

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 218 of 2023

STATE

vs.

ATUNAIISA VEITATA CAWAKI

Counsel: Mr. J. Singh for the State
Mr. W. Navuni with Ms. P. Kete for Accused

Dates of Hearing: 02nd and 03rd December 2024

Date of Closing Submission: 11th December 2024

Date of Judgment: 21st February 2025

JUDGMENT

1. The Acting Director of Public Prosecution filed this Information, charging the accused, Mr. Atunaisa Veitata Cawaki, with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act. The particulars of the offence are:

COUNT 1

Statement of Offence

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

Particulars of Offence

ATUNAIISA VEITATA CAWAKI on 21st day of June 2023 at Deuba Village, Navua in the Central Division, penetrated the vagina of **TANYA WITHERBY FILOMENA LAL** with his finger, without her consent.

2. Following the not-guilty plea entered by the Accused, the matter proceeded to a hearing. The hearing commenced on 2nd December 2024 and concluded on 3rd December 2024. The Prosecution presented evidence from five witnesses, including the Complainant. The Accused provided evidence for the Defence. Subsequently, the Learned Counsel for both the Prosecution and the Defence made their respective closing submissions. Additionally, both Counsel also filed written submissions. Considering the evidence presented during the hearing, as well as the oral and written submissions, I shall now pronounce the judgment.
3. I first draw my attention to the burden and standard of proof. The Accused is presumed innocent until proven guilty. The burden of proof for the charge against the Accused rests with the Prosecution, as the Accused is presumed innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Main Elements of the Offences

4. The main elements of Rape are:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his finger,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his finger,
 - iv) The Accused knew or believed or recklessly that the Complainant was not consenting for him to insert his finger in that manner.

5. The first element is the identity of the Accused. It is the responsibility of the Prosecution to prove beyond a reasonable doubt that the Accused committed this offence against the Complainant. There is no dispute regarding the accuracy of the identification. The Accused and the Complainant are acquainted with each other. The Accused has not raised the issue that the Complainant was mistaken in identifying the alleged perpetrator, the dispute centres on whether this alleged incident involving the Accused occurred.
6. Evidence of even the slightest penetration of the Complainant's vagina by the Accused's finger is sufficient to establish the element of penetration.
7. Consent is a state of mind that can take many forms, ranging from willing enthusiasm to reluctant agreement. With regard to the offence of Rape, the Complainant consents if she has the freedom and capacity to make a choice and to express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, the use of force, or intimidation cannot be regarded as consent expressed freely and voluntarily. A submission without physical resistance from the Complainant to the actions of another person shall not, by itself, constitute consent.
8. The Complainant must possess the freedom to make a choice without being pressured or forced. Furthermore, she must have the mental and physical capacity to choose freely. Consent can be withdrawn at any time; it is an ongoing state of mind and not irrevocable once granted. It should not be an optional choice, and a person's consent should not be assumed.
9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his finger and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

Admitted Facts

10. The Prosecution and the Defence tendered the following Admitted Facts under Section 135 of the Criminal Procedure Act, they are:

1. *Atunaisa Cawaki (hereinafter referred to as the Accused) was born on the 6th of February 1985.*
2. *Tanya Witherby Filomena Lal (hereinafter referred to as the complainant) was born on the 23rd of April 2010 and a copy of her Birth Certificate is tendered by consent as a Prosecution Exhibit. (See TAB 17 of disclosures).*
3. *The Accused and the complainant are known to each other and are related to one another as cousins.*
4. *They live in the same village in Deuba and their houses are closely situated.*
5. *The complainant's house is built on stilts and the floor is elevated off the ground.*
6. *Rosalia Tukana is the complainant's mother and she along with her three children live with her mother Litia Tuvakawa at Deuba in Pacific Harbour.*
7. *The Accused on the 21st of June 2023 purchased 7 bottles of Fiji Bitter Beer from the Indigo Shop.*
8. *He then consumed the same along with 9 other boys from Vakabalea.*
9. *Before the alcohol finished, the Accused left the drinking group and returned to his home in Deuba village at around 3.30pm.*
10. *At around 9pm on the 21st of June 2023 the complainant's grandmother Litia Tuvakawa had a confrontation with the Accused who was at home with his wife Vasemaca Bula.*
11. *The Accused was arrested on the 27th of June 2023 by PC 6496 Torosi and taken to the Navua Police Station.*
12. *On the 27th of June 2023 the Accused was interviewed under caution by WPC 5506 Saivoro at the Navua Police Station and the same interview was witnessed by DC 5467 Timoci.*
13. *The Accused was formally charged on the 29th of June 2023 by WDC Silvia Esava.*

14. *DC 5246 Romulo took photographs of the alleged scene of crime and compiled the said photographs into a photographic booklet.*
15. *PC 7685 Inosi Salababa on the 4th of August 2023 drew a rough sketch of the alleged layout of the scene.*

The Prosecution's case

11. The Prosecution claims that the Accused entered the crawl space of the Complainant's grandmother's house while the Complainant was inside, searching for her pen. The Accused then touched the Complainant's vaginal area, inserting his hand through her shorts and underwear. The Complainant stated that the Accused was seated while he assaulted her. The Complainant claimed that the Accused threatened her, demanding her not to tell anyone about this incident. The Complainant's younger sister, who was playing with other children on the opposite side of the house, entered while searching for the ball in the crawl space and observed the Accused touching her elder sister's vaginal area. The younger sister reported this incident to their mother when she returned home from work in the evening. The matter was subsequently reported to the Police.
12. The Accused vehemently denied the allegation, asserting that he neither touched nor penetrated the Complainant's vagina, as claimed. He contends that the Complainant's family fabricated this false allegation due to a rivalry between the two families. The Accused acknowledges his presence at the scene of the incident at the relevant time but maintains that his involvement was limited to checking on the dog that had consumed his food. He squatted down to see whether the dog had entered the crawl space. At that moment, he noticed the Complainant inside the crawl space while her sister played outside the house.

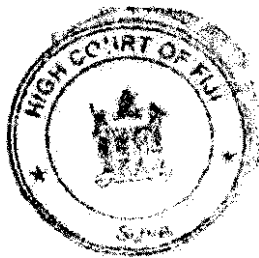
Evaluation of Evidence

13. I shall first embark on the evaluation of the evidence presented before the Court to determine whether the Prosecution has proven beyond reasonable doubt that the Accused penetrated the vagina of the Complainant with his fingers without her consent.

14. The Court needs to consider two aspects in deciding the testimonial trustworthiness of the evidence: the credibility of the witness evidence and the reliability of the evidence. Credibility is linked to the correctness or the veracity of the evidence, while reliability is related to the accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (**vide; Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**
15. I initially focus on assessing whether the account of the event provided by the Complainant and her younger sister, which states that the Accused was seated under the crawl space when he touched the Complainant's vaginal area, is probable or possible. Probability and possibility are key components in evaluating evidence in criminal matters. Probability denotes the likelihood of an event occurring, while possibility refers to whether an event could have happened, even though it is considered unlikely. In criminal law, the standard of proof, as outlined previously, is proof beyond a reasonable doubt. Therefore, in this matter, the Prosecution must establish beyond reasonable doubt that the Accused penetrated the Complainant's vagina while he was seated under the crawl space, rather than merely presenting a probability.
16. The Prosecution presented photographs of the house, including its crawl space, as evidence. In their testimonies, the Complainant and the Investigating Officer demonstrated, using the side of the witness box, that the height of the crawl space is approximately 50 cm to 75 cm. Regrettably, the Prosecution provided no evidence to establish the actual height of the crawl space, thus failing to establish that it would be probable for a tall person like the Accused to be seated inside it.
17. The Complainant and her younger sister explicitly stated that the Accused was seated when he touched the Complainant's vaginal area by reaching his hand through her shorts. It was most unfortunate to observe that the Learned Counsel for the Prosecution made no effort to

further explore the matter, directing the two young witnesses to elaborate on what they meant by sitting under the crawl space. The Prosecution had numerous options, such as the use of dolls or diagrams, to provide the young witnesses with a suitable environment in which to explain their version of events clearly and accurately.

18. Given the photographs of the house and the estimated height within the crawl space, it is logically untenable to argue that a tall person like the accused could enter and be seated in the crawl space, as depicted in the photographs, and manoeuvre his body so as to penetrate the vagina of the Complainant, who was also seated and wearing a short garment and undergarment.
19. Considering the foregoing reasons outlined, it is my view that the Prosecution failed to prove beyond reasonable doubt that the Accused penetrated the vagina of the Complainant with his finger without her consent, as charged in the Information. Consequently, I find the Accused not guilty of the offence of Rape, as charged in the information, and acquit him of the same.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe".

.....
Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

21st February 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.