

IN THE HIGH COURT OF FIJI AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 250 of 2023

The State vs Emoni Davui

For the State: Ms. P. Ram

For the Accused: Mr. S. Ravu

Date of Trial: 11th to 12th November 2024

Date of Judgment: 13th March 2025

JUDGMENT

1. The Accused Emoni Davui is charged on the following Information: filed on the 15th of September 2023 -

Statement of Offence

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

Particulars of Offence

EMONI DAVUI on the 24th of May 2023, at Nacokaika, Naitasiri, in the Eastern Division penetrated the vagina of **MELIKA MALAKE**, with his penis without her consent

2. The Accused was first produced in the Nausori Magistrate's Court on the 24th of July 2023 and the case was then transferred to the High Court and he was arraigned on the 7th of August 2023.
3. The Accused pleaded Not Guilty to the Information on the 29th day of September 2022.

4. The matter was adjourned for pretrial conference and the parties also filed the following Agreed Facts: -

- (a) The accused in this matter is Emoni Davui [herein referred to as Mr. Davui] 38 years of age, farmer of Natoaika village, Baulevu.
- (b) The complainant in this matter is Melika Malake [hereinafter referred to as the complainant] 15 years old, student of Naganivatu, Naitasiri. She was born on 16 January 2008.
- (c) That Mr. Davui and the complainant are related. Mr. Davui is the complainant's granduncle.
- (d) That Merelita Rokosenimarama (herein referred to as Ms. Rokosenimarama) 20 years of age, Domestic Duties of Naganivatu, Naitasiri. Ms. Rokosenimarama is the complainant's friend. Mr. Davui is related to Ms. Rokosenimarama as her tavale.
- (e) That Leveni Rokosuva [herein referred to as Mr. Rokosuva] 20 years old, farmer of Deladamanu, Naitasiri. Mr. Davui and Mr. Rokosuva are related as cousins.

The Incident

- (f) Mr. Davui drives a black Toyota Fielder registration number KP 219. They were drinking beer inside the vehicle.
- (g) Mr. Davui then drove his vehicle towards an isolated road in Nacokaika Road. There, Mr. Rokosuva and Ms. Rokosenimarama swapped their seats. Mr. Rokosuva was now seated beside the complainant and asked her to drink beer.
- (h) Mr. Davui then drove to another store in Koroqaqa, to buy more beer. After purchasing the same, he then drove back to Nacokaika Road to drink alcohol.
- (i) Mr. Davui then drove to a road beside the Naitasiri Mandir. They exited the vehicle.
- (j) Mr. Davui and the complainant went to the back of the vehicle and they laid down on a piece of cardboard. Mr. Davui penetrated the vagina of the complainant with his penis.

- (k) Mr. Davui then returned to the vehicle
5. The parties also filed the Pre-trial Checklist, and the matter was fixed for Trial on the 24th of July 2023.

Admitted Facts

6. The parties have filed Agreed Facts pursuant to section 135 of the Criminal Procedure Act 2009. The relevant section provides as follows: -

“Admission of facts

135.-(1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and–

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial”

7. This means that the State does not have to prove the following elements of the offence at the trial of this matter:
- (a) That Emoni Davui and no other person, on the 24th of May 2023
 - (b) at Nacokaika village, Naitasiri
 - (c) Had sexual intercourse with the Complainant Melika Malake
8. The only litigation issue that is left to be established at the Trial is that the sexual intercourse was without the consent of Melika Malake and Emoni Davui was aware that she was not consenting to the sexual intercourse.

The evidence for the State

9. The State called the following witnesses: -
 - a) PW1 – Melika Malake – the complainant
 - b) PW2 – Merelita Rokosenimarama
 - c) PW3 – PC 5905 Samuela
10. In her evidence, PW1 Melika Malake confirmed that on the 24th of May, in the evening she was sitting at the village bus stop waiting for her aunt who was coming on the last bus. She was sitting there with PW2 Merelita Rokosenimarama when the Accused and Mr. Rokosuva came to the roundabout in the Accused's car, and they were drinking beer inside the car. She knew the Accused as her grand uncle, and she referred to him as her taitai.
11. The Accused invited the two girls to come and have beers with them. PW2 Rokosenimarama convinced the complainant to agree and they both entered the vehicle. The Accused then drove off to Nacokaika road where they started to drink. They then went to another store in Koroqaqa to buy some more drinks and they returned to Nacokaika road to continue drinking.
12. The Accused later received a call to pick up a passenger, the two girls sat at the back with the passenger while the Accused and Leveni Rokosuka sat in the front. After dropping off the passenger the Accused then drove to a road beside the Naitasiri Mandir.
13. The Accused approached the complainant and asked her to have sex with him and he was very persistent. She made it clear to him that she was not interested, that he was her relative and a married man with children, and he was old, and she was disgusted by his advances. In the course of this exchange he said he didn't care that they were related and she either submit or walk home.
14. The Accused then left the vehicle and went around to the back of the vehicle. The complainant was then pushed out of the vehicle towards the back.

