

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 093 OF 2023

STATE

v

AKUILA VOSATAKI KACANAVESIKULA

Counsel: Mr J. Nasa for the State
Ms L. Volau with Ms S. Nand for Defence

Dates of Hearing: 18 – 21 February 2025

Date of Judgment: 24 February 2025

JUDGMENT

(Rape-related complaint-totality of circumstantial test- *'bulubulu'*)

1. The Accused is charged with a representative count of Rape. The alleged rape incidents had occurred in 2002 when the Penal Code, Cap 17 was in force. Therefore, the charge is laid under Sections 149 and 150 of the Penal Code. The information filed by the Director of Public Prosecutions is as follows:

Statement of Offence

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap 17

Particulars of Offence

AKUILA VOSATAKI KACANAVESIKULA between the 1st day of January 2002 and 31st December 2002, at Nadi in the Western Division, had carnal knowledge of EMELE TAIVEI KACANAVESIKULA, without her consent.

2. The Accused pleaded not guilty to the charge. At the ensuing trial, the Prosecution closed its case after presenting the Complainant's evidence. At the close of the Prosecution case, the Accused was put to his defence. Only the Accused presented evidence for the Defence. The counsel from each side tendered written closing submissions.
3. Having considered the evidence presented at the trial and the counsel's submissions, I now pronounce my judgment as follows.
4. The Prosecution bears the burden of proving all the elements of the offence. That burden must be discharged beyond a reasonable doubt. The burden never shifts to the Accused at any stage of the trial. The presumption of innocence in favour of the Accused will prevail until the charge is proved beyond reasonable doubt.
5. Section 149 of the Penal Code defines Rape as follows: *Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.*
6. The Complainant, at the time of the offence, was 12 years old. Under the Crimes Act 2009, which is currently in force, the law deems that a child under the age of 13 cannot consent to sexual intercourse. Therefore, the prosecution does not have to prove a lack of consent on the part of the complainant to secure a conviction in a rape case involving a child under the age of 13. However, the Accused is charged under the Penal Code, Cap 17 (now repealed)

because the alleged rape incidents had occurred in 2002 when the Penal Code was in force. Therefore, the Prosecution must prove that the sexual intercourse took place without the Complainant's consent or with her consent obtained by force, threats or intimidation of any kind, or by fear of bodily harm, or false representations as to the nature of the act.

7. Accordingly, the Prosecution, in this case, must prove that the Accused (Akuila Vosataki Kacanavesikula) penetrated the vagina of the Complainant (Emele Taivei Kacanavesikula) without her consent or with her consent obtained by force, threats or intimidation and that the Accused knew or believed that the Complainant was not consenting or that he was reckless as to whether the Complainant was consenting or not.
8. I shall now summarise the salient parts of the evidence led in this trial.

The Case for Prosecution

PW1- Emele Taivei Kacanavesikula (Emele) The Complainant

9. Emele is 34 years old now. She was born on 24 April 1990. She testified that she currently lives in Varoko, Ba, with her *defacto* partner and four kids. She has five sisters and two brothers.
10. In 2002, she was 12 years old- Class 7 student at Nawaka District School. She was living in Nawaka in Nadi with her father, Akuila Kacanavesikula (Akuila) and her three younger siblings. The three siblings were still schooling. Her mother and father were divorced. Her father won the court case from which her father took custody of all the children.
11. In 2002, while living with her father and siblings in Nawaka, she came home after an inter-house athletics meet. She went straight upstairs to her room to sleep. During the night, her father came to her room and woke her up. He told her to come down to his room to show her

something. She followed him downstairs to his room where he showed her a lamp that he had bought recently.

