

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 36 of 2020

BETWEEN: STATE

PROSECUTION

AND: ATILE NAITUINITABUA

ACCUSED PERSON

Counsel: Ms. S. Swastika for State
Ms. R. Raj for Accused

Date of Hearing: 22 February 2021

Date of Judgment: 23 February 2021

JUDGMENT

1. The Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are that;

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) of the Crimes Act of 2009.*

Particulars of Offence

*ATILE NAITUINITABUA, between the 22nd and 23rd day of April, at Labasa in the Northern Division, had carnal knowledge of **AKENETA SOGOIVALE**, without her consent.*

2. The hearing of this matter commenced on the 22nd of February 2021 and concluded on the same day. The prosecution presented the evidence of two witnesses, including the complainant. The Accused gave evidence for the defence. Subsequently, the learned counsel for the prosecution and the defence filed their respective written submissions. Having carefully considered the evidence presented by the parties and the respective written submissions of the parties, I now proceed to pronounce my judgment as follows.

3. Section 207 (1) and (2) (a) of the Crimes Act states that;

(1) “Any person who rapes another person commits an indictable offence. - Penalty — Imprisonment for life.

(2) A person rapes another person if—

a) the person has carnal knowledge with or of the other person without the other person's consent; or

4. Accordingly, the main elements of the offence of Rape are that:

- (i) The Accused,
- (ii) Penetrated the vagina of the Complainant with his penis,
- (iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
- (iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

The Accused

5. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed this offence to the Complainant. According to the Admitted Facts, the Defence had admitted that the Accused is the Complainant's uncle, and he was present at home during the time material to this alleged offence.

Penetration

6. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce evidence of full penetration.

Consent

7. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. A consent obtained through fear, by threat, by the exercise of authority, by use of force, or by intimidation could not be considered as consent given freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
8. The Complainant must have the freedom to make a choice. It means that she must not be pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
9. If the Court finds that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court must then consider the last element of the offence. That is whether the Accused honestly believed or knew or reckless that the Complainant was freely consenting for these alleged sexual acts. The belief in consent is not the same thing as hope or expectation that the Complainant was consenting. The Court must consider whether the Accused knew either that the Complainant was not in a condition or a position to make a choice freely and voluntarily, or the Complainant had made no choice to agree to the sexual act. If the Court concludes that the Accused believed or knew that the Complainant was consenting. In that case, the Court must then

proceed to consider whether such a belief of the Accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

10. Having briefly discussed the main elements of the offence of Rape, I now proceed to discuss the evidence presented by the Prosecution and the Defence.

Evidence of the Prosecution and the Defence

11. The prosecution alleged that the Accused had penetrated the vagina of the complainant with his penis on the 22nd or the 23rd of April 2020 without her consent. The complainant is the Accused's niece as the Accused had married one of the sisters of the complainant's mother. The complainant and her family had lived with the Accused and his family for nearly five years at Namara. After that, the Accused and his family had moved to Naikavaki. The Accused's wife is employed as a teacher at Naikavaki College. The complainant was sixteen years old in 2020. On the 22nd of April 2020, the complainant had gone to the Accused house with her aunty Vasenai, who was heavily pregnant and her elder brother, Emosi, who was 22 years old in 2020. They have gone to the Accused's house to bake pies. In the evening, Vasenai had developed her labour pain and was taken to the hospital by the Accused's wife, Salaseini.
12. The Accused and Emosi had been drinking grog at the passage between the living room and the kitchen. The complainant had gone to sleep at around 11 a.m. after watching movies. The Accused and her brother were still drinking grog when she went to sleep. She had slept in the living room. The complainant said that she felt something heavy on her while she was sleeping. When she woke up and found that the Accused was on top of her, trying to penetrate her vagina with his penis. He had removed her shorts and undergarment. The complainant said that she did not feel or awaken when the Accused removed her shorts and undergarment. The Accused was heavy, so the complainant had tried to push him away from her hands and legs. She was shocked as she had never expected the Accused, her uncle, had ever done such a thing to her. In her evidence, she explained that she did not try to wake up her brother, who was sleeping at the other corner of the living room, as she was shocked. The Accused had told her to relax. He managed to

penetrate her vagina with his penis, irrespective of the resistance from the complainant. The Accused had penetrated the vagina of the complainant for about five minutes. Eventually, the complainant had managed to push the Accused away. She got up and ran to the bathroom and stayed there for about half an hour. She then came out of the bathroom and slept next to her brother.

13. Her brother had wakened her up at around 6.30 a.m., and by then, they had missed the morning bus. The Accused had made them breakfast. While she was sitting in the living room with her brother, their aunty had called the brother on his mobile phone. Her brother went out to answer the phone. The Accused had approached and told her not to tell anyone about what he had done to her. She had asked him, "what's wrong with you". The Accused laughed and went away.
14. According to the evidence of the mother of the complainant, Ms Olita Tinai, she had gone to visit her daughter, son and her sister, who gave birth recently on the 25th of April 2020 at Saolo village. Ms Olita had met her daughter, the complainant. The complainant had told her mother that she wants to tell her mother something in private. The complainant had then told her mother that the Accused had raped her. Ms Olita said that, at first, she was shocked and did not believe it. She had told her daughter not to lie as she was shocked. Ms Olita said the Accused was like a father figure to her daughter; hence she never thought he would do such a thing to the complainant. Ms Olita had waited for her husband to return from work. She did not tell him about this matter over the phone, as he is a hot-tempered person. If she tells him over the phone, he might have gone straight to the Accused and do something to him. They have finally reported the matter one month after this alleged incident.
15. In his evidence, the Accused denied the allegation, stating that he did not commit this crime. According to the Accused, the solar power went off before his wife took Vasenai to the hospital. They had to use the torch in their mobile phones after the power went off. He was drinking grog while the complainant and her brother went to sleep. They slept on the mattress in the living room. He then went to his room with his two kids, who had fallen off to sleep beside his drinking place. He then locked the door and went to sleep. In his

