

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 234 of 2021

STATE

vs.

WAIKAKE DRANUNABULEWA

Counsel: Ms. J.Fatiaki with Ms. Kumar for the State
Ms. R.Nabainivalu with Ms. O. Grace for the Accused

Date of Hearing: 08th September 2022

Date of Closing Submission: 12th September 2022

Date of Judgment: 21st September, 2022

JUDGMENT

1. The name of the Complainant is suppressed and referred to as "RW"
2. The Accused is charged with one count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act. The particulars of the offence are that;

COUNT 1

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act
2009.*

Particulars of Offence

WAISAKE DRANUNABULEWA on an unknown date between the 1st day of January 2012 and the 31st day of December 2012 at Moala, Lau, in the Eastern Division, had carnal knowledge of RW, a child under the age of 13 years, by penetrating her vulva with his penis.

3. The Accused pleaded not guilty to this offence; hence the matter proceeded to the hearing. The hearing commenced on the 8th of September, 2022 and concluded on the same day. The Prosecution presented evidence from two witnesses, including the Complainant. The Accused and another witness gave evidence for the Defence. The Court then heard the closing submissions of the parties. Having carefully perused the evidence presented and the respective submissions of the parties, I now proceed to pronounce the Judgment as follows.

Elements of the Offence

4. The main elements of the offence of Rape as charged are that;
 - i. The Accused
 - ii. Penetrated the vagina of the Complainant with his penis,
 - iii. The Complainant was a child under the age of 13 years,

Prosecution's Case

5. The Prosecution alleges that sometimes towards Christmas in 2012, the Accused had approached the Complainant when she was collecting "Tavola" nuts on the beach with her friends. She was five years old in 2012. He then offered his help and took her to the other side of the beach near "vutu" trees. He then asked the Complainant to remove her underwear and lay down. Once she laid down, the Accused penetrated her vagina with his penis. Afterwards, he threatened the Complainant, saying he would kill her and her father if she told anyone about this incident.

Defence's Case

6. The Accused denies this allegation, stating that he was in Suva, staying at his Uncle's place between January 2012 and the week before the Christmas of December 2012. He had gone to Suva for surgery on his nose and then had to attend the review procedures till the end of December 2012. The Accused testified that he eventually returned to his Village during Christmas.

Admitted Facts

7. The prosecution and the Defence admitted the following facts under section 135 of the Criminal Procedure Act;
 - i. *The name of the person charged is Waisake Dranunabulewa "Waisake", 32 years old.*
 - ii. *Waisake was born on 19 November 1989 and was 23 years old in 2012.*
 - iii. *The name of the complainant is Rosi Wati "Rosi" of Vunuku village, Moala, Lau.*
 - iv. *Rosi's father's name is Jofiliti Sukanavere and Rosi's mothers name is Salote Senilagakali. Waisake and Jofiliti are cousins.*
 - v. *Waisake and Rosi are known to each other's namely Rosi is Waisake's niece.*
 - vi. *Waisake and Rosi are from the same village namely Vunuku village, Moala, Lau.*
 - vii. *On the 7th October 2021, Waisake's Record of Interview was conducted by PC 4741 Sakiusa Gonetoko and concluded on 08th October 2021*

Defence of Alibi

8. The Accused has raised the Defence of Alibi. Therefore, I first draw my attention to the issue of alibi.

9. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the accused is guilty of the offence without any reasonable doubt.
10. In this case, the Accused raised the Defence of alibi. He claims that he was elsewhere when the alleged crime took place. If the Accused relies on the Defence of alibi, he bears the burden of proving it. The Accused is not required to prove his Defence of alibi beyond a reasonable doubt. The burden of the Accused to prove his alibi is an evidential burden. The Accused has to adduce or point to evidence suggesting a reasonable possibility that he was somewhere else when this alleged offence occurred.
11. Even though the Accused have put forward the Defence of alibi, the burden of proving the case against the Accused beyond a reasonable doubt remains on the Prosecution. The Prosecution must prove that the Accused was present at the crime scene and committed this offence as charged in the Information. In doing that, the Prosecution must disprove the alibi defence put forward by the Accused. That does not mean the Prosecution must provide specific evidence to disprove that the Accused was not in Suva in 2012. If the Court believes and accepts the evidence of the Prosecution witnesses as credible, reliable and truthful beyond a reasonable doubt, then the Prosecution has discharged its duty of disproving the alibi defence of the Accused.