15. The complainant testified that the Accused told her to take off her clothes and she refused, she told him that they were related, and she was still a virgin. He refused to listen, and he opened the boot and took out a piece of cardboard and spread it near the back of the vehicle.
16. The Accused then took her to the back of the vehicle, pushed her down onto the cardboard. He forcefully removed her shorts and panties whilst he was kneeling next to her and he penetrated her vagina with his penis. She was scared and helpless and she screamed out her mother's name saying, "I Na!" She did not like what was happening, and she did not consent to what was happening to her.
17. The Accused was then interrupted, and it caused him to rush as the complainant was shouting. He stopped and told Melika to get back in the vehicle and he then dropped the two girls back in the village at Nacokaika.
18. She maintained her evidence in cross examination.
19. Her testimony was corroborated by PW2 and in her testimony she also confirmed that she was also coerced by the Accused to have sex with him, and she submitted to him because he threatened to leave them there to walk back home if she did not consent to have sex.
20. The matter was then reported to the Police after rumours started circulating in the village about the Accused and the complainant.
21. The third witness was the investigating officer, and he also recorded the Accused's statement under caution.
22. That was the evidence for the State. State counsel later also filed written submissions to supplement the evidence.

The evidence for the Accused

23. The Accused gave evidence on his own behalf.

24. He testified that on the day in question he had come with Leveni to Nacokaika to collect their wages and they had been drinking alcohol. They arrived at the village in the evening, and they saw the two girls at the bus stop and so they invited them to join them and cruise around.
25. He confirmed that they finished their drinks, and he drove to the store in Koroqaqa to buy some more drinks. From there they went to the road near the Mandir as it was isolated, and they could drink without getting disturbed.
26. He also confirmed receiving a call to pick up a passenger and they all went together picked her and then dropped her off at her destination. They then returned to the Mandir and continued drinking. By this time the complainant had moved to the front seat and she was touching him and making it clear that she was interested in him.
27. He then asked her to have sex and initially she told him that it was disgusting, and they were related however she followed him outside and he spread the cardboard on the ground. She then took off her clothes, and he took off his clothes, and they had sex. He maintained that she consented, and he did not force her or threaten her in any way.
28. He maintained his evidence under cross examination and maintained that the sexual intercourse was consensual and at no time did he force or coerce her. Under cross examination he confirmed that he said they could walk home if he did not get his way.
29. That was the evidence for the Accused.
30. Counsel for the Accused later filed written submissions and reiterated that the sexual intercourse between the Accused and the complainant was consensual.

Analysis

31. The Accused is charged with the offence of Rape contrary to section 207 of the Crimes Act 2009, which provides: -

“The offence of rape

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

Penalty– Imprisonment for life.

(2) A person rapes another person if-

1. (a) the person has carnal knowledge with or of the other person without the other person’s consent; or
2. (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or
3. (c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

(3) For this section, a child under the age of 13 years is incapable of giving consent.”

33. The State alleges that on the date and time in question, the Accused Emoni Davui had sexual intercourse with Melika Malake without her consent. At the time Emoni Davui knew that Melika Malake was not consenting to the sexual intercourse, or he was reckless as to whether or not she was consenting to the act of sexual intercourse.
34. The burden is on the State to prove the offence in the Information beyond a reasonable doubt. The Accused elected to give evidence although he does not have to prove or disprove anything.

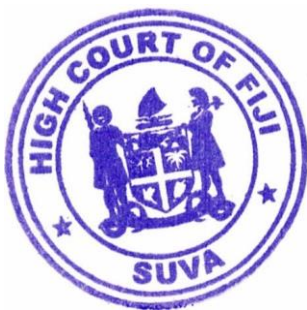
35. Sexual intercourse between Emoni Davui and Melika Malake is an agreed fact therefore the only litigation issue is whether Melika Malake consented to the sexual intercourse or not.
36. Under cross examination, Emoni Davui confirmed that he had approached the complainant to have sex and she was disgusted and refused. He also confirmed that later she agreed.
37. Consent is defined in law at section 206 (1), (2) of the Crimes Act 2009 as follows:-
- “(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.”
38. The agreed facts have established that Emoni Davui had sexual intercourse with the complainant at an isolated spot near the Naitasiri Mandir.
41. The State had the burden of establishing beyond a reasonable doubt that at the time that the Accused had sexual intercourse with Melika Malake she did not consent and, at the time Emoni Davui either knew she was not consenting, or he was reckless as to whether she was consenting or not.

42. The evidence establishes that Emoni Davui parked near the Naitasiri Mandir, at an isolated spot, he had asked for sex with both the complainant and PW2 and he had sexual intercourse with both of them. It also came out in the evidence that he had threatened PW 1 that if she did not consent, they would be left there to walk back to the village. The two girls had also been drinking alcohol and for PW1, the Accused was in a position of authority over her as an elder relative,
43. That being the case, I find that the consent was obtained through threat and intimidation (section 206 (2) (b)) and through exercise of authority (section 206 (2) (d)). Accordingly, I find that the consent was not freely and voluntarily given.
44. The State has therefore discharged its burden and established the charge of Rape beyond a reasonable doubt.

This is the Court's judgment in this matter: -

1. Emoni Davui for the offence of Rape – you are convicted as charged.
2. The Court will hear from you in mitigation.

30 days to appeal



Mr. Justice U. Ratuviili
Puisne Judge

- cc:
1. Office of the Director of Public Prosecutions
 2. Legal Aid Commission

