

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 138 of 2021

STATE

V

SAVENACA TIQE

Counsel : Ms. S. Swastika for the State.
: Ms. A. Bilivalu and Mr. P. Chand for the Accused.

Dates of Hearing : 08, 09 and 12 June, 2023
Closing Speeches : 15 June, 2023
Date of Judgment : 16 June, 2023

JUDGMENT

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

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

Statement of Offence

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

Particulars of Offence

SAVENACA TIQE on the 22nd of November, 2021 at Lautoka in the Western Division, had carnal knowledge of “S.C” without her consent.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the offence 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. To prove 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 “S.C” 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.
7. The second element is the act of penetration of the complainant's vagina by the penis.
8. The third element is that of consent, 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. As a matter of law, I 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

15. 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.
16. 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

17. The complainant informed the court that she lives in Lololo settlement with her parents and three siblings an elder sister and two younger brothers. On 21st November, 2021 after 7pm the complainant, her younger brother

Viliame Tuibua and her cousin Karalaini reached home after attending a function in Ba.

18. At home the complainant with Karalaini and Viliame planned to go to town and buy some liquor. The complainant hired the car of the accused who is her uncle from her paternal side. The complainant was sitting in the back seat with Karalaini while Viliame sat in the front passenger seat.
19. In town they purchased one carton (24 cans) of beer the complainant was wearing a white t-shirt, black pants and sulu. In the car everyone started drinking on the way the accused turned the vehicle into Vakabuli landing, everyone got out of the car and they continued drinking till the drinks finished.
20. The group again went to town and the complainant purchased a bottle of bounty rum. The drinking continued in the car after having four glasses the complainant blacked out. She does not recall what happened after that.
21. When the complainant woke up the next morning (22nd) at around 6am to 7am she found herself lying in the accused car on the back seat. She was wearing her pants and sulu but over her t-shirt there was another black t-shirt. The complainant had no idea how she was wearing another t-shirt. The accused was sleeping in the front seat and the complainant was alone with the accused.
22. The complainant told the accused to take her home she met her brother Viliame who told her that the accused had taken off her pants and laid on top of her. The complainant was shocked when she heard this and she could not believe what she was told. Thereafter the complainant with her

mother and brother Viliame went to the house of Karalaini to ask about what had happened the previous night.

23. From the house of Karalaini they went and reported the matter to the police. The complainant identified the accused in court and said that she treated the accused like her own father.
24. In cross examination the complainant denied that it was her idea to drink at Vakabuli landing. At Vakabuli landing the complainant denied removing her t-shirt and only wearing her bra.
25. The complainant could not recall if Viliame was really drunk and sleeping, she also denied that she had not blacked out. The complainant could not recall seeing Viliame falling on the ground after they went to buy liquor the second time.
26. The complainant could not remember after Viliame and Karalaini got off the car the accused while driving along Vakabuli road had stopped the vehicle. The complainant also could not remember that she had touched the accused on his chest and kissed him.
27. The complainant could not remember what happened after she blacked out and she maintained this position when suggested that she agreed to have sexual intercourse with the accused at the back seat of the accused car for 5 minutes and thereafter wearing the accused t-shirt.
28. The complainant agreed when she regained consciousness the accused was sleeping in the driver's seat and she was in the back seat. The complainant was ashamed when Viliame told her what had happened the night before. The complainant denied that she was telling the court she

does not remember anything because she regretted drinking with the accused that night.

29. The complainant also denied that the reason she was saying she does not remember anything is not because she had consensual sex with her uncle and her family had come to know about this and also not out of shame.
30. The complainant was not forced by her parents to report the matter to the police when she heard what had happened she reported the matter to the police. The complainant also denied that she was conscious and awake when she had consensual sex with the accused.
31. The second witness Viliame Tuibua the younger brother of the complainant informed the court that on 21st November, 2021 the witness with the complainant and cousin Karalaini returned home from a function in the afternoon.
32. After sometime it was the complainant's idea for them to go to town to buy some drinks. The witness arranged with the accused for them to be taken to town. The accused drove them in his car where the complainant paid for one carton of beer.
33. In the car all of them including the accused started to drink, after driving for some time the accused turned the car into one of the bushes. The drinking continued until the drinks finished by this time Viliame went to the front passenger seat of the car and slept.
34. When he woke up he saw the others drinking rum, he did not drink because he was really drunk. Viliame heard Karalaini telling the accused for them to be taken home. At this time the complainant was very drunk

lying here and there at the back seat of the car. At one time Karalaini had to push the complainant in the back seat of the car even when Viliame spoke to the complainant she did not reply.