Evaluation of Evidence

12. According to the evidence given by the Accused, he had gone to Suva in January 2012 to undergo surgery on his nose. The surgery was done in March; after that, he had to attend to his reviews until December 2012. In the fourth week of December 2012, he eventually returned to the Village. The Accused had stayed with his Uncle and Aunty when he was in

Suva. He confirmed that he reached the Village a week before Christmas. The Accused, during his evidence, denied this allegation.

13. Ms. Wati Salata is the second witness of the Defence and aunty of the Accused. She explained that the Accused stayed with them from January 2012 to December 2012. He went back to his Village a week before Christmas of 2012. The learned Counsel for the Prosecution decided not to cross-examine Ms. Wati Salata, leaving her evidence unchallenged, thus confirming the claim of the Accused that he was not in the Village during 2012. He came back to the Village a week before Christmas.
14. Accordingly, it appears that the Prosecution accepts that the Accused returned to the Village after his visit to Suva the week before Christmas of 2012. Therefore, I shall now determine whether the Prosecution presented evidence to establish this alleged incident occurred during the week before Christmas of 2012.
15. The Complainant stated in her evidence that this incident happened sometime towards Christmas, during a holiday. However, during the cross-examination, the Complainant admitted that she told the Police that this incident took place during a school term. She then answered affirmatively, stating 'yes" when the learned Counsel for the Defence asked her ", it was not the holidays?". Hence, I observe a material contradiction in her evidence, where she stated during the evidence in chief that this incident took place on holiday towards the Christmas of 2012. On the contrary, she testified during the cross-examination that this incident happened during a school term and not on holiday. The Prosecution does not provide any explanation for this contradictory version regarding the time of this alleged incident. Further, there is no evidence to establish whether the week before Christmas of 2012 was a school holiday.
16. Having taken into consideration the unchallenged evidence of Ms. Wati Salata, confirming the Accused left Suva in the week before the Christmas of 2012 and the unexplained contradictory nature of the Complainant's evidence, there is a reasonable possibility that this alleged incident, if actually happened, would have taken place when the Accused was away

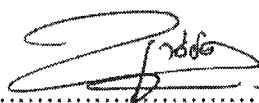
in Suva. Therefore, I find the Prosecution failed to discharge their duty to disprove the alibi defence of the Accused, thus, creating reasonable doubt about the prosecution case.

Delay

17. The Court further heard that the Complainant had reported this matter in 2021, 9 years after the alleged incident occurred. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
18. According to the Complainant, the Accused had threatened her, stating that he would kill her and her father if she told anyone about this incident. However, in 2021, this allegation came out after Williame, the Complainant's boyfriend was found in her room with her. The Complainant's father had reported to the Police that Williame trespassed on his house. Before that, he had asked the Complainant whether Williame had done something to her, for which she said "yes". The Complainant's father then called the Police and reported the matter. According to the Complainant, the father was angry with her.
19. Once it was reported to the Police, the Complainant was taken for medical examination. The Doctor informed the Complainant that she had been raped before. The Complainant's father said in his evidence that medical examination found the Complainant was already damaged. The Complainant's father then asked the Complainant who had sexual intercourse with her. The Complainant then told her father about this incident nine years after it allegedly occurred.
20. Interestingly, the Complainant, who had not told anyone about this alleged incident for nine years due to the threat made by the Accused, eventually decided to reveal it when her father

confronted her, asking who had sexual intercourse with her. That was after he reported to the Police that she was found in her room with her boyfriend. The Complainant admitted to her father that Wiliame had done something to her. Father then reported the matter to the Police. There is no evidence explaining the reason for conducting a medical examination for the Complainant. The Complainant did not explain why she eventually decided to tell her father despite the threat made by the Accused, which kept her quiet for nine years. There is a doubt whether she made up this story against the Accused after the medical examination to save her boyfriend or finally found the courage to tell her father about this alleged incident. Such doubt undoubtedly affects the credibility of the Complainant's evidence.

21. In view of the reasons discussed above, I find the Prosecution has failed to prove beyond reasonable doubt that the Accused had penetrated the vagina of the Complainant at the beach at Moala in 2012 as alleged by the Complainant.
22. In conclusion, I find the Accused not guilty of this offence of Rape contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and acquitted of the same accordingly.
23. Thirty (30) days to appeal to the Fiji Court of Appeal.



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

At Suva

21st September 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.

