

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 117 of 2016

STATE

V

- 1. RUPENI VULI SUGUTURAGA**
- 2. JOSAI RASIGA TAWAKE**

Counsel	:	Mr. J.B. Niudamu for the State.
	:	Ms. K. Vulimainadave [LAC] for the First Accused.
		Mr. K. Tunidau for the Second Accused.
Dates of Hearing	:	30, 31 October, 01, 04 November, 2019
Closing Speeches	:	05 November, 2019
Date of Summing Up	:	06 November, 2019
Date of Judgment	:	08 November, 2019

JUDGMENT

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

RUPENI VULI SUGUTURAGA, on the 1st day of June, 2016 at Lautoka in the Western Division, penetrated the vagina of **LUISA WATI SOKILAU** with his penis, without the consent of the said **LUISA WATI SOKILAU**.

COUNT TWO
Statement of Offence

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

Particulars of Offence

JOSAIA RASIGA TAWAKE, on the 1st day of June, 2016 at Lautoka in the Western Division penetrated the vagina of **LUISA WATI SOKILAU** with his penis, without the consent of the said **LUISA WATI SOKILAU**.

2. The three assessors had returned with a unanimous opinion that the first accused was guilty of rape as charged. In respect of the second accused the assessors returned an opinion that the second accused was guilty of rape as charged by a majority of two is to one.
3. I adjourned to consider my judgment. I direct myself in accordance with the summing up and the evidence adduced at trial.
4. The prosecution called four witnesses, the first accused gave evidence and called one witness and the second accused gave evidence.
5. The complainant informed the court that on 31st May, 2016 after work she went to a grog shop in Nadi Town where her two friends drank grog, from there she went to the Deep Sea Night Club. After having some drinks the complainant went to the White House Night Club where she met her two school mates, by this time it was 1am the next day.

6. The complainant and her two school mates continued drinking till 5 am when the complainant came out of the night club to go home there was only one taxi parked outside. Her friends boarded this taxi and left at this time a car came driven by the first accused. The first accused called out "taxi" the complainant responded by saying Saunaka and then she boarded the car.
7. In the car she sat in the front passenger seat fastened her seat belt and fell asleep when she woke up she saw the sea and some trees, her seat belt was still fastened. The driver was not in the car, he was drinking at the back of the car with three boys and a girl.
8. After some time the complainant got out of the car she was offered a bottle of beer to drink. After drinking, she became unconscious only to regain consciousness when her head hit the root of a tree. She saw the first accused was having sexual intercourse with her since the complainant was feeling weak she did not do anything.
9. The complainant felt pain on her vagina and her thighs she "blacked out" again. When she regained consciousness another man was having sexual intercourse with her at a different location. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.
10. After sometime, a lady came and woke the complainant when she sat she noticed that she was without her shoes and panty. The complainant saw there were people gathered around her, at this time she realized something had happened. By this time it was after 9 am when she stood up she felt pain in her vagina.
11. The complainant was taken to a house where she was given a cup of tea, "Sulu" and panty to wear, on the same day the complainant reported the matter to the police.

12. The complainant identified the first accused in court as the person who had sexual intercourse with her at the Saweni Beach. As for the second man the complainant only remembered this person had sexual intercourse with her.
13. The second witness Otto Delana informed the court that on 1st June, 2016 he was at work at about 7.30am renovating the roof of a customer at Vesi Crescent, Waiyavi, Lautoka. The witness was on the roof top when he saw two ITaukei boys and two ITaukei girls standing under a Vaivai tree.
14. After a while all of them moved to the volleyball court, he then saw one female move further into the grass and was having sexual intercourse, both the man and the girl were “fully drunk” while another man was taking pictures of them.
15. The witness came down from the roof and went near the scene, the young man was still on top of the girl when this man saw the witness he pulled up his pants and ran away.
16. The witness was able to recognize this man as the second accused since he knew the second accused from his earlier employment. He used to call the second accused “*tau*” meaning they were from the same ancestry. The witness saw the girl was naked and was “blacked out”.
17. The third witness Sgt. Silio Finau informed the court that he had caution interviewed the first accused in the English language at the crime office of the Lautoka Police Station. The first accused was given all his rights.
18. The interview commenced on 2nd June, 2016 at 09.00 hours which ended the following day at 13.30 hours. Before or during the interview, the

accused was not induced, threatened, intimidated, promised, coerced or oppressed to make a statement.

19. The caution interview was signed by the accused, the witness and the witnessing officer. The caution interview was marked and tendered as prosecution exhibit No. 1.
20. The final witness Detective Sgt. Salen Kumar informed the court that on 2nd June, 2016 he had interviewed the second accused in the English language. The interview was signed by the accused, the witness and the witnessing officer.
21. The caution interview of the second accused was marked and tendered as prosecution exhibit no. 2.
22. The first accused Rupeni informed the court that on 31st May, 2016 at around 10 to 11pm he drove Susana and another guy from Lautoka to White House Night Club in Nadi. At the night club the accused drank about four cans of rum and cola till 5am. By this time the second accused had joined them and all of them were drinking.
23. When the night club closed, all went to the car the accused was driving with Susana sitting in the front passenger seat whereas the second accused and the other boy sat at the back seat. At the exit of the car park the second accused called the complainant who was standing there. The complainant came and sat in the front passenger seat of the car while Susana went to the back seat.
24. On the way the complainant was laughing about something the accused did not know about. As they went further the complainant put her head on his shoulder and was leaning on his shoulder and kissed his cheek. By this time they reached Waimalika where they bought some beer. On the

way the complainant was also asking him questions whether he had a girlfriend or not.

25. It was around 6am when they reached the Saweni Beach here the complainant pulled his hands so both went for a walk on the beach about 10 meters away from the others. At the beach, both started kissing each other.
26. At this time the complainant put a cloth on the sand and took off her skirt. The complainant asked the accused to lie down so he lay on top of her and both started kissing each other. The accused had not taken off his clothes and the kissing had continued for 10 minutes until Susana and the second accused called him so both left. The complainant put on her skirt and both left by holding each other's hand.
27. From the Saweni Beach, the accused drove everyone to Kaleli Settlement, in Waiyavi. Here the accused went to open the door for the complainant to come out of the car, however, she had already left the car so he took out the left over drinks from the car and sat down to drink.
28. After a while he dropped Susana at Jinnu Road, Waiyavi and then went to Kaleli Settlement to pick the second accused. At Kaleli Settlement the second accused was already at the road side, the second accused got into the car and told the first accused to leave the place.
29. The first accused stated that during his caution interview he was asked about three times whether he had sexual intercourse with the complainant. The accused said he had answered "no" and he doesn't know why it was written that he had answered "yes".

30. The accused denied the allegation saying that he did not penetrate the vagina of the complainant the allegation was all wrong and he never gave his statement to the police admitting the allegation.
31. The accused maintained that he did not have sex with the complainant at the Saweni Beach and that the complainant had lied about it. He was only kissing the complainant for about 10 minutes.
32. The witness called by the first accused was Dr. Lusiana Ravea. The doctor recalled examining the complainant Luisa Wati Saukilau on 1st June, 2016 at the Lautoka Hospital. The Fiji Police Medical Examination Form of Luisa Saukilau was marked and tendered as first accused defence exhibit no. 1.
34. After examining the complainant the following specific medical findings were recorded by the doctor:
 - a) There were multiple small bruises over the anterior neck and on her right breast. The doctor saw small discoloration of the skin over the front of the patient's neck. The small bruises looked like they were caused by small trauma such as kissing or sucking on the skin namely love bites;
 - b) There was mild tenderness over patient's lower abdomen. The doctor explained mild tenderness meant pain upon touch it was painful to the patient on the lower abdomen below the umbilicus near to the private region;
 - c) Petechial rash was seen over left inner thigh. The doctor explained that such bruises can be caused by blood seeping out of the capillaries under the skin there was an area of rash like small dots smaller than 2mm. This rash is usually caused by blunt force trauma like someone is hit by something hard such as a blunt object. The doctor also stated that such rashes can also be caused by

medications, which will be in a lot of places in the body or by blood disorders.

The hymen was intact but had a small bruise at 2 o'clock position. The doctor explained the hymen was a thin mucosal membrane that covered the vaginal opening. Furthermore, the doctor had noted a bluish discoloration of the hymen at 2 o'clock position; and

d) Discharge was noted at posterior forchette, pus and dirt. The doctor explained the posterior forchette was part of the labia minora being the external genitalia of the female reproductive organ. The discharge was seen where the vulva was when a female was in a lying down position towards the bottom. It was here the doctor had seen the discharge of pus and dirt.

35. In the professional opinion of the doctor her findings suggested sexual intercourse and tenderness over lower abdomen which could suggest trauma. The doctor further stated that the patient's hymen being intact did not rule out sexual intercourse and the bruise noted on the hymen may suggest forceful entry.
36. The second accused Josaia informed the court that at around 11pm, he went to the White House Night Club in Nadi where he drank a lot of alcohol till the night club closed. By this time he was heavily intoxicated.
37. After the night club closed he joined the first accused and his friends, as they were leaving the car park the complainant was waving for a transport. When the car was stopped the complainant spoke to Ben the first accused who was driving the car and then she came and sat in the front passenger seat, from there all went to Waimalika to buy more drinks.
38. From Waimalika they went to the Saweni Beach. At the Saweni Beach all started drinking when he went to sit in the car he "blacked out" since he

was heavily intoxicated he does not know where the car went to. By “black out” the accused meant his mind and his whole body was not functioning, he does not know if he was talking or saw anyone. When he regained from his “black out”, he stood up from beside the complainant, his pants were up to his knees.

39. The accused denied that he had sexual intercourse with the complainant as alleged by her because he had “blacked out”. The accused further explained that when he “blacked out” his penis and his feelings were “off”, he does not know whether his penis was erect or not or if he had urinated in his pants or had shit in his pants.
40. When Q & A 76 of the caution interview was shown to the accused he stated that the answer given by him was just a guess because of the situation he was in when he had woken up.
41. Upon carefully considering the evidence adduced by the prosecution and the defence I accept the evidence of all the prosecution witnesses as truthful and reliable. The complainant gave a coherent account of what the two accused persons had done to her on 1st June, 2016. The demeanour of the complainant was consistent with her honesty.
42. The complainant was not shaken or discredited during cross examination, she was forthright in her answers as well. There was no suggestion during the cross examination of the complainant that she had a motivation to implicate both the accused persons or had lied about what had happened to her.
43. Furthermore, the prosecution case was that the complainant was so intoxicated that she did not have the capacity to consent to have sexual intercourse with both the accused persons.

44. The complainant became unconscious when she drank beer at the Saweni Beach only to regain consciousness when her head hit the root of a tree. At this time she saw the first accused on top of her having sexual intercourse. As a result of the intoxication she did not resist because she was feeling weak. The complainant felt pain on her vagina and her thighs and she “blacked out” again. When she regained consciousness the second accused was having sexual intercourse with her at a different location. She was not wearing her panty and this person was on top of her, again the complainant fell asleep.
45. Considering the above, did the complainant have the capacity to consent to have sexual intercourse with the two accused persons?
46. In a situation where the capacity of the complainant to consent due to self-induced intoxication through drink and drugs is in issue the following points may be considered by the court (Blackstone’s Criminal Practice 2018 [B3.30]):
- a) *Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently. If she is aware of what is happening, but the consumption of alcohol or drugs has caused her to consent to activity which she would ordinarily refuse, then she has consented no matter how much she may regret it later. The fact that a person makes an unwise choice does not mean that she lacked the capacity to make it. A drunken consent is still a consent if a person has the capacity to make the decision whether to agree by choice.*
 - b) *However, if a complainant becomes so intoxicated that she no longer has the capacity to agree, there will be no consent. Clearly she will not have the capacity to agree by choice where she was so intoxicated through drink or drugs, and her understanding and knowledge are so limited that she was not in a position to decide whether or not to agree.*