evidence, the Accused further said that his family and the complainant family had issues when they were staying together at Namara.

Analysis

16. In view of the evidence presented by the prosecution and the defence, it appears that the main issue in this matter is to determine whether the Accused had actually penetrated the vagina of the complainant with his penis without her consent. In order to do that, the court must properly evaluate the evidence presented by the parties.
17. The learned counsel for the defence cross-examined the complainant, asking her why she did not alarm her brother, who was sleeping a few meters away from her when this alleged incident took place. The complainant had gone to sleep while the Accused and her brother were still drinking grog. According to her, she was suddenly wakened up when she felt something heavy on top of her. Therefore, there was no reason for the complainant to know that her brother was sleeping a few meters away. She further explained that she was shocked to see her uncle, whom she had considered like a father figure, on top of her, trying to penetrate her vagina with his penis. There is no stereotype of responses from the victims of sexual assault. They act in various ways in responding to such a sudden sexual assault on them. Moreover, her brother had consumed kava before he went to sleep. In view of these reasons, I do not find that the reason for not alarming her brother had affected the reliability and the credibility of the complainant's evidence.
18. In **D [2007] EWCA Crim 2556** Latham LJ said:

“Experience shows that people react differently to the trauma of a serious sexual assault. There is no classic response.... some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint”.

19. The complainant had eventually reported this matter to the Police nearly a month after this alleged incident. The complainant explained her evidence that she felt unsure to tell her brother about this incident on the following day. She had waited to meet her mother, whom she finally met on the 25th of April 2020. Once the complainant found an opportunity, she had informed her mother about this incident. According to the complainant, she had told her mother everything that the Accused had done to her. However, the complainant's mother said that the complainant just told her that the Accused raped her.

20. The supreme court in **Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014)** had discussed the scope of the recent complaint evidence, where Gates CJ found that;

“The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant’s evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.

21. Regardless of the above-discussed inconstancy between the complainant and the mother of the complainant, it appears that the complainant had told her mother the exact nature of the sexual conduct that the Accused had allegedly committed on her. Hence, I do not find the said inconstancy has affected the credibility and the reliability of the complainant's evidence.

22. The complainant's mother explained in her evidence the reason for the delay in reporting the matter to the Police. It was due to the late arrival of the complainant's father from his work. She did not want to tell him over the phone as he is a hot-tempered person, and it might lead to further unnecessary issues. Once he returned home, the matter was reported to the Police. Accordingly, I accept the reason for the delay in reporting the matter.

Wherefore, I do not find the delay had affected the credibility and reliability of the complainant's evidence.

23. The complainant explained that she started to push the Accused away from her hands and legs. However, the Accused managed to penetrate her vagina with his penis despite her resistance. Accordingly, it is clear that the Accused knew that the complainant was not consenting for him to penetrate her vagina with his penis.
24. It is a rule of evidence that if one party is going to present a different version of events from the other, the witnesses of the opposing party who are in a position to comment on that version should be given an opportunity to comment on them. (**Browne v. Dunn [1893] 6R 67**). If the party, who did not provide the opposing party with an opportunity to comment on the version that he relies on, failed to provide any reasonable explanation for such failure, the court may make adverse inference about the credibility of the evidence adduced by the party regarding the different version.
25. In this case, the Accused, in his evidence, stated that the solar power went off before his wife took Vasenia to the hospital. They had to use the torch of their mobile phones after that. Moreover, the Accused said that there was a mattress in the living room, which the complainant and her brother used to sleep. However, these two issues were not presented to the complainant to comment when she gave evidence. There is no explanation provided for that failure. These two facts are directly relevant to the issue in this case.
26. On the contrary, the complainant said that she saw the Accused clearly from the light that came from outside. There was a light on outside the house. She further said that the brother slept in other corners of the living room. Hence, I find the complainant evidence that she saw the Accused clearly is credible and reliable.
27. I have observed the manner the complainant gave evidence. She was straight, firm, coherent and consistent in giving her evidence. I accordingly accept the evidence of the complainant as reliable, credible and truthful evidence.

28. In view of the reasons discussed above, I find the Accused's evidence is not true or may not reasonably be true. Thus the defence fails to create any reasonable doubt about the prosecution case.
29. In conclusion, I find the prosecution has successfully proven beyond reasonable doubt that the Accused had penetrated the vagina of the complainant with his penis without her consent as charged in the information. Wherefore, I find the Accused guilty of the offence of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act and convict to the same accordingly.



Hon. Mr. Justice R.D.R.T. Rajasinghe

At Labasa

23 February 2021

Solicitors

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused