

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 100 of 2021

STATE

V

ROMANU BATIRATU

Counsel : Mr. J. Nasa for the State.
: Ms. L. Volau and Mr. F. Singh for the Accused.

Dates of Hearing : 20, 21 March, 2023
Closing Speeches : 22 March, 2023
Date of Judgment : 23 March, 2023

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "S.M")

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

(Representative Count)

Statement of Offence

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

Particulars of Offence

ROMANU BATIRATU between 1 April 2021 and 18 September 2021 at Qina Settlement, Nawaka, Nadi, in the Western Division, had carnal knowledge of “S.M” without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for the count of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. In respect of the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis

without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element of the offence is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the penis. This element is also not in dispute.
8. The third element of consent is in dispute which means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his

penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. Furthermore, the law also provides that when a person is charged with an offence and the court is of the opinion that he or she is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence.
15. I have also directed my mind in respect of the lesser offence that is if the accused is not guilty of the offence of rape then I should consider the lesser offence of incest by a relative. To prove the offence of incest by a relative the prosecution must prove the following elements of this offence beyond reasonable doubt:
 - (a) The accused;
 - (b) Being the father of the complainant;
 - (c) Penetrated the vagina of the complainant with his penis.
16. In respect of the offence of incest by a relative it is immaterial that the accused had penetrated the vagina of the complainant with his penis with her consent.

17. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

18. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
19. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

20. The complainant informed the court that she was born on 10th April, 2005 which means she was 16 years of age in 2021. Between 1st April, 2021 and 18th September, 2021 the complainant was residing at Qina settlement in Nawaka, Nadi with the accused her father and her two younger sisters who were 11 and 15 years of age at the time.
21. On 1st April, 2021 after midday the complainant was sleeping face downwards on her bed in her bedroom, she was alone and the door of the room was open. The accused came and lay on top of the complainant and touched her breasts with both his hands.

22. The complainant stood up, pushed the accused and told him that he is her father and he should not be doing such things, upon hearing this the accused threatened her and told her to take her things and leave the house. The complainant got scared and she did not know what to do. The accused pushed the complainant on the bed by holding her hand, and told her to remove her shorts and her panty.
23. The complainant was scared since her father was forcing her to take off her shorts and panty and she did not know what to do. The complainant did as she was told at this time she was lying face up on the bed.
24. At this time the accused was taking off his pants and underwear told the complainant to put her legs up when she did this the accused moved closer to her and inserted his penis into her vagina. The reason why she had put her legs up was because she was forced to do so.
25. The complainant told the accused to stop because it was painful. The accused scolded her and told her not to say anything since her sisters would hear. At this time the complainant screamed and the accused blocked her mouth with his left hand. The accused had sexual intercourse with the complainant for about 6 minutes and he ejaculated on her thigh. After this the accused stood up took his clothes and went outside. The complainant did not agree to what the accused had done to her.
26. After the accused left the complainant wore her clothes and had her shower. The complainant's sisters were in the living room watching something on the phone she did not tell them anything because the accused had told her not to tell anyone and if she did then he will chase her out of the house.

27. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1. According to the complainant from thereon the accused would have forceful sexual intercourse with her two times in a day till 18th September, 2021. The complainant said *he would force me to give my body to him* and on all occasions the complainant was forced to have sexual intercourse with the accused. On 21st September, the complainant reported the matter to the police. The complainant identified the accused in court.
28. In cross examination the complainant was referred to her police statement dated 21st September, 2021, line 20 which was read as:
- He then turned me up facing the roof, removed my t-shirt then he started licking my breast for about 3 minutes. After that he then took off my pants and panty, lift up both my legs then he forcefully rubbed his penis into my vagina.*
29. The complainant agreed that in her evidence she had told the court that she had removed her clothes but in her police statement she had told the police officer that the accused had removed her clothes. When asked which was the correct version the complainant said she was forced to take off her clothes. Furthermore, she had screamed once when the accused had penetrated her vagina with his penis. When referred to her police statement the complainant said her screaming was not in her police statement, when it was put to the complainant that she had not screamed the complainant maintained that she had screamed.
30. When it was suggested that she could have run out of the bedroom door which was open the complainant said the accused had forced her and pulled her to sit and if she wants to go then she is to pack her things and go forever. The complainant also agreed that she had told the court that

the accused had blocked her mouth. When referred to her police statement the complainant said blocking of her mouth by the accused was not written in the police statement.

