

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 337 OF 2020S

STATE

VS

VARINAVA LOTU RALULU

Counsels : Ms. K. Semisi for State.
Mr. W. Navuni for Accused.
Hearings : 21 and 22 November, 2022.
Judgment : 25 November, 2022.

JUDGMENT

1. On 21 November 2022, in the presence of his counsel, the following information was read over and explained to the accused:

“Statement of Offence

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

Particulars of Offence

VARINAVA LOTU RALULU, on the 14th day of November, 2020 at Navua in the Central Division, had carnal knowledge of ***ASIVINA VARAU***, without her consent.”

2. He said, he understood the information, and he pleaded not guilty to the same. So, the question that needed to be answered in this case, was as follows:
 - (i) Did the accused rape the complainant (PW1), on 14 November 2020, at Navua 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. 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 penis,
 - (iii) without her consent, and
 - (iv) he knew she was not consenting to 4 (ii) at the time.
5. The slightest penetration of the complainant's vagina by the accused's penis is sufficient to satisfy element 4 (ii) above. Whether or not he ejaculated, is 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 not guilty plea was received on 21 November 2022, the prosecution opened her case. Then she called the complainant (PW1) as her first witness. The complainant said, she was 33 years old and married to the accused. She said, they had a daughter and two sons, aged between 11 and 7 years old. She said, they resided in Navua with her parents and two siblings. She said, the 14 November 2020 (Saturday) was the area's youths sports day. She said, the youths played volleyball against each other. She said, her husband and her attended the volleyball games.
9. She said, after the games, they had lunch and thereafter drank grog from 3 pm to 10 pm. She said, after 11 pm, her husband (accused) and her then walked back home. She said, while walking back, the accused asked her for sex. She said, she refused. At their house, the complainant said, she went to drink water from a tap. She said, the accused came from behind her, gagged her with his hand and dragged her through the grass to a breadfruit tree near a river. She said, under the breadfruit tree, the accused pushed her down to the ground, pulled her shorts and panty off and then separated her legs. She said, he then inserted his penis into her vagina, without her consent. She said, she was kicking him and trying to push him off her while they were having sex. She said, she later kicked him off, and ran home.
10. She said, when she arrived home, she told her mother (PW2) what happened to her. She said, the matter was then reported to police. An investigation was then carried out. After her evidence, the prosecution called their next witness, the complainant's mother (PW2). She said, on 14 November 2020, she was sleeping at home. Later at night, she said, she heard someone crying outside the house. She said, she went outside and saw the complainant sitting down and crying. She said, the complainant told her that she had just had sex with her husband. She said, the police were called and the complainant was later

taken to Navua Police Station. She said, the complainant returned home before morning break. When cross-examined, PW2 admitted that her knowledge of the case was based on what her daughter told her. Thereafter, the prosecution closed their case.

11. The defence then submitted there was no case to answer by the accused. Their reasons were noted in the record. The prosecution submitted there was a case to answer by the accused. Their reasons were also noted in the record. After carefully considering the evidence so far laid before the court, including the parties' submissions, the court ruled that the accused had a case to answer. The court then gave the accused the options available to him. He chose to give sworn evidence in his defence, and chose not to call any witness. That was his constitutional right.
12. The accused (DW1) said, he was 42 years old. He said, he was a ginger factory worker at a nearby ginger industry. In paragraph 6 of the Agreed Facts, he said he was living with the complainant, his wife, and their three children at Navua, on 14 November 2020. He said, he and his wife, the complainant went and played volleyball with the youths in the area, on 14 November 2020. After the volleyball games, he admitted he and his wife drank grog with the youths from 1 pm to 10 pm. He said, thereafter, he and his wife returned home. He said, he and his wife argued when they were returning home. He said, he suspected his wife was having an affair, because he saw on her mobile phone that a man was messaging her. He said, he and his wife, were on most occasion, arguing that day. As to his wife's allegation of rape, he denied the same. He said, he did not penetrate his wife's vagina that night. After the accused gave his evidence, the parties made their closing submissions.
13. The court had carefully listened to and carefully considered the complainant's evidence, as against the accused's evidence. The court had also carefully considered the parties closing submissions. The court had also carefully examined and considered their demeanors, when they were giving evidence in

court. This case was basically the words of the complainant, the accused's wife, against the words of the accused, the complainant's husband. They had been married to each other since 2011, according to the complainant. Under cross-examination, the complainant said they were very much in love at the time, resulting in three children now, aged 11, 9 and 7 years old. She said, their marriage became "rocky" in 2017 or 2018 or thereabout. She said, in cross-examination that, she is now living with her defacto husband, Mr. Semisi Lagivala. She said, they now have a 2 month old daughter. She said, when she complained to the Navua Police on 14 November 2020, the day of the alleged incident, she did not complained to them that she was raped. She said, she was more interested in getting a Domestic Violence Restraining Order [DVRO] against her husband. She said, she made a rape complaint to the police on 19 November 2020, 5 days after the alleged rape. The accused, on the other hand, denied raping the complainant, on 14 November 2020. He said, he and his wife, the complainant, were in constant argument on 14 November 2020. The accused said, he saw a man messaging his wife in her mobile phone. He said, he suspected his wife was having an affair. He said, on the night of 14 November 2020, he saw his wife talking to a cousin in a car, near to where they were drinking grog. He said, when he inquired, she appeared to tell him, it was none of his business.

14. With no eye witness witnessing the alleged rape on 14 November 2020, and given the argumentative type of relationship the two were allegedly experiencing on the night of 14 November 2020 because of perceived infidelity by the wife, it was difficult to say beyond reasonable doubt that the complainant's version of events were the truth. Furthermore, on 14 November 2020, when the complainant was taken to Navua Police Station, she didn't tell the police that she was allegedly raped by the accused. Consequently, she was not medically examined on 14 November 2020. In most rape complaints that come before the courts, it was standard procedure for the police to order a medical examination of the complainant, soon after. This would enable bruises

and other injuries to be discovered on the complainant's body to confirm the complainant's version of events. Although, no corroborative evidence is required to support the complainant's evidence, in order for a conviction to be made (Section 129, Criminal Procedure Act 2009), supportive evidence is sometimes essential to confirm someone's version of events, especially so when there are two competing and conflicting version of events. The law requires the prosecution to prove the complainant's version of events beyond a reasonable doubt. When putting the complainant's version of events together with the accused's version of events, the court is not sure beyond reasonable doubt of the accused's guilt. In my view, the prosecution had not proven the accused's guilt beyond a reasonable doubt.

15. Because of the above, I find the accused not guilty as charged, and I acquit him accordingly.




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JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused : **Legal aid Commission, Suva.**