12. He told her to sit on his bed and started taking off her pants. She was still wearing her athletics school uniform. She kept asking him, 'Why?' he kept saying, 'It's okay.' He removed her pants and underwear. He then covered her mouth with his hand and inserted his penis into her vagina. She turned her head from left to right to resist. When his hand freed her mouth, she said, 'Don't!' After he had humped her many times (inserting his penis in and out), he stopped. She pulled up her pants and ran to the porch. She did not give consent to her father to engage in that conduct.
13. He then followed her to the porch and threatened her. She told him that she would tell her mother He told her not to. He warned her that if she did tell anybody about what had happened, something would happen to him. He told her that if something happened to him, no one was there to look after her younger siblings and to finance their education; it would embarrass her family, and nobody would want to marry her. She was terrified. The following day, she did not go to school because she was scared. She did not tell her siblings or anyone else because she was scared. *After all, he is my father, I knew he had power over me*, she said.
14. After this incident, she would not go to school very often; rather, she stayed with her friends because she was scared to be around him. He had been doing the same thing to her more often. Whenever she needed money for sanitary pads and school projects, he would tell her to do something together so that he could give her some money.
15. Her room was upstairs, and his room was downstairs. He made an opening on the wooden floor so that he could have direct access from his room to hers. He would lift himself from his room and enter her room. He would tell her to lie on her bed, lick her and have sexual intercourse with her on more than five occasions. She would tell him to stop, but he would not stop. He would tell her it was okay and to keep it between them.

16. When she was in Form 4, she would stay with her friends, but she never shared any of the things because she was embarrassed. She knew it would embarrass her family too. She was also thinking of her younger siblings.
17. When she dropped out of school in Form 5, she stayed at a Church Missionary Camp to which her father had no access. At the camp, she met one Vero Qoro (Qoro) who would notice her crying every time she was having prayers. He would come and ask her what was wrong. He was the first person to have been told about everything that had happened to her. Vero agreed to marry her so that he could take her away from her father's grip. When she turned 15, Vero came to her house to traditionally ask for her hand in marriage from her father. Her father agreed and legally signed for her to get married because she was still underage. She got married to Vero the same year.
18. During her marriage to Qoro, they would often have arguments. During arguments, Qoro would bring out her past and swear the words *go and fuck your father, you know the good thing about fucking your father*. It was painful for her, and it led to the point where she almost took her own life. After all, she left her husband and stayed with one of her uncles in Suva.
19. She almost committed suicide again when she learnt from her sister Letila about the fights between her siblings and her father where the siblings would bring up what the father had done to her. They often scream it out loud to make her father quiet. Everyone in her family learned about what her father had done to her. Still, she did not complain to the police. Whenever she wanted to tell somebody, Qoro urged her to forgive her father, for God's sake. Her older siblings would tell her not to tell anybody because it would embarrass her family.
20. She eventually lodged a report with the police in June 2023. She described the circumstances under which the report was made to police. When her younger sibling Paulini, her husband and some of their friends were drinking at home, Paulini started screaming out at her father

that he had raped Emele so loud that even the neighbourhood could hear. She then asked her father to accompany her to the police station and report the matter. Her father said— *You care about the law more than you care about me, then go and get the police.* Then she went and reported the matter to the police.

21. Under cross-examination, Emele agreed that there were nearby houses where iTaukei people lived. She agreed that her father had had sexual intercourse with her more than four times. She did not like it. She had to do everything he had told her to do. She denied that when her father caressed her body, she got sexually aroused. He used only one hand to take off her pants. Her mouth was blocked only on the first occasion. She did not scream for help on other occasions because he had already threatened her.
22. On the first occasion, the door was not locked but was closed. She did not run out of the room because he had authority over her. He had threatened her in the room and threatened her again when he followed her to the porch. She didn't go to school the next day because she was scared and feeling pain between her thighs and abdomen.
23. Back in 2002, she was 12 and not aware that in an iTaukei setting, a father and a daughter having an affair or sexual intercourse secretly was forbidden. She agreed that if the story came out it would embarrass the family.
24. She agreed that despite being scared of her father, she would still go to her father's home in Nawaka. They had reconciled, and after the reconciliation, she had gone to Nawaka. She agreed that if Paulini had not screamed out to the community the fact that she and her father had sexual intercourse, she would not have reported the matter to the police in 2023. She reported it because she was coming to a stage where she had had enough. It kept repeating almost every year. She had enough of all the trauma and all her past being brought up from time to time. She wanted to put this ordeal to an end.

25. When she got married, Qoro told her to forgive her father. They all sat down together and went through a family reconciliation process where she had forgiven her father. That prevented her from reporting the matter to the police.