PREVIOUS INCONSISTENT STATEMENT

31. This court directs its mind to the fact that the defence counsel during cross examination of the complainant had questioned this witness about some inconsistencies in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.
32. This court is allowed to take into consideration the inconsistencies or omissions between what this witness told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents.
33. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
34. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.

35. When it was put to the complainant that she had consented to have sexual intercourse with the accused the complainant said *only because he forced me for us to have sexual intercourse*. The complainant stated that she did not complain to anyone because she was scared of the accused.
36. The complainant also stated that she was forced by her aunt Mere to report the matter to the police because she was scared and embarrassed to do so. The complainant agreed that she was embarrassed because she was pregnant and had she not got pregnant she would not have reported the matter to the police. The complainant agreed she was further embarrassed of the fact that the father of her child was her father. The complainant maintained that the accused had raped her.
37. Upon further questioning the complainant agreed that because she was ashamed and embarrassed that her extended family members will find out that she was pregnant she said the accused had raped her.
38. In re-examination the complainant clarified that on the day of the alleged incident she was not in school since it was during the pandemic lockdown. The complainant stated that she gave consent to the accused to have sex with her because he was forcing her.
39. The final witness DC 4926 Isimeli Bolakivei informed the court that on 21st September, 2021 he was instructed to interview the accused and to make a rough sketch plan of the alleged crime scene. As part of the crime scene reconstruction the accused showed the witness the place where the alleged offence had taken place. The rough sketch plan of the alleged crime scene was marked and tendered as prosecution exhibit no. 2.
40. This was the prosecution case.

DEFENCE CASE

41. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
42. From the line of cross examination the defence took the position that the complainant did not tell the truth in court of what had happened. The accused did not at any time have forceful sexual intercourse with the complainant as alleged. The complainant in cross examination had stated that she would not have reported the incident to the police had she not become pregnant. Furthermore, the complainant only cried rape to avoid embarrassment and shame since it was her father who was her child's father.
43. There was no threat on the complainant by the accused, as per the admitted facts the complainant was a form 4 student who was going to school and she had families and relatives namely uncle Jope and aunt Mere to complain to but she did not because she had consented to have sexual intercourse with the accused on all occasions. The defence submits the complainant was a "free agent" and an educated person who did not tell anyone about what the accused was doing to her is because she was consenting to have sexual intercourse with the accused.
44. Finally, the defence is asking this court not to believe the complainant the complainant's evidence is not only impossible but they do not make sense thus making it obvious that the complainant did not tell the truth. There were obvious inconsistencies and omissions between the police statement she had given to the police officer writing her statement when things were

fresh in mind with what she told the court. There was nothing in the police statement about any threats made by the accused, or any screaming by the complainant or the blocking of the complainant's mouth by the accused with his hand. The complainant was not restrained by the accused and there was nothing for the complainant to be afraid of.

45. This was the defence case.

ANALYSIS

46. The prosecution alleges that the accused is the biological father of the complainant. They were living together at Qina Settlement, Nawaka, Nadi. In the year 2021 the complainant was 16 years of age.

47. Between 1st April, and 18th September, 2021 the accused had forceful sexual intercourse with the complainant without her consent on several occasions. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time. The forceful acts of the accused did not stop after the first incident but continued for several weeks thereafter till 18th September, 2021.

48. On 1st April the complainant was sleeping in her bedroom when the accused went and lay on top of the complainant and touched both her breasts with his hands.

49. The complainant stood up, pushed the accused and told him that he is her father, upon hearing this the accused threatened and told her to take her things and leave the house. The accused got scared and she did not know what to do. The accused pushed the complainant by holding her hand, and told her to remove her shorts and her panty.

50. The complainant was scared her father was forcing her to take off her shorts and panty and she did not know what to do. The complainant did as she was told at this time she was lying face up on the bed.
51. After taking off his pants and underwear the accused told the complainant to put her legs up when she did the accused moved closer to her and inserted his penis into her vagina. The reason why she had put her legs up was because she was forced to do so.
52. The complainant told the accused to stop because it was painful. The accused scolded her and told her not to say anything since her sisters would hear. The accused had forceful sexual intercourse with the complainant for about 6 minutes. The complainant did not consent to what the accused had done to her on all occasions.
53. On the other hand, the defence says the allegations are a made up allegation. A scrutiny of the complainant's evidence will show that whatever she told the court is improbable and it does not make sense, there is a doubt on how the accused would have had forceful sexual intercourse with the complainant in the manner described. She did not say anything or provide any resistance whatsoever.
54. The door of the bedroom was open she could have run away, she could have screamed her sisters were in the living room beside the bedroom, she could have kicked or pushed the accused out of the bed but she did not because she was actively taking part in what was happening.
55. The complainant was never forced by the accused she was consenting to have sexual intercourse on all occasions. It was only when she got pregnant to avoid shame and embarrassment she cried rape.

56. Finally, the defence is asking this court not to give any weight to the evidence of the complainant.

DETERMINATION

57. I would like to once again remind myself that the burden to prove the accused guilty beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.

58. In this case the complainant was 16 years of age at the time of the allegation and the relationship between the two is of father and daughter.

59. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I accept the evidence of the complainant as truthful and reliable. She gave a consistent and coherent account of what the accused had done to her, and she was also able to withstand cross examination and was not discredited. The complainant was steadfast in what the accused had done to her.

60. I accept that the complainant had not told anyone about what the accused her father was doing to her. In my considered judgment this silence by the complainant cannot be taken in isolation the circumstances of the complainant is crucial in this regard.

61. The complainant had nowhere to go, it was her father who was the perpetrator and the power of authority in the house and the forceful manner in which the accused was exerting his authority cannot be ignored from the evidence adduced.

62. Moreover, it is not expected of a 16 year old girl who has just been repeatedly abused by her father would tell her friends and relatives that her father was having forceful sexual intercourse with her. I accept that the complainant was ashamed and embarrassed by what was happening to her. The failure by the complainant to tell anyone about what the accused was doing to her does not affect her credibility at all.
63. Furthermore, experience has shown that individuals differ in terms of how they react towards people after an unexpected happening. Some display obvious signs of distress and some not. The fact that the complainant did not tell anything to her two younger sisters or anybody else about what the accused had done to her does not mean that she should not be believed. The situation of the complainant ought to be considered holistically. It cannot be ignored that the complainant was a child of 16 years at the time who was oblivious to the unexpected abuse by her father. The complainant told the truth when she said she was scared and she did not know what to do.
64. There were some inconsistencies or omissions between what the complainant told the court and her police statement, however, the discrepancies were not significant to affect the credibility or the thrust of the complainant's evidence. The age of the complainant at the time and passage of time does affect one's memory.
65. However, the complainant was not shaken as to the basic version of her allegation the inconsistency or omission between her evidence in court and her police statement was not significant and it does not adversely affect the credibility of the complainant.

66. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

67. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following manner about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony* (1985) 1 SCC 505:

“While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to

find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'

LATE REPORTING

68. It is obvious that there is an issue of late reporting by the complainant to the police. The delay is about 6 months from the date of the allegation on 1st April, to 18th September, 2021. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*"[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."

“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

69. In my considered judgment the delay is not unreasonable. Firstly, the complainant was dependent on the accused for support and assistance. She had nowhere else to go if she was chased out of the house by the accused. The accused was the father of the complainant and a person of authority in the house.

70. Secondly, the complainant was 16 years of age and also from my observations she struck me as a simple and unsophisticated person who would not easily speak out against any wrong doing. The complainant also appeared to be a reserved person who would not share her problems with anyone. I accept the complainant was threatened by the accused which made her to lose her self-esteem hence she got scared and did not know what to do.
71. The complainant was not a “free agent” who could have told someone about what was happening to her or had reported the matter to the police earlier. The accused was living with the complainant hence he was around which in my view would have instilled fear in her. I also accept that during the dates in question the country was on Covid-19 alert which would have contributed to the delay since the complainant’s aunt Mere was in Naitasiri.
72. This court is satisfied beyond reasonable doubt that the complainant had not consented to have sexual intercourse with the accused. In this regard the lesser offence of incest by a relative is not considered as an alternative or lesser offence to the substantive count of rape.

CONCLUSION

73. This court is satisfied beyond reasonable doubt that the accused between 1st April, 2021 and 18th September, 2021 had penetrated the vagina of the complainant with his penis without her consent. The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.

74. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.

75. This is the judgment of the court.



Sunil Sharma

Judge



At Lautoka

23 March, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.