

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 048 OF 2021S

STATE

VS

TIMOCI NAIVALUWAQA

Counsels : **Ms. K. Semisi for State.**
Mr. N. Tuifagalele for Accused.

Hearings : **26, 27, 28 and 29 September, 2022.**

Judgment : **3 October, 2022.**

JUDGMENT

1. On 26 September 2022, in the presence of his counsel, the following information was read over and explained to the accused:

“Statement of Offence

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

Particulars of Offence

TIMOCI NAIVALUWAQA *between the 5th day of February, 2021 and the 6th day of February, 2021 at Suva in the Central Division, had carnal knowledge of **TIMALETI MAHARAJ**, without the consent of the said **TIMALETI MAHARAJ**.”*

2. He said, he understood the information, and he pleaded not guilty to the charge. So, the question that needed to be answered in this case, was as follows:
 - (i) Did the accused rape the complainant (PW1) between 5 and 6 February 2021, at Suva in the Central Division?
3. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, he must be found not guilty as charged and acquitted accordingly.
4. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) penetrated the complainant's vagina with his penis,
 - (iii) without her consent, and
 - (iv) he knew she was not consenting to 4 (ii) at the time.
5. The slightest penetration of the complainant's vagina by the accused's penis is sufficient to satisfy element 4 (ii) above. Whether or not he ejaculated, is irrelevant.
6. "Consent" is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.

7. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. The court will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
8. After the not guilty plea to the information was received on 26 September 2022, the prosecution, without opening her case, proceeded to call her main witness, the complainant (PW1). The complainant said, she was 29 years old. She said, she was born on 5 February 1993. She said, she was not married but had been living with her partner and family for the last 3 years. She said, she had a diploma in information technology and was employed as an IT Technician with the Ministry of Education.
9. The complainant said, she recalled 5 February 2021. She said, she was living with her parents at Howell Road, Suva. She said, her elder sister (DW1) was also living at the house with her husband, the accused, with their two young children. She said, the house had four bedrooms; one for her parents, one for her, one for her sister (DW1), her husband, the accused and their two children, and one bedroom was vacant. Please, refer to the sketch plan of the house, which was tendered in evidence as Prosecution Exhibit No. 2. The complainant said, she has known the accused since 2009, when he was a student at Indian College, now Jai Narayan College. She said, the accused and her elder sister were in the same form.
10. The complainant said, 5 February 2021 (Friday) was her birthday. She was turning 28 years old. She said, nothing big was planned for her birthday. She said, it was just an ordinary family get together. She said, she had cooked chicken curry. Her parents were at home, so was her elder sister (DW1), the accused and their two children. The complainant said, the accused brought a carton of Fiji beer. She said, from 7 pm to 8 pm, she started drinking beer with

the accused, her brother-in-law, he being married to her elder sister (DW1). She said, the two were drinking beer with a “taki style” glass. She said, her mother also joined them, but she had only two glasses of beer mixed with sprite.

11. The complainant said, her father left sometime after 7 or 8 pm to drink grog with his friends. The complainant said, her elder sister (DW1) was not drinking as she was pregnant. The complainant said her mother retired to her bedroom after 9 pm. She said, the accused and her continued to drink beer from 9 pm to 12 am the next day. She said, she and the accused were watching TV and listening to music on YouTube. They were also yarning. She said, her sister was also present, but she retired to her bedroom after 12 midnight, taking her two young children with her. The complainant said, after 12 midnight she was so drunk that she “blacked out”.

12. The complainant said, she was awoken from her “blacked out” condition, when she heard her elder sister (DW1) screaming in a loud voice. She said, when she came to, she noticed that the accused was on top of her, and she could feel him pulling his penis out of her vagina. She said, she was lying on a mattress face up, naked from the waist down. She said, at no point in time did she give the accused permission to insert his penis into her vagina. She appeared to say that because she was “blacked out”, and that she had not given the accused permission to insert his penis into her vagina, he well knew she was not consenting to sexual intercourse with him, at the material time. She said, the above alleged rape occurred in the family living room. She said, her mother (PW2) later came to the living room. She said, she told her mother that the accused had just raped her. She said, she later reported the matter to the Fiji Women’s Crisis Centre. The matter was later referred to the police. An investigation was carried out. The accused was later charged for raping her.