The Case for Defence

DW -1 Akuila Vosataki Kacanavesikula (The Accused)

26. Akuila has seven children. Back in 2002, he was living in Nawaka with his three children, Jimi, Emele, Letila and Paulini. He is an artist. He had a good relationship with his children and took care of them.
27. Emele was an obedient child. The day Emele returned from inter-house athletics, he overheard a conversation where Emele told her siblings Letila and Paulini that she ran very well in the inter-house meet and she wanted a sports bra to prevent her breast from rubbing on her top. When Letila and Paulini had gone upstairs he called Emele and told her that the sports bra would only be for people who had developed their breasts. She started to have tears in her eyes. He followed her to the veranda and consoled her. Then she told her that something was paining. She parted her legs, moved her panty to the side, and said that the pain was coming from her private part. Then he told her, "Hey, not here" because Letila was lying on the settee. Emele immediately stood up and went to his room. She turned on the light, removed her pants by herself and showed her private part to him. He touched the place where she said was paining but he could not find any lumps. When he was touching her vagina to feel for any lumps, she told him that she liked being touched and she felt good. He denied blocking her mouth and forcefully inserting his penis into her vagina without her consent on that night.
28. He agreed that he had sexual intercourse about four times with Emele on subsequent occasions with her consent. He cut out a hole in the floor just enough for her to come down to his room. On the 2nd night, she came down with clothes on and the 3rd time, she dropped

down from the opening naked. Whenever he had sexual intercourse with Emele, she would never say anything, but the occasion just moved by itself. She never resisted and said 'Don't'. It stopped when they decided to block that hole.

29. Akuila admitted that he had threatened Emele not to tell anyone about their sexual intercourse, stating that if she did, something would happen to him; no one was there to care for her siblings, and she would embarrass her family. Whenever he was performing sexual intercourse with Emele, she was just normal and showed no reluctance. She liked whatever was done, and she never complained. She just stayed silent. He didn't threaten her. He agreed that after the fondling on the first night, she may have felt afraid and awkward.
30. Under cross-examination, Akuila agreed that Emele was an obedient daughter and that he was a strict father to his children. If they disobeyed, he would give them corporal punishments to instil fear in them. He agreed to threaten Emele that if she did complain to anybody, she would be in trouble, and no one was there to look after her siblings. He knew what he was doing to Emele was wrong. He didn't threaten but just said slowly what he wanted to say.
31. Akuila agreed that he created a hole leading up to her room to play the 'sex game' secretly. He didn't lift himself through the hole. It was Emele who used to come down to have sex with him. He understood that having sexual intercourse with his daughter by itself was disgusting behaviour. He agreed that he held the power cards and continued to have sex with her daughter. He did not know whether she was consenting to sexual intercourse or not.
32. He did not disagree that the reason why her daughter was moving from house to house was because she was looking for the love and safety that was not provided to her at home. He did not deny having permitted Emele to marry when she was still 15 years old because that was a way of healing from the trauma that he had instilled in her at a young age. He agreed that Paulini, during the fights with him, would normally bring up the past about him having sex

with Emele. He kept quiet because it was the truth. He agreed that what Paulini told of him having raped Emele was the truth.

Evaluation/ Analysis

33. There is no dispute that the Accused, who is the biological father of the Complainant, had carnal knowledge of the Complainant on multiple occasions between January 1, 2002, and December 31, 2002. The dispute revolves around the lack of consent- specifically, whether the Complainant consented to sexual intercourse and whether the Accused was aware of her non-consent, or if he was reckless regarding her consent status.
34. Only the Complainant and the Accused presented evidence at this trial. It was a case of one word against the other. Who told the truth? The outcome hinges on who provided truthful testimony in Court. However, the overall burden of proof lies with the Prosecution, and that burden must be discharged beyond a reasonable doubt.
35. The Defence claims that the Complainant did not tell the truth when she stated she was raped. It argues that the Complainant's behavior was inconsistent with that of a rape victim, as she never reported the incident at the first available opportunity and made a late complaint to the police after more than twenty years, driven by a desire to protect her reputation and that of her newly established family. Additionally, it is suggested that the delayed reporting was due to her engagement in consensual sexual intercourse with her father.
36. The alleged incidents occurred in 2002 when the Complainant was 12 years old. She reported the matter to police in June 2023. The delay is substantial. However, a late complaint does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for the Court to determine whether, in the circumstances of this case, the complaint eventually made to the police was a true complaint.

37. The Court of Appeal in State v Serelevu¹ 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 Nadu*; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or afterthought 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.”

38. Therefore, the Court should look at whether the explanations given by the Complainant for the delay are justified in the circumstances of this case. In this analysis, the Court should be mindful of the undisputed fact that the Complainant was a child of 12, and her alleged rapist was her biological father under whose roof, care and custody she lived at the time of the offence.