(This relates to understanding and knowledge of what is going on, as opposed to the quality of the decision-making.)

- c) *A person may reach such a state without losing consciousness. For instance, she may be in a state where she knows that she does not want to take part in any sexual activity with someone, but she is incapable of saying so. Alternatively, she may have been affected to such a degree, that, whilst having some limited awareness of what is happening, she is incapable of making any decision at all.*
- d) *If a person is asleep or has lost consciousness through drink or drugs, she cannot consent, and that is so even though her body responds to the accused's advances.*

- 47. The English Court of Appeal in *R vs Gael Tameu Kamki [2013] EWCA Crim. 2335* had approved this approach.
- 48. Based on the above and the evidence of the complainant I accept that the complainant did not have the capacity to consent and had not consented for both the accused persons to have sexual intercourse with her.
- 49. The circumstances and the condition of the complainant was such that she was in no position to physically resist to what the accused persons had done to her on the two separate occasions as narrated by the complainant.
- 50. I also accept that Otto Delana told the truth when he said he saw the second accused having sexual intercourse with the complainant. He gave an honest account of what he had seen he knew the second accused and was also related to him. Furthermore, the counsel for the second accused did not dispute the evidence of Otto Delana.

51. In their caution interviews both the accused persons give a detailed account of events, it is puzzling to note how they were able to remember all the details of what they had done when interviewed by the police if they were indeed in an extreme state of intoxication.
52. I accept that there was no fabrication of the answers in the caution interview of the first accused. As for the second accused the failure by the interviewing officer to ask the accused during the caution interview about what the second accused meant by the phrase "black out" did not cast any doubt on the voluntariness of the answers given by the second accused. There is no reason for this court to doubt the answer given by the second accused at Q.76 of his caution interview as well.
53. The evidence of the complainant is also supported by Dr. Ravea who was called as a defence witness. The specific medical findings of the doctor and her opinion support the fact that there was forceful sexual intercourse on the complainant and despite the complainant's hymen being intact, sexual intercourse could not be ruled out. The complainant had also promptly reported the matter to the police and under gone medical examination.
54. On the other hand, both the accused persons did not tell the truth in court. Their demeanour was not consistent with their honesty. The evidence given by the accused persons was untenable on the totality of the evidence. Self-induced intoxication is not a defence or reason to avoid culpability in the circumstances of this case.
55. The defence witness namely Dr. Ravea who had examined the complainant promptly after the alleged incidents did not add anything to the defence case as well.

56. The admissions contained in the caution interview of both the accused persons cannot be ignored. I reject the evidence of both the accused persons as unbelievable and unreliable.
57. The defence put forward by both the accused persons has not been able to create a reasonable doubt in the prosecution case.
58. I am satisfied beyond reasonable doubt that both the accused persons on 1st of June, 2016 had penetrated the vagina of the complainant with their penis without her consent.
59. I also accept that both the accused persons knew or believed that the complainant was not consenting or didn't care if she was not consenting at the time.
60. In view of the above, I accept the unanimous opinion of the assessors that the first accused is guilty of one count of rape and I also accept the majority opinion of the assessors that the second accused is guilty of one count of rape as well.
61. I find both the accused persons guilty as charged and I convict both of them for one count of rape each.
62. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka

08 November, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the First Accused.

Messrs. K. Tunidau Lawyers for the Second Accused.