13. The next prosecution witness was the complainant's mother (PW2). She said, her knowledge of the alleged rape of her daughter (PW1) was based on what the complainant told her. She admitted, she did not actually see the alleged rape. However, she said she was more sympathetic to the complainant's version of events. The prosecution later closed their case. The defence submitted that there was no case to answer against the accused. He asked that the accused be found not guilty as charged, and to be acquitted accordingly. The prosecution submitted that, on the evidence so far laid before the court, there was a case to answer. The court agreed with the prosecution that given the evidence so far laid before the court, there was a case to answer. The standard options were given to the accused.
14. The accused chose to exercise his right to remain silent. Nothing negative whatsoever should be imputed to the accused for choosing to exercise his right to remain silent. This is because the burden to prove the accused's guilt beyond reasonable doubt stays with the prosecution throughout the trial. I repeat what was said in paragraph 3 hereof. The accused is entitled to sit there, fold his arms and demand that the prosecution prove his guilt beyond a reasonable doubt. By exercising his right to remain silent, he is merely exercising his constitutional right.
15. However, the defence called Ms. Rosemary Maharaj (DW1), as their only witness. She is the complainant's elder sister. She was present when the complainant and the accused were drinking liquor between 7 to 8 pm to 12 midnight. She said, she was not drinking beer at the time, because she was pregnant. She said, after 12 midnight, on 6 February 2021 (Saturday), she retired to her bedroom with her two young children. She said, she did not sleep but remained awake right to 1 am in the morning. She said, she later decided to go to the washroom. She said, she noticed it was quite. She said, while going to the washroom, she noticed the living room light was turned off. She said, she

heard a “thumping sound”. She said, she was in the toilet for 2 to 3 minutes. She said, when she came out of the toilet, she could still hear the thumping sound. She said, she later decided to check out the thumping sound. She said, she went into the family’s living room. She said, she could hear a man and woman moaning, as if they were enjoying something. She said, she saw two persons having sexual intercourse on a mattress in the living room. She said, it took her a while to realize that she was watching her husband, the accused, and her little sister, the complainant, having sexual intercourse in the living room. She said, she saw them kissing and moaning. She said, her husband was holding her little sister in the same way they used to make love. She said, she saw her sister lying on her back facing up, and her husband was holding one of her leg up beside him. She said, with one hand, he was holding the complainant’s head towards him. She said, with the kitchen light and porch lights on, she clearly observed what the accused and the complainant were doing.

16. Rosemary Maharaj said she was very angry. That was why she screamed loudly at the time. She said, she later went into the kitchen. When she returned to the living room, she said, she saw them still having sexual intercourse. She said, she again screamed at them loudly by showing her disapproval to what they were doing. She said, they then stopped. She said, the complainant then realized what was happening and she was ashamed. Rosemary said she repeatedly told the two off in the living room. She said, her mother arrived a while later. Rosemary said, that was the time the complainant told her mother that the accused raped her. The defence later closed their case. The parties then made their closing submissions.
17. The court had carefully listened to all the witnesses’ evidence and had carefully considered their demeanors, while they were giving evidence in court. The court had also carefully considered the parties’ closing submissions. The case showed

there were two versions of events on the rape allegation. As far as the complainant's version of events was concerned, she said the accused inserted his penis into her vagina, at the material time, without her consent. She was of the view that because she was "knocked out", at the material time, the accused well knew she was incapable of giving her consent to sexual intercourse, at the time. As far as the defence was concerned, the accused and the complainant were having consensual sexual intercourse, at the material time. This was evident by the moaning and the kissing the two were doing while in the act of sexual intercourse. Even when Rosemary told them off before going into the kitchen, the two were still having sexual intercourse when she came out of the kitchen. In my view, when looking at the evidence in its totality, there were numerous doubts in the prosecution's case. Rosemary Maharaj's evidence was more credible than the complainant's evidence. She was the only sober individual at the time, and her recollection was not affected by anything. The same cannot be said for the complainant, who "blacked out" after 12 am on 6 February 2021. In my view, the prosecution had failed to prove its case against the accused beyond a reasonable doubt. There are so many doubts in the prosecution's case. The benefit of that doubt, as a matter of law, must go to the accused.

18. As a result of the above, I find the accused not guilty as charged. I acquit him accordingly. You are free to go home.



Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused : **N. Tuifagalele, Barrister & Solicitor, Suva.**