

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 316 of 2022**

**STATE**

**v**

**OSINTAI GILL FOKILAU**

**Counsel:** Ms. S. Bibi for the State  
Ms. O. Grace for the Accused

**Date of Judgment:** 14 February 2025

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**JUDGMENT**

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1. **Osintai Gill Fokilau**, the accused, is indicted with the offence of *Rape* contrary to section 207(1) & 2(a) of the Crimes Act 2009 laid out as follows in the Information by the Director of Public Prosecutions filed on 18 October 2022:

**COUNT ONE**

*Statement of Offence*

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

*Particulars of Offence*

**OSINTAI GILL FOLIKAU**, between the 31<sup>st</sup> day of October, 2021 and the 1<sup>st</sup> day of November, 2021, at Nasinu, in the Central Division, had carnal knowledge of

**KAROLINA RADINI QELE**, without her consent.

2. Osintai Gill Fokilau pleaded *not guilty* to the aforesaid charge, and tried accordingly on 12 - 27 September 2023, and this is the Court's judgment.
3. Pursuant to sections 57 - 58 of the Crimes Act 2009 and Woolmington v DPP [1935] AC 462 at 481 (HL), the prosecution bear the legal burden to prove all elements of the offence of *Rape* beyond reasonable doubt.

### **Physical and fault elements of Rape**

4. *Rape* is contrary to section 207(1) - (2)(a) of the Crimes Act 2009 which state:

*207.-(1) Any person who rapes another person commits an indictable offence.*

*(2) A person rapes another person if –*

*(a) the person has carnal knowledge with or of the other person without the other person's consent; ...*

Section 206(4) of the Crimes Act 2009 state, '[i]f "**carnal knowledge**" is used in defining an offence, the offence, so far as regards that element of it, is complete on penetration to any extent'.

**Consent** is defined under section 206(1)-(2) of the Crimes Act 2009 as:

*206. In this Part –*

*(1) The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.*

*(2) Without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained –*

*(a) by force; or*

*(b) by threat or intimidation; or*

*(c) by fear of bodily harm; or*

*(d) by exercise of authority; or*

*(e) by false and fraudulent representations about the nature or purpose of the act; or*

*(f) by a mistaken belief induced by the accused person that the accused*

*person was the person's sexual partner.*

5. The physical and fault elements for the offence of *Rape* are:

- i) A person i.e. the accused
- ii) Had carnal knowledge with the complainant by penetrating the complainant's vagina with his penis
- iii) Without the complainant's consent [ See ss.206(1) - (2) ]
- iv) *Mens rea* - Intentionally and/or recklessly. For 'reckless', refer to Tukainiu v State [2017] FJCA 118; AAU0086.2013 (14 September 2017) per Prematilaka, JA. at paragraphs 31 – 34.

6. In Tukainiu v State (supra), at paragraphs 31 – 34, Prematilaka, JA held:

*[31] Therefore, since section 207(2)(a) (i.e. the law creating the offence of rape) does not specify a fault element for the physical element i.e. the act of penetration without the victim's consent (amounting to a circumstance), section 23(2) would become applicable and recklessness becomes the fault element for the physical element of rape. This is the same with section 207(2)(b) and 207(2)(c) as well, though not applicable in this case.*

*[32] Section 14 states inter alia that in order for a person to be found guilty of committing an offence the existence of the physical element and the require fault element in respect of that physical element must be proved (by the prosecution). Fault elements of an offence could be intention, knowledge, recklessness or negligence but the law creating the offence may specify any other fault element as well [vide section 18(1) and (2)]. Therefore, I conclude that the prosecution in a case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent); (b) lack of consent on the part of the victim; and (c) recklessness on the part of the accused as defined in section 21(1).*

*[33] Section 21(1) states, 'A person is reckless with respect to a circumstance of – (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.'*

*[34] If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element [vide section 21(4)]. Therefore, in a case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offence of rape.*

### **Admitted facts between prosecution and defence**

7. The *Admitted facts* between the prosecution and defence filed on 11 July 2023 are:
- a) The name of the person charged is Osintai Gill Fokilau [ “Fokilau” ].
  - b) The Complainant is Karolina Radini Qele [ “Complainant” ].
  - c) Fokilau has been in a relationship for 5 years with Wasevina Vurai Raisaluwaki at the time of the incident.
  - d) The Complainant and Wasevina Vurai Raisaluwaki are cousin sisters.
  - e) Fokilau and the Complainant are known to each other.
  - f) At the time of the incident, Fokilau was residing with his wife at her family house in Rokara Settlement.
  - g) Wasevina Vurai Raisaluwaki had also been consuming alcohol on the day of the alleged incident.
  - h) Fokilau had gone off to drink yaqona at another location, however returned later that same night.
  - i) The Complainant was found crying later on the night of the alleged incident.
  - j) Fokilau also met his brother-in-law Kele and his wife after seeing the Complainant crying.
  - k) The police had arrived after a report was lodged to them regarding the incident against the Complainant on the same night.
8. At trial, prosecution called one (1) witness i.e. PW1: Karolina Radini Qele (Complainant); while the defence called one (1) witness as well i.e. the accused Osintai Gill Fokilau (DW1) who testified under oath.

### **Prosecution case via PW1 Karolina Radini Qele (Complainant)**

9. **PW1 Karolina Radini Qele (Complainant)** in examination-in-chief testified that in 2021 she stayed in Nasilai, Rewa, and in October to November 2021 she stayed one and half week at

Delaivalelevu. PW1 stated that she is in Court to tell what happened to her because she was the one who had reported the case of rape that happened to her on Sunday. PW1 stated that the rape happened to her when she was staying at her uncle's place situated at Rokara in Delaivalelevu Settlement. PW1 stated that at Rokara Settlement she lived with her cousin-sister, her cousin-brother's child, her cousin-brother and his wife, and her sister-in-law. PW1 stated that she knows Osintai Fokilau and he also stayed with his wife in the same house as PW1 at Rokara Settlement, but they didn't talk much to each other. PW1 stated that she does not know or recall anything about Osintai Gill Fokilau's and Wasevina Vurai Raisaluwaki's (*a.k.a* Sevina) marriage life or relationship. PW1 stated that Osintai Gill Fokilau's wife namely Wasevina Vurai Raisaluwaki (*a.k.a* Sevina) is her cousin-sister which therefore makes Osintai PW1's '*daku*' (i.e. I-Taukei term for brother-in-law) or brother-in-law. PW1 stated that on that Sunday the 30<sup>th</sup> day of the month she could not recall in 2021, Sevina and others were outside drinking and they called her to join them, and PW1 did join them and took four (4) cups of beer, and then Sevina and PW1's cousin-brother's son went inside the house to sleep. PW1 then told her cousin-brother and his wife that she is going inside the house to have her sleep. PW1 stated that apart from Sevina, a driver by the name of Watisoni, PW1's cousin-brother, his wife and child namely Rokara Naidiri were also part of the beer drinking session. PW1 stated that Osintai Gill Fokilau was not part of the aforesaid beer drinking session at the car park outside the house at Rokara Settlement. PW1 stated that after drinking beer she then entered the house and lied down on her mattress beside the settee and fell asleep, and on her right laid her cousin-brother's son. PW1 stated that when she was lying down asleep, she could feel that someone was lying on top of her, and felt a male private part going in and out of her female private part. PW1 stated *dick or penis* to refer to the 'male private part', and *vagina* to mean her female private part. PW1 stated that she knows what a *vagina* is being her female private part. PW1 stated that she was wearing a t-shirt, a suluvakatoga, a short shorts, and a panty. PW1 stated that at the moment she felt a penis going in and out of her vagina, her short shorts and panty were together at the settee closer to her uncle's room. PW1 stated that when she felt the penis in her vagina, she tried to turn but couldn't, and when she tried to call her brother-in-law, the person whose penis was in her vagina took a pillow and put it on top of her mouth. PW1 stated at that moment she tried to move but couldn't and also tried to smack him. PW1 stated that at that time her

brother-in-law was lying just beside her house. PW1 stated that she felt that they were having sexual intercourse when the penis penetrated her vagina, which was not that long. PW1 stated that Gill had penetrated his penis into her vagina and she does not know his full name and only recalled the name Gill because his family always call him by that name. PW1 stated that Gill is her *'daku'* (i.e. I-Taukei term for brother-in-law) or brother-in-law. PW1 stated that she knew that it was Gill who had penetrated his penis into her vagina because her boyfriend is not skinny and that Gill is a tall boy, while her boyfriend is not tall but a small man. PW1 stated that the lighting condition where she laid was not that bright but dim, and the only light was coming from the porch via a small globe light which was not that bright and it shone into where she was lying down. PW1 stated that it was not long when she was observing Gill, and he was really close to her that he can kiss her with no obstruction to her view. PW1 stated that when she saw Gill, she tried to stand up to look for her clothes and panty to wear. PW1 stated that after wearing her clothes and panty then she ran towards Sevina's room so that she can tell her of what her husband Gill had done to her. PW1 stated that when she went to Sevina's room, Sevina was not inside the room, then she saw Gill walking around inside the house. PW1 stated that she then ran towards the front door on the porch, she tried to open the door which couldn't open then she ran towards the second door and opened it and jumped outside and ran towards her grandmother's place at Rokara Settlement. PW1 stated that upon reaching her grandmother's place, they were all there and she then woke her grandmother and told her of what had happened to her. PW1 stated that when telling her grandmother of what had happened to her, she was crying and then she called the police at the Valelevu Police Station. PW1 stated that the police from Valelevu Police Station then came, and she told the police of what had happened to her. PW1 stated that soon after she had informed the police of what had happened to her, Gill and his wife then entered, and the police asked Gill but he was just bowing his head down and then Sevina told the police that she was inside the room when the incident happened. PW1 stated that thereafter Gill boarded the police vehicle and taken to the Valelevu Police Station. PW1 stated that Gill and her do not talk to each other much, and sees him often as they stay together in the same house. PW1 stated that the sexual intercourse between Gill and her was not consensual because she was sleeping and did not know how he entered inside the house. PW1 stated that the incident happened between 2am to 3am in the morning. PW1 stated that

she lodged the rape complaint with the police on the same day it happened but could not recall the month. PW1 stated that the police told them not to contact each other and for her to stay at her grandmother's place. With the Court's leave for Dock ID, PW1 was able to positively identify Osintai Gill Fokilau sitting in the accused box.

10. In cross-examination PW1 stated that she stayed with a number of people at her uncle's place at Rokara Delaivalelevu between October and November. PW1 stated that Sevina was drinking with a number of people including some men, and that Gill was not part of that drinking party. PW1 stated that the drinking session started when it was still day light. PW1 stated that when she went to sleep, Gill was still not at home. PW1 stated that she fell into a deep sleep and though the lights were off, it was not too dark where she was sleeping. PW1 stated that the person got the pillow and covered her mouth and face. PW1 stated that her boyfriend is a smaller man. PW1 stated that she did not meet Gill and his wife on the road while she ran to her grandmother's house. PW1 stated that she was in shock and when she reached her grandmother's place then she began crying. PW1 maintained that she did not see anyone including Gill and his wife when she was running towards her grandmother's house whilst in a state of shock.

11. In re-examination PW1 stated that the pillow covered her mouth and face, but could still see and knew Gill as he was closer to her while Gill was penetrating her vagina with his penis. PW1 stated that where she slept was not too dark and light was coming from the small light on the porch. PW1 stated that the porch is not that far from where she laid on the mattress just closer to the room door which is closer to the porch, a distance of about 5 to 7 meters being demonstrated by PW1 using the Court room. PW1 stated that the light was shining through the windows and into where she was lying down, and the door was closed. PW1 stated that when she awoke, she saw Gill and knew that it was him penetrating his penis into her vagina.

12. After PW1's testimony, the prosecution then closed its case, and defence counsel indicated that they will not be making a submission of no case to answer, and the Court then provided the following options to the defence of: (i) the accused remaining silent; (ii) the accused providing sworn testimony; or (iii) the defence call other witnesses other than the accused, to

which the defence opted for the accused to give sworn testimony and also call an alibi witness.

### **Defence case via DW1 Osintai Gill Fokilau**

13. **DW1 Osintai Gill Fokilau** in examination-in-chief testified that he is currently 36 years old and reside at Makoi, Tovata, Nasinu, and has been there for about a year since he got out of remand. DW1 stated that prior to that, he stayed for about 3 years at his father-in-law's place at Rokara in Khalsa Road. DW1 stated that in October and November 2021 he was staying at his father-in-law's place at Rokara in Khalsa Road with a total of thirteen (13) people. DW1 stated on that particular Sunday in 2021 he woke up in the morning then his wife asked him to go and get the extension cord which his aunt was using. DW1 stated that after getting the extension cord, he came back then saw his wife, Karolina and some of the people staying at the house drinking together at the garage. DW1 stated that this was slightly after 10am that morning, and he did not like the people that were drinking with his wife. DW1 stated that he then went to visit a friend who lives along Khalsa Road at Nukubuco Settlement, and was there and returned home about 2am in the morning having finished drinking grog. DW1 stated that when he got home, he woke his wife up and asked her what's for dinner. DW1 stated that his wife and him then went to the shop to look for food as dinner. DW1 stated that when they were close to the shop, his wife's son ran to them and told them that the police were looking for DW1 because Karolina was sobbing at the cement house of her grandmother. DW1 stated that before he reached home that morning, he met Karolina sobbing at the roadside, and asked her as to why she was sobbing but she did not answer and ignored him and kept on walking towards the cement house where her grandmother lives. DW1 stated that after meeting his step-son, they then proceeded to where the police were. DW1 stated that the police then questioned him and insisted that he accompany them to the police station. DW1 stated that he was not at home at anytime before 2am contrary to Karolina's testimony.

14. In cross-examination DW1 stated that he came back home situated at Rokara Settlement at about 2am in the morning. DW1 stated that when he returned home at 2am, he met Karolina on the road and she was not sleeping inside the house then. DW1 stated that he had not gone

to Karolina before waking his wife. DW1 stated that he did not put a pillow on Karolina's face, nor removed her clothes and panty and penetrated his penis into Karolina's vagina on the same night. DW1 stated that he did not penetrate his penis into Karolina's vagina, and neither did Karolina see him do that and then him later standing up and walking around the house. DW1 stated that he did not go and wake his wife who was in the other room after Karolina had gone to her grandmother's place.

15. DW1 was not re-examined by his counsel Ms. Grace.

16. After DW1's testimony, defence counsel Ms. Grace then informed the Court that the alibi witness does not wish to testify and therefore will not be calling that particular witness, to which the defence then closed its case.

17. Closing submission by both counsels was held on 27 September 2023, and this is the Court's judgment.

### **Analysis of the prosecution vis-à-vis defence evidence**

18. The primary issue to be determined in this case is whether DW1 Osintai Gill Fokilau raped PW1 Karolina Radini Qele between Sunday 31 October 2021 and Monday 1 November 2021 at Rokara Settlement, Delaivalelevu, Nasinu.

