I believe PW1 when she told me that she had told the defendant that it was painful and to stop but the defendant closed her mouth and continued biting her.
63. I am sure that the defendant knew that she did not like what he was doing and continued nonetheless.
64. I accept the evidence of the victim that these bites were not done by the defendant in the course of being affectionate or before sex.
65. There is no direct evidence of motive or reason why the defendant would do such a thing.
66. Despite this, I am convinced by the evidence of the victim that there was continued abuse by the defendant leading up to when she was bitten.
67. I accept that the victim was in effect told and made to feel that she was worthless or good for nothing. I accept that earlier the defendant threatened her with physical assault and that her clothes will be thrown out.
68. I bear in mind that the defendant is not charged for any abuse in the past.
69. However, the evidence of past abuse, which I accept to be the case, is probative or indicative of the defendant's ill will towards and ill treatment of PW1.
70. This is circumstantial evidence of why he would sadistically inflict punishment on the victim on that night by biting her several times.
71. I am sure that the defendant caused those injuries on the victim's arm when he bit her repeatedly. He knew she was not consenting or did not care whether she was consenting.
72. The remaining elements are proven beyond a reasonable doubt.

**CONCLUSION**

73. For the reasons outlined above, the court is satisfied beyond a reasonable doubt that it was the defendant who assaulted or bit the victim several times causing her actual bodily harm.
74. I find the defendant guilty as charged and convict him accordingly.
75. I will now hear your mitigation Mr. Shivneel Nischal Narayan.



Lisiata TV Fotofili  
**Resident Magistrate**

Dated at Tavua this 16<sup>th</sup> day of November, 2018.