35. The accused drove all of them near their house Karalaini got off and closed the door she realized that she had forgotten her bag in the car but before she could get her bag the accused drove the car and stopped at Iyam Place. The witness was still in the front passenger seat when the accused left the driver's seat and went to the back seat where the complainant was. He pulled up the complainant's t-shirt and pulled down her sulu, pants and panty and got out of the car. According to the witness the complainant was knocked out and unconscious and lying on the seat.
36. Viliame saw the complainant was without clothes and the accused standing outside the car. He got out of the car pulled down the complainant's t-shirt and was trying to pull up her pants and panty.
37. Viliame could not put on the complainant's clothes because she was really drunk. At this time he saw Karalaini coming towards the car he told Karalaini the accused had raped the complainant. Viliame then left the car and started going home so that he could go and tell his family members about what had happened.
38. Shortly after the accused reversed the car and told the witness to get in which he did. The car was driven to the main road near their house. The witness left the car and the accused gave Karalaini some money to buy cigarette. At this time the complainant was in the car with the accused. After a while Karalaini came back and while Viliame and Karalaini were outside the car the accused drove away with the complainant.

39. By this time it was about 2am to 3am on 22nd November. Later Viliame went home and told his family members about what had happened and at around 8am the complainant came to the house of Karalaini. The witness said the complainant looked very dirty.
40. In cross examination the witness said that this was not the first time he and the complainant had drunk with the accused. It was the complainant's idea to go and drink but not in the bushes.
41. At the place where they were drinking Karalaini and the complainant did not force the accused to drink. Furthermore, at no time the complainant had removed her t-shirt and was dancing. Viliame agreed that he went to sleep in the car because he was too drunk. When he woke up he was a bit sober and he saw Karalaini serving rum. Viliame agreed before Karalaini got off the car the complainant was awake but really drunk, however, at the time Karalaini forgot her bag the complainant was not awake and had knocked out with her eyes closed.
42. Viliame denied that the complainant was awake when the accused was pulling up her t-shirt and pulling down her sulu, pants and panty. The witness was referred to his police statement dated 4th December 2021 to line 3 on page 2 which was read as follows:
- “Sera was awake but I saw her was too drunk. I was drunk but not that drunk that cannot figure out what Savenaca was doing was wrong. I saw Savenaca made “S” lay down at the rear seat and went on top of “S” and started kissing her on her lips and furthermore he pulled “S’s” t-shirt colour white up to her chest where I saw “S’s” bra was showing.”*
43. The witness agreed that he told the above to the police and the last time he saw the complainant was awake was at Iyam place. When the witness

met the complainant she was not talking to anyone but crying during the family discussion.

PREVIOUS INCONSISTENT STATEMENT

44. This court directs its mind to the fact that the defence counsel in the cross examination of Viliame had questioned him about an inconsistency in his police statement which he had given to the police when facts were fresh in his mind with his evidence in court.
45. This court is allowed to take into consideration the inconsistency between what the witness told the court and his police statement when considering whether Viliame is believable and credible. However, the police statement is not evidence of the truth of its contents. 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.
46. If there is any inconsistency, 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.
47. In re-examination the witness stated that the complainant was awake as per his police statement but was not saying words properly.

48. The final witness Karalaini Lewaqato informed the court that Viliame and the complainant are her cousins in the evening of 21st November Karalaini was drinking with the accused, the complainant and Viliame.
49. According to Karalaini, whilst drinking beer Viliame slept in the front passenger seat of the car and he did not drink rum. The complainant after drinking a few glasses of rum knocked out. According to the witness the complainant did not respond or speak "*she was just sitting there*" in the back seat of the car.
50. At the junction leading to her house the accused stopped the car Karalaini got out and wanted to take out her bag from the car boot but before she could do this the accused drove the car. Karalaini ran after the car when the car stopped Viliame came out of the car and said that the accused had raped the complainant when the witness went to the back seat of the car she saw the complainant was not seated but lying on the seat wearing her panty only so she spread the sulu over the complainant to cover her.
51. The witness observed at this point in time that the complainant was "*just lying there she didn't react to anything she was just lying there*".
52. The witness pushed the complainant a bit inside so that she could sit in the car and go home. By this time Viliame was walking home the accused drove the car and picked Viliame and parked it at the junction where he had parked before. The accused told the witness to buy cigarette when she returned Viliame was outside the car and at this time the accused drove the car with the complainant. The witness also stated that the complainant did not respond when she was pushing the complainant inside the car.

53. The witness went home and slept when she woke up her family members were telling her about what had happened. After a while the complainant came with the bag of the witness the complainant was normal in that she was not aware of what everyone was talking about and she was not aware of what had happened to her. Viliame told the complainant what had happened to her the night before.
54. In cross examination the witness denied that after the complainant had knocked out after drinking rum she was still awake. To confirm this, the witness looked at the complainant whose eyes were closed. The complainant was sitting down leaning on the back seat and her head was tilted on the headrest of the seat.
55. When Karalaini saw the complainant lying in the back seat in her panty she was facing up she did not see the complainant's eyes because it was dark inside the car. When asked the complainant looked normal the witness said she meant the complainant was not aware of everything that happened to her. The complainant did not say anything whether to report the matter to the police or not the decision was made by the family members.
56. This was the prosecution case.

DEFENCE CASE

57. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.

58. The accused informed the court that in the year 2021 he lived at Lololo with his wife and children. For a living he drove his car and also did farming. The accused does not have any blood relationship with the complainant and her family but they live in the same area. The complainant used to call him father or uncle.
59. In the evening of 21st November, 2021 he agreed to take the complainant, her younger brother Viliame and Karalaini to town to buy liquor. He was paid by the complainant after buying one carton of beer the group went and stopped at Vakabuli landing. The complainant removed her t-shirt and was dancing with Karalaini. According to the accused the complainant had said that they should drink somewhere near the road so they can go back and buy more liquor.
60. At Vakabuli landing all drank beer when some drinks were left the complainant told the accused to buy some more. The accused drove the group to town, a bottle of rum was bought Viliame after drinking some glasses of rum knocked out and went to sleep in the front passenger seat of the car. After buying the bottle of rum Karalaini told the accused to drive them home, on the way they drank the rum.
61. The vehicle was driven to the junction near their home the complainant told Karalaini to take Viliame home since Viliame was knocked out. After Karalaini had taken Viliame with her at this time the complainant told the accused to go and buy some more drinks at a black market. The accused drove the car for a while and went past Vakabuli, from here he could not drive anymore since he felt he was about to get knocked out so he parked the vehicle.

62. The complainant kept insisting that he drive on and she kept touching him and hugged him from behind his seat and was trying to pull him to the back seat. According to the accused he was eventually pulled to the back seat. The accused further explained by saying “*she hugged my neck and pulled me sideways and then pulled me to the back.*”
63. When the accused was at the back seat he saw the complainant was sitting naked the accused wanted to go but the complainant kept pulling him by his neck and was also holding his pants and hugging him from behind. The accused asked the complainant what she wanted she said that she wanted to have sex with him.
64. The accused refused saying that he could not but the complainant kept hugging him so he had sex with the complainant for about 5 minutes. When asked how he knew that the complainant had given him permission to have sex with her the accused said the complainant had become naked and she had pulled him towards the back of the car where she was.
65. After this the accused went to the driver’s seat the complainant got dressed and laid down on the seat. When the accused woke up he saw the complainant was wearing a sulu and his t-shirt. The accused maintained that the complainant had given her consent to have sex with her.
66. In cross examination the accused agreed that he was also drinking with the complainant and others that evening and it was at Vakabuli landing the complainant had removed her t-shirt and that some cans of beer was left, however, the complainant wanted to buy some more drinks.
67. The accused drove to town the second time a bottle of rum was bought by the complainant. As for Viliame at this time he had not knocked out but was just lying down and talking. The accused denied the complainant had

knocked out after drinking rum he stated the complainant was awake and she told the accused to drop the other two at home since Viliame had knocked out.

68. The accused denied that he had driven the car after Karalaini got out since she was the only one awake he denied that at Iyam place he had stopped the car and gone to the back seat of the car where the complainant was. When it was suggested that this was a perfect opportunity for the accused to take advantage of the complainant the accused said the complainant was not knocked out but was insisting that they buy more drinks.
69. When mentioned that Viliame had intervened the accused said Viliame was carried away by Karalaini. The accused denied telling Karalaini to buy a cigarette for him. He maintained the complainant was not knocked out, was not that drunk but conscious. When the accused was alone in the car with the complainant she was talking to him that they buy more drinks.
70. When suggested that it would be difficult for the complainant to pull him in the manner described by him from the back seat the accused stated that the complainant was doing that to him. The accused denied the allegation saying that the complainant had consented for him to have sex with her.
71. In re-examination the accused said he came to know that the complainant had not passed out because she was sitting behind him and telling him to drop Karalaini and Viliame and they have to go. When asked how did he know that the complainant had the capacity to give consent the accused said whilst she was pulling him she was naked.
72. This was the defence case.

ANALYSIS

73. The prosecution states that the complainant and the accused are known to each other, the accused is the uncle of the complainant from her paternal side. In 2021 the accused was 51 years and the complainant was 19 years of age.
74. The complainant and the accused started drinking alcohol with two others namely Viliame the younger brother of the complainant and Karalaini their cousin sister. The drinking started in the evening of 21st November after finishing one carton of beer, Viliame got drunk so he went in the car and slept in the front passenger seat.
75. The group, however, went and purchased a bottle of rum and started drinking after four glasses the complainant passed out in the back seat of the car. According to the observations of Viliame and Karalaini the complainant was not responding she was sitting in the back seat with her head tilted backwards.
76. After Karalaini left the car at the junction to her house the accused drove the vehicle to Iyam place where in the presence of Viliame the accused pulled up the t-shirt of the complainant and pulled down her pants and panty as she lay in an unconscious state in the back seat of the car. Viliame out of pity for his sister was only able to pull down the complainant's t-shirt he could not pull up her pants and panty because the complainant was not responding also at this time the accused had come near Viliame.
77. At this time Karalaini who was left behind at the junction of her house came running and upon seeing the complainant spread the sulu over her according to Karalaini the complainant was not reacting to anything.

Karalaini and Viliame got in the vehicle and again they were taken to the junction near the house of the complainant. It was here Viliame got out of the car while Karalaini was sent by the accused to buy a packet of cigarette.

78. At this time the accused was in the driver's seat with the complainant in the back seat. After a short while Karalaini came back and before she could hand over the packet of cigarette the accused drove the car away with the complainant in the back seat. The car was stopped at an isolated place where the accused had sexual intercourse with the complainant without her consent. The accused knew or believed the complainant was not consenting or did not care if she was not consenting at the time.
79. It was in the morning the accused dropped the complainant near her home. The complainant did not know what had happened to her so Viliame told her the story, in a state of disbelief the complainant with Viliame went to Karalaini's house. During the discussions at Karalaini's house the complainant was quiet since she had no recollection of what had happened.
80. The prosecution is asking this court to look at the state in which the complainant was after consuming four glasses of rum. The observations of Viliame and Karalaini are clear and specific and consistent with each other that the complainant was so drunk that she was unconscious and not responding.
81. It is submitted that due to excessive drinking the complainant had lost her capacity to give consent to have sexual intercourse with the accused. The prosecution further submits that Viliame and Karalaini were the last ones to observe the complainant who was knocked out and not responsive before the accused drove the complainant away in his car.

82. The complainant honestly could not remember what had happened to her after she knocked out only to wake up with the accused in the driver's seat and the complainant wearing the accused t-shirt over her t-shirt lying in the back seat of the car. It is an undisputed fact that the accused had sexual intercourse with the complainant in his vehicle.
83. Finally the prosecution submits that when the complainant arrived at the house of Karalaini she did not know anything that had happened after she passed out. In fact it was Viliame who told the complainant about the conduct of the accused the previous night going into the early morning.
84. On the other hand, the defence says the allegation against the accused does not make sense the complainant has raised an unfounded allegation against him. A scrutiny of all the prosecution witnesses evidence will show that all were drunk they did not know what they were doing. The accused has in all honesty admitted having sexual intercourse with the complainant that early morning with her consent. There is nothing wrong with that.
85. He could have denied this but he did not because the complainant had agreed she was the one who was touching the accused and pulling him towards her in the car and then having consensual sexual intercourse. Furthermore, there were no injuries on the complainant and Karalaini had correctly observed that the complainant was normal when she walked home the next day. Being a responsible person the accused as requested by the complainant promptly dropped her home. There is no evidence of any threat or force or pressure on the complainant what happened that night was what the complainant had agreed to with her conscious mind which she was at liberty to do and she did so.

86. The defence is asking this court to consider the fact that the complainant has on previous occasions been drinking with the accused and there have been no complaints by the complainant against the accused. Furthermore, the complainant is the one who wanted to drink and she had initiated the idea of going to town to buy more drinks. It was the accused who was about to knockout that he had to park the car despite the continued insistence of the complainant to buy more drinks from the black market.
87. The defence also submits that the complainant was a heavy drinker who is taking advantage of lost memory and passing out to avoid shame since her family members know what she had been doing with the accused. The complainant is a pretender who dramatized the situation in a way that despite remembering every bit of her consensual sexual intercourse with the accused she is saying she cannot remember anything is a sham because she does not want to remember out of shame. The other prosecution witnesses also should not be believed because they were also drunk and they are making up a story to make the accused look like the perpetrator when in fact he is the victim here.
88. The defence also says that at no time had the complainant insisted on making a complaint to the police she was quiet all along when the family members were discussing what Viliame had told them. Had the complainant not consented she would have been the first one to complain to the police. She did not say anything since nothing had happened without her consent. On the contrary the accused told the truth in court he admitted having sexual intercourse which was by the consent of the complainant and nothing else.
89. Finally, the defence is asking this court not to believe the prosecution witnesses they did not tell the truth because after consenting to have sexual intercourse with the accused the complainant is not owning up or

taking responsibility of her equal participation in a consensual sexual intercourse with the accused. She is blaming the accused by not telling the truth. The accused was forthright in what he told the court he gave a detailed account of what had happened that early morning he was honest in admitting the act he did and what the accused did would not have been possible had the complainant not consented.

DETERMINATION

90. I would like to once again remind myself that the burden to prove the accused guilt 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. The only issue in this trial is whether the complainant had consented to have sexual intercourse with the accused.
91. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant and the two prosecution witnesses as truthful and reliable. The complainant told the truth when she said that she had knocked out after drinking four glasses of rum in addition to the shared drinks of one carton beer between the four of them.
92. I also accept Viliame and Karalaini told the truth of what they had observed. I have no doubt in my mind that all the prosecution witnesses told the truth in court their demeanour was consistent with their honesty. Even though there was an inconsistency between what Viliame told the court and his police statement about the complainant being awake when the accused was kissing the complainant and removing her clothes does not in my considered judgment affect the reliability of his evidence. In any event this inconsistency was not significant.

93. All the prosecution witnesses were also able to withstand cross examination and were not discredited as to the main version of their evidence and observations.
94. In my considered judgment Viliame and Karalaini were with the accused and the complainant from the time the drinking started. They were in close proximity of the complainant and they had seen how the complainant was in that she was really drunk, not responding and was sitting with her head tilted in the back seat of the car.
95. The only issue in this trial is whether the complainant had consented to have sexual intercourse with the accused that early morning. It is not in dispute that the complainant and the accused were known to each other. The complainant was in the car of the accused when it was suddenly driven by the accused after Viliame and Karalaini had left the car which was parked at the junction near the house of the complainant.
96. The prosecution argument has been that the complainant did not have the capacity to consent due to her intoxication. The observations by Viliame and Karalaini are relevant in this regard which supports the evidence of the complainant that she does not remember anything after she drank about four glasses of rum.
97. It was the accused who saw the complainant alone in the car took advantage of the opportunity and drove the car away from Viliame and Karalaini. When the complainant woke up she saw that she was wearing the accused t-shirt over her t-shirt. She had absolutely no recollection of how this had happened. Moreover, when the complainant arrived at the house of Karalaini she was oblivious to what the family members were

talking about which suggests that the complainant had no recollection of what had happened to her.

98. I accept that the complainant did not have the capacity to consent to what the accused had done to her.
99. It is to be noted that the legal meaning of consent is wide which also states *inter alia* that submission without physical resistance to an act of another shall not alone constitute consent here the complainant did not have the capacity to consent due to excessive drinking hence she was in no position to consent to have sexual intercourse with the accused.
100. On the other hand, the accused did not tell the truth he gave a version of events which is fanciful and unbelievable. It is difficult to accept that the accused was led on by the complainant to have sexual intercourse with her since she was naked in the back seat and was hugging the accused neck from behind the driver's seat is improbable and a nonsensical story. Firstly, it is mind boggling to think how the accused was pulled from the back seat by the complainant.
101. Secondly, it was the accused who had removed the clothes of the complainant in front of Viliame before driving the complainant away to a secluded place. The accused did not tell the truth in court he was making up a story as he went along in his evidence. It was also noticed that in cross examination the accused was not answering the question asked. His demeanour was not consistent with his honesty he did not tell the truth when he said the complainant had consented to have sexual intercourse with him. This is not a case of drunken consent but a case of lack of capacity to consent due to excess drinking of alcohol.

102. Furthermore, I also accept that it was the accused who had sent Karalaini to buy cigarette and when he realized that Viliame was also not in the car he quickly drove away with the complainant. I reject the evidence of the accused as unreliable and untruthful. This court rejects the defence of consent as not worthy of belief.

103. In *State v Rupeni Suguturaga and another* [2019] FJHC 1070; HAC117.2016 (8 November 2019) at paragraphs 46 and 47 I had mentioned the following about capacity to consent as follows:

46. In a situation where the capacity of the complainant to consent due to self-induced intoxication through drink and drugs is in issue the following points may be considered by the court (Blackstone's Criminal Practice 2018 [B3.30] :

- a. Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently. If she is aware of what is happening, but the consumption of alcohol or drugs has caused her to consent to activity which she would ordinarily refuse, then she has consented no matter how much she may regret it later. The fact that a person makes an unwise choice does not mean that she lacked the capacity to make it. A drunken consent is still a consent if a person has the capacity to make the decision whether to agree by choice.*
- b. However, if a complainant becomes so intoxicated that she no longer has the capacity to agree, there will be no consent. Clearly she will not have the capacity to agree by choice where she was so intoxicated through drink or drugs, and her understanding and knowledge are so limited that she was not in a position to decide*

whether or not to agree. (This relates to understanding and knowledge of what is going on, as opposed to the quality of the decision-making.)

- c. A person may reach such a state without losing consciousness. For instance, she may be in a state where she knows that she does not want to take part in any sexual activity with someone, but she is incapable of saying so. Alternatively, she may have been affected to such a degree, that, whilst having some limited awareness of what is happening, she is incapable of making any decision at all.*

- d. If a person is asleep or has lost consciousness through drink or drugs, she cannot consent, and that is so even though her body responds to the accused's advances.*

47. The English Court of Appeal in R vs. Gael Tameu Kamki [2013] EWCA Crim. 2335 had approved this approach.

405. Furthermore, the English Court of Appeal in *R vs. Bree*, [2007] 2 All ER 676 at paragraph at 34 made a pertinent observation about lack of capacity to consent in the following words:

“ ...If, through drink (or for any other reason) the complainant has temporarily lost her capacity to choose whether to have intercourse on the relevant occasion, she is not consenting, and subject to questions about the defendants state of mind , if intercourse takes place , this would be rape...”

106. In my considered judgment the complainant's alcohol consumption had vitiated her capacity to consent to have sexual intercourse the complainant in fact was disabled by the excessive drinks she had consumed to have

formed any capacity to consent. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

107. This court is satisfied beyond reasonable doubt that the accused on 22th November, 2021 had penetrated the vagina of the complainant with his penis without her consent.
108. This court also accepts that the accused knew or believed the complainant was not consenting or did not care if she was not consenting at the time.
109. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.
110. This is the judgment of the court.


Sunil Sharma
Judge



At Lautoka

16 June, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.