19. The physical and fault elements for the offence of *Rape* in this particular case are:

- i) The accused Osintai Gill Fokilau (DW1);
- ii) penetrated the Complainant Karolina Radini Qele's (PW1) vagina with his penis;
- iii) without the Complainant's (PW1) consent [ See ss.206(1) - (2) ]; and
- iv) the accused Osintai Gill Fokilau (DW1) did so intentionally and/or recklessly [ i.e. fault element or *mens rea* ]

20. The *Admitted facts* noted in paragraph 7 herein prove that the Complainant Karolina Radini Qele and the accused Osintai Gill Fokilau know each other including the fact that the accused

wife is the Complainant's cousin-sister, who all lived in the same house with a number of other people at Rokara Settlement, Delaivalelevu, Nasinu.

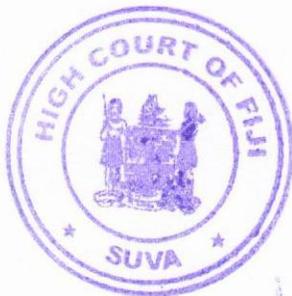
21. Given the *Admitted facts*, I now turn to carefully consider the entire evidence adduced at trial consisting mainly of the testimonies of PW1 - Karolina Radini Qele (Complainant) vis-a-vis DW1 - Osintai Gill Fokilau (accused).
22. According to PW1 - Karolina Radini Qele (Complainant), she was asleep when she felt someone lying on top of her and a penis penetrating her vagina, and upon waking she immediately saw the accused whom she referred to as Gill inserting his penis into her vagina. The Complainant knew the accused being the husband of her cousin-sister and living together in the same house at Rokara Settlement. Furthermore, PW1 stated that the penile penetration of her vagina by Gill the accused was not consensual. PW1 stated that she was shocked from what Gill had done to her, and then ran to inform her grandmother and later called the police at Valelevu Police Station to report being raped by the accused. PW1 positively identified the accused Osintai Gill Fokilau in Court via Dock ID.
23. DW1 – Osintai Gill Fokilau the accused totally denies the allegation of rape by the Complainant Karolina Radini Qele, having stated, in particular, that before he reached home that morning, he met the Complainant sobbing at the roadside, and asked her as to why she was sobbing but she did not answer and ignored him and kept on walking towards the cement house where her grandmother lives, and when he reached home, he woke his wife and then they both left for the shop to look for food. At no time did he approach and rape the Complainant. Furthermore, the defence decided not to call the alibi witness.
24. Having carefully considered the entire evidence adduced by the prosecution and defence including counsels closing submission, I find as follows:
  - a) The Complainant PW1 - Karolina Radini Qele not recalling the month of the alleged rape does not in any manner negatively impact upon her testimony, and her testimony remained consistent while being calm and composed during the trial.

- b) PW1 is a credible and reliable witness, and I attach immense weight to her testimony, and reject the testimony of DW1 – Osintai Gill Fokilau as being unreliable, unbelievable and therefore of lesser weight, to the effect that the testimony of PW1 proves *beyond reasonable doubt* that the accused Osintai Gill Fokilau penetrated PW1’s vagina with his penis without PW1’s consent, and the accused did so intentionally and recklessly.
- c) The evidence of identification is well founded and safe in light of the Turnbull guidelines proving *beyond reasonable doubt* the identity of the accused Osintai Gill Fokilau in relation to the allegation of rape.

25. For the reasons stated above, I therefore find that the prosecution has proved *beyond reasonable doubt* all elements of the offence of *Rape* contrary to section 207(1) & 2(a) of the Crimes Act 2009 in the Information by the Director of Public Prosecutions filed on 18 October 2022 against the accused Osintai Gill Fokilau.

26. On such basis I find the accused Osintai Gill Fokilau **guilty** of the offence of *Rape* and **convict** him accordingly.

27. Thirty (30) days to appeal to the Fiji Court of Appeal.



.....  
**Hon. Mr. Justice Pita Bulamainavalu**  
**PUISNE JUDGE**

**At Suva**

14<sup>th</sup> February 2025

**Solicitors**

Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused