

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 116 OF 2021S

STATE

VS

WILLIE TUICAUCAU

Counsels : Ms. W. Elo for State.
Mr. O. Verebalavu for Accused.
Hearings : 14 and 15 November, 2022.
Judgment : 18 November, 2022.

JUDGMENT

1. On 14 November 2022, in the presence of his counsel, the following information was read over and explained to the accused:

“Count One

Statement of Offence

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

Particulars of Offence

WILLIE TUICAUCAU *on the 11th day of April, 2021 at Samabula in the Central Division, penetrated the vagina of N.N. with his tongue, without the consent of the said N.N.*

Count Two

Statement of Offence

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

Particulars of Offence

WILLIE TUICAUCAU on the 11th day of April, 2021 at Samabula in the Central Division, had carnal knowledge of ***N.N.*** without the consent of the said ***N.N.***

Count Three

Statement of Offence

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

Particulars of Offence

WILLIE TUICAUCAU on the 11th day of April, 2021 at Samabula in the Central Division, penetrated the vagina of ***N.N.*** with his fingers, without the consent of the said ***N.N.***”

2. He said, he understood the three counts in the information, and he pleaded not guilty to the same. So, the questions that needed to be answered in this case, were as follows:
 - (i) On count no. 1, did the accused rape the complainant (PW1), on 11 April 2021, at Samabula in the Central Division?
 - (ii) On count no. 2, did the accused rape the complainant (PW1), on 11 April 2021, at Samabula in the Central Division?
 - (iii) On count no. 3, did the accused rape the complainant (PW1), on 11 April 2021, at Samabula in the Central Division?

3. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty. The prosecution must prove the accused’s guilt, beyond reasonable doubt. If there

is a reasonable doubt, so that the court was not sure of the accused's guilt, he must be found not guilty as charged and acquitted accordingly.

4. Under the Crimes Act 2009, there are various types of rape. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) penetrated the complainant's vagina with his tongue (count no. 1); or
 - (iii) penetrated the complainant's vagina with his penis (count no. 2); or
 - (iv) penetrated the complainant's vagina with his fingers (count no. 3);
 - (v) without the complainant's consent, and
 - (vi) he knew the complainant was not consenting to 4 (ii), 4 (iii) and 4 (iv) at the time.
5. The slightest penetration of the complainant's vagina by the accused's tongue (count no. 1), or penis (count no. 2), or fingers (count no. 3), is sufficient to satisfy elements 4 (ii), 4 (iii) or 4 (iv) above. Whether or not the accused ejaculated was irrelevant.
6. "Consent" is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.
7. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. The court will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
8. After the accused's not guilty pleas to the three rape counts were received on 14 November 2022, the prosecution chose not to open her case. The burden of proof being on them, they immediately called their only witness, the complainant (PW1). The complainant said that she resided with her partner at

Namuka Street, Samabula. She said, she recalled 10 April 2021 (Saturday). She said, she was 34 years old at the time. She had three children, two girls and a boy. They were aged 16 to 11 years old. She said, her partner was not their father.

9. She said, her partner worked at Superb Distributors, at Kasanji Street, Vatuwaqa. He was a warehouse attendant. The accused also worked as a warehouse attendant, with the complainant's partner, at Superb Distributors. The complainant's partner and his work colleagues were going to have a belated Christmas party at their house in Namuka Street. So, after breakfast, the complainant said, she and her partner went out shopping, to buy food, drinks and other items for the party. She said, at Courts Samabula, they met the accused and two of his colleagues. They came back together to their flat to prepare for the party. They bought a carton of long neck Fiji Bitter beer bottles.
10. She said, when they arrived at their house, they started drinking beer "taki style". She said, she continued to prepare the house for the party. This was about 10 am. She said, at 1.30 pm, about a dozen work colleagues joined the party. They brought 6 cartons of long neck beer bottles and some food for BBQ. The BBQ started at 4 pm, and some were drinking beer, while others were drinking grog. After 5 pm, other work colleagues arrived. All those at the party were males, while the complainant was the only female. At the time, the Covid 19 curfew hours was from 11 pm to 4 am the next morning. The complainant said, people were drinking, eating and dancing.
11. The complainant said, at 10 pm on 10 April 2021, the partying people started going home. She said, the accused was "knocked out", that is, sleeping next to their bed in their house. She said, he had been sleeping there for 2 hours. She said, she saw him with her own eyes within those 2 hours. She said, a 2 feet tubelight was above their bed and another one in the kitchen. She said,

the light was bright and it enabled her to see the accused's face within those 2 hours. She said, he was about 2 feet from her. She said, when she saw his face, there was no obstruction in her view. She said, that was the first day she met the accused. She said, she saw his face from 9.30 am on 10 April 2021 to 10.30 pm that night. She said, she went to bed between 10.30 pm to 10.45 pm. She said, she slept, only to be awoken by her partner at 12 midnight. They had an argument.

12. Later, her partner came to sleep beside her in their bed, in the house. The accused was sleeping near their bed 2 feet away. He was drunk and knocked out. The complainant said, she turned out the lights, and went to sleep. She said, she was not sure of the time. She said, she felt someone was taking off her shorts. She thought the person doing the above was her partner. She said, the person caressed her thighs, then touched her hips, then opened her legs. She said, the person then licked her vagina, and penetrated the same with his tongue for 5 to 10 minutes (count no. 1). She said, she enjoyed the sensation and responded by caressing the person's arms, shoulders and face. Then she said, she realized that the person's hair was not straight but spiky, and that was not her partner's. She said, when she realized the person was not her partner, the person grabbed her hand and pinned her down. She said, the person then told her to shush and do as he says. She said, she fought him back and told him to get off her. She said, she struggled against him, but he was too strong for her. She said, he kept holding her down, and later he got ontop of her. She said, she couldn't move as he pinned her down. She said he separated her legs by using his knees. She said, he then inserted his penis into her vagina for 5 to 6 minutes (count no. 2). She said, he later inserted his fingers into her vagina for about 10 minutes (count no. 3).
13. She said, when she realized the person was not her partner, she struggled against him for approximately 10 minutes. She said, although it was dark, nearby street lights were coming into their room through a side window. She

said, the street light lighted the room. She said, when he was inserting his penis into her vagina for 5 to 7 minutes, she saw his face via the light provided by the street light. She said, his face was 6 inches to 1 foot away from her. She said, there was no obstruction in her view. She said, she previously saw the person's face from 9.30 am on 10 April 2021 to 10.30 pm that night. She said, she couldn't forget the person's face, given what he did to her that night. She said, she later pushed him off her. She said, she woke her partner up. She said, she turned the room light on, and the accused went back to the floor, near their bed, and pretended to be asleep. She said, there were only 3 people in the house at the time, that is, herself, her partner and the accused. She said, when the Covid 19 curfew ended at 4 am, she went to the Samabula Police Station and reported the alleged rapes to them. An investigation was carried out. She was later taken to CWM Hospital for a medical examination. That was the complainant's version of events on the alleged rapes. The prosecution then closed their case.

14. The defence then made a submission that there was no case to answer. Their reasons were noted in the court record. The prosecution submitted there was a case to answer. Their reasons were also noted in the court record. The court, after listening to the parties' submissions, found that the accused had a case to answer. He was given the standard options. He chose not to open his case. Then he chose to give sworn evidence in his defence. He called no witness.
15. The accused's version of events were simple. Yes, he admitted he worked with the complainant's partner at Superb Distributors at Kasanji Street, Vatuwaqa. He said, they were warehouse attendants. He said, he was 54 years old on 11 April 2021. He admitted he was at the belated Christmas party at the complainant's compound between 10 and 11 April 2021. He said, they consumed liquor and BBQ food during the party. He said, a lot of work colleagues attended the party, and some drank liquor while others drank

yaqona. He admitted, via paragraph K of the “Admitted Facts”, dated 14 November 2022 that, he was “lying down on the floor beside Azar and his wife’s bed inside their house”, between 10 to 11 April 2021. However, he denied the complainant’s rape allegations as outlined in count no. 1, 2 and 3 of the information. He said, he did not penetrate the complainant’s vagina with his tongue (count no. 1), nor penetrate her vagina with his penis (count no. 2), and did not penetrate her vagina with his fingers (count no. 3). He appeared to be saying that he was not guilty as charged. That was the accused’s version of events. The defence then closed their case.

16. The court then listened to the parties’ closing submissions. The court had carefully listened to and carefully considered the complainant’s evidence, as against the accused’s evidence. The court had carefully considered their closing submissions. The court had also carefully examined and considered their demeanours, when they were giving evidence in court. The complainant, at the time of the alleged offences was 34 years old. The accused was 54 years old. There was a 20 years age gap. The complainant said, she was raped three times on 11 April 2021 in the early morning, when she alleged the accused crept from where he was sleeping next to their bed, and committed the offences against her. The accused, on the other hand, denied the three alleged rape against him. Which version of events to be accepted by the court, will depend on who the court considered to be a credible witness. In my view, I find, after the two days hearing that, the complainant was the credible witness of the two. Although she was very emotional during the trial, it in no way detracts from the veracity of her evidence. She identified the accused as the person who was sleeping near their bed, before she went to sleep. There were only three people sleeping in their house, at the material time, that is, the complainant, her partner and the accused. Before she went to bed, she identified the accused well within the **R v Turnbull** identification guideline. She saw the accused’s face from 9.30 am to 10.30 pm on 10 April 2021. He was partying with them. He knocked out near the complainant and her partner’s

bed, approximately 2 feet away. When committing the offence, his face was 6 inches to one foot away from the complainant's eyes.

17. First, there was a 2 foot tubelight above the complainant's bed. When the offences were committed street lights came into the room that enabled the complainant to see his face. The offences were committed between 5 to 7 minutes, which was enough time for the complainant to see his face. She managed to get him off her, and she turned the lights on. The accused quickly went back to the floor near their bed, and pretended to sleep. After curfew hours at 4 am, the complainant reported the matter at Samabula Police Station. The accused was taken in the same day, 11 April 2021. This court accepts the complainant's version of events, simply because the complainant was a credible witness, although she was very emotional during the trial. The court rejects the accused's denials, because he was not a credible witness.
18. Given the above, the court finds that the prosecution had proven its case beyond a reasonable doubt. The court finds the accused guilty as charged on counts no. 1, 2 and 3 of the information, and convicts him accordingly on those counts.



Solicitor for State
Solicitor for Accused

: **Office of the Director of Public Prosecution, Suva**
: **Verebalavu Lawyers, Suva.**

Salesi Temo
JUDGE