39. A careful examination of the Complainant’s evidence reveals at least four explanations for the delay. The first explanation was that she was scared to complain against her father after being threatened. It was contended that soon after the first alleged rape, the Complainant had

¹ (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)

the opportunity to complain to her younger siblings, who were home at that time. She said the Accused blocked her mouth and threatened to prevent her from yelling. After the alleged rape he followed her to the porch and threatened her. When she told the Accused that she was going to complain to her mother, he warned her that if she did tell anybody about what had happened, something would happen to him, and no one was there to look after her younger siblings and finance their education; that it would embarrass her family, and that nobody would want to marry her. She said she was terrified, and she did not tell her siblings or anyone else because she was scared.

40. The Accused admits to having passed those words (except for *nobody would want to marry her*) but denies them being ‘threatening’. After the Accused won the custody case with her mother, the Complainant and her younger siblings were under the sole care and custody of the Accused. They had to depend on the Accused for everything, including sanitary towels and school expenses, as she said. She was made to believe that if something happened to her father, no one was there to look after her and her younger siblings.
41. The Complainant said, ‘*After all, he was my father, and I know he had power over me*’. She was naïve and helpless in that situation. She had to do everything he had told her to do. The Accused admits that the Complainant was obedient and that he would even use corporal punishments if his children disobeyed. Under these circumstances, from the Complainant’s perspective, I am satisfied that those words could pose a subtle threat, sufficient to discourage the Complainant from complaining against the Accused. This reason is justified.
42. The second reason that discouraged her from complaining was her concern for the reputation of herself and her family if the ‘story’ were disclosed to the community. When her siblings found out about what was done to her by her father, they told her not to tell anybody because it would embarrass her and create a bad image for the family. She was even told to lie if somebody outside the family knew about the issue.

43. Back in 2002, when she was 12, she was unaware that in an iTaukei setting, a father and daughter having a secret affair or sexual intercourse was forbidden. However, she acknowledged that if the story were to come to light, it would bring shame to her family.
44. It was argued that the Complainant could have shared her 'story' with her friends when she went to stay with them (when she was in Form 4). The Accused did not deny that her daughter was moving from house to house because she was looking for the love and safety not provided to her at home. Even though the Complainant was away from home, she was under the constant radar of the Accused, who would send the younger siblings to bring her back. However, what discouraged her most from sharing the story with her friends was that she knew it would embarrass her family. She was also thinking of her younger siblings. This reason is not unjustified.
45. The third thing that discouraged her from complaining to the police was her ex-husband, Vero Qoro (Qoro)'s request that her father be forgiven, for God's sake. Qoro was the first person to receive the complaint about what the Accused had done to her. That was in 2006 when she was in Form 5. Qoro was not in Court to confirm the truth of her claim and, therefore, is not admissible as recent complaint evidence. However, the significance of what she said in evidence is not completely lost if she could be believed as it sheds some light on the issue of late complaint and her distressed condition.
46. The circumstances surrounding her disclosure of the 'story' to Qoro were significant. At that time, she was staying at a Church Missionary Camp, which she believed her father could not access. Qoro approached her, noticing that she cried every time she participated in prayers. His inquiry about her distressed conduct eventually led her to reveal what she had kept a secret even from her siblings for over three years. Qoro agreed to marry the Complainant to free her from her father's grip. The Accused does not deny that he gave parental consent for Qoro to marry the Complainant when she was still 15, acknowledging that it was a way to heal her from the trauma he had instilled in her from a young age.

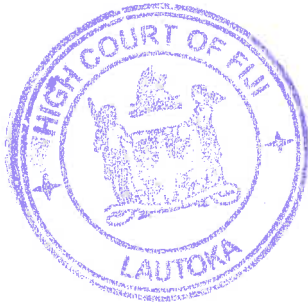
47. I accept that the Complainant acceded to the request of Qoro to follow the Word of God to forgive the Accused, which was one of the reasons why she didn't report the matter to the police.
48. The fourth factor that prevented her from reporting the matter to the police concerns the traditional Fijian dispute resolution mechanism called *bulubulu* where the parties reconcile themselves without resorting to judicial mechanisms. The Court is mindful that there is social pressure in our villages to accept an apology in the belief that reconciliation breaks the cycle of vengeance.
49. The Complainant agreed that despite being scared of her father, she would still go to her father's home in Nawaka. The family had sat together and pressured her to forgive her father, to which she agreed. The reconciliation process had facilitated her return home. I accept this reasoning as being sound.
50. The circumstances that finally led the Complainant to report the matter to the police should also be examined to know the truth or otherwise of the complaint. The marriage to Qoro no doubt relieved the Complainant from the grip of the Accused. It also put an end to one of her concerns that came as a warning from the Accused that she would not be able to marry because of the stigma attached to her having sexual intercourse with her father. However, she soon realised that the relief brought to her by the marriage was not long-lasting when Qoro used his knowledge about her bitter past to re-traumatize her. During arguments, Qoro would bring out her past and swear at her. The words were painful for her, and it led to the point where she almost took her own life.
51. The re-traumatisation continued when she returned home to Nawaka after the reconciliation process. Her siblings used her bitter past to silence the Accused whenever they fought. This was painful for her which led to her second attempt to commit suicide.

52. In June 2023, when her younger sibling Paulini was drinking with her husband and his friends, she (Paulini) shouted and brought the rape to the limelight. The news about rape infiltrated her community outside her family, rendering it no longer a secret. It tarnished her reputation and that of her family, which she had been trying to protect by keeping the secret within the family. She agreed that if Paulini had not screamed out to the community, she would not have reported the matter to the police in 2023.
53. The Complainant eventually decided to report the matter to the police because the affairs had come to a stage where she could not tolerate it anymore. It kept repeating almost every year. She had enough of all the trauma when her bitter past was brought up from time to time. She wanted to put this ordeal to an end. The fact that she made a complaint in that context to protect her reputation from being further ridiculed, in my opinion, does make her a liar. She has taken some time to reassure herself to vindicate her rights and tell the truth to the police. I do not see any motive on her part other than telling the truth when he decided to go to the police against her father.
54. I am satisfied that the late reporting in this case does not signify a false complaint. The reasons advanced for late reporting are reasonable and justified.
55. I observed the demeanour and deportment of the Complainant in Court. She was straightforward and not evasive. Her conduct in Court is consistent with that of an honest rape victim. She gave acceptable explanations for the delayed reporting, why she did not run away and cry rape immediately before the first incident. I accept that the Complainant told the truth in Court.
56. The evidence of the Accused is not appealing to me. He desperately attempted to save his skin. He did not explain why he had to warn the Complainant not to tell anybody about what had happened if he had engaged in consensual sexual intercourse. He denied having had sexual intercourse on the first occasion but agreed that the Complainant looked afraid and

awkward soon after the incident he described. I am sure the Complainant looked distressed because she was raped.

57. The Complainant was 12 years old at that time, and as she said, her breast was not developed to wear a bra. I am sure the Accused fabricated a story about her wanting a sports bra. He agreed to have touched her vagina to feel a lump. There is no evidence that she consented to that conduct. The Accused agreed that he held the power cards and continued to have sex with her daughter. He even made a hole in the wooden floor to continue the 'sex game' secretly. He agreed that he kept quiet when Paulini would normally bring up the past about him having raped Emele because it was the truth.
58. I am sure the Accused did not tell the truth in Court when he denied the allegation of rape. I reject the version of the Accused.
59. During the first incident, the Complainant turned her head to resist. When his hand freed her mouth, she said, 'Don't! Soon after the assault, she ran to the porch and told the Accused that she would complain to her mother. Her conduct is consistent with that of a rape victim. I am satisfied that the Accused had sexual intercourse without the Complainant's consent at the first incident. Free and informed consent is given if it is not obtained through by force, threat, intimidation or by exercise of authority. On subsequent occasions the Accused obtained the consent by force, threat and exercise of authority of fatherhood.
60. The Accused said that he did not know whether she was consenting to sexual intercourse or not. She kept on asking what was going on. He just said 'it's okay'. The risk he had taken was unreasonable when he proceeded to have sexual intercourse with the complainant, who was not mature enough to give consent to such an act. I am sure the Accused knew that the Complainant was not consenting to sexual intercourse.

61. All the elements of Rape under the Penal Code are satisfied. The Prosecution proved the charge beyond reasonable doubt. I find the Accused guilty of Rape as charged. The Accused is convicted accordingly.



Aruna Aluthge

Judge

24 February 2025

At Lautoka

Solicitors

Director of Public Prosecution for State

Legal Aid Commission for Defence