

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 094 OF 2021S

STATE

VS

MARIKA SAVIRIO

Counsels : Ms. P. Ram for State.
Mr. W. Navuni for Accused.
Hearings : 3 and 4 October, 2022.
Judgment : 5 October, 2022.

JUDGMENT

1. On 3 October 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

MARIKA SAVIRIO *on the 21st day of March, 2021 at Nakadi Settlement, Navuso in the Eastern Division, had carnal knowledge of MARIA NORA, without her consent.”*

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) on 21 March 2021, at Nakadi Settlement, Navuso in the Eastern 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; or
 - (iii) penetrated the complainant's anus with his penis,
 - (iv) without her consent, and
 - (v) he knew she was not consenting to 4 (ii) or 4 (iii) at the time.
5. The slightest penetration of the complainant's vagina or anus, by the accused's penis, is sufficient to satisfy element 4 (ii) or 4 (iii) 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 3 October 2022, the prosecution, without opening her case, proceeded to call her main witness, the complainant (PW1). The complainant said, she had been married to the accused since 2012. She said, she was residing at Nakadi Settlement with her husband, and they had 6 children. There were three boys and three girls, aged 11, 9, 6, 4, 2 years old and the youngest one was 2 months old. She said, the family had stayed at Nakadi Settlement for 11 years.
9. She said, she could recall the 12 March 2021. She could not recall the 21st March 2021, the date of the alleged incident. She said, she was at home with the children. She said, the accused went to Nausori Town to do some shopping. She said, he returned home at 2 pm drunk. She said, he left the shopping at home and went away again. She said, the accused returned home again at 4 pm. She said, he was drunk. She said, the accused chased the children out of their house. She said, he later threatened her to take off her clothes. She said, she was frightened of him, and she did so.
10. She said, the accused then "climbed her" from the back. She said, the accused put his "soresore" (scrotum) into her anus. She said, her anus was painful. She said, he kept forcing his scrotum into her anus. She said, he later made her lie down on the floor. She said, the accused later inserted his "soresore" (scrotum) into her vagina. She said, he later turned her around again, and inserted his "soresore" (scrotum) into her anus. She said, she did not give the accused her consent for him to insert his "soresore" (scrotum) into her anus and/or vagina, at the material time. She said, the accused well knew she was not consenting to the above, at the material time. She said, the experience was painful and she cried. She said, she later became

unconscious. She said, the above episode occurred between 4 pm and 5 pm. She said, when she came to, she reported the matter to police. An investigation was carried out. She was medically examined at Nausori Health Centre on 22 March 2021 at 2.09 am, by Doctor Rachel Joselyn Prasad (PW2). The medical report of PW1 was tendered in evidence as Prosecution Exhibit No. 1. The defence did not cross-examine the complainant. There was no re-examination.

11. The prosecution next called Doctor Prasad (PW2) as their next witness. She medically examined the complainant on 22 March 2021 at 2.09 am and recorded her findings in a medical report (Prosecution Exhibit No. 1). The doctor noted a “non-bleeding” laceration at 12 o’clock near the anal opening approximately 0.5 to 1 cm. The doctor described the male genitalia. She said, the male genitalia consist of the penis and the scrotum anatomically. She said, the penis is shaped like a cylinder allowed to enter to produce sperm. She said, the scrotum is part of the male genitalia. She said, it is connected to the penis. She said, the penis is used to penetrate the vagina and/or anus. She said, the scrotum is not used to penetrate the vagina and/or anus. She said, the scrotum is a soft organ. She said, it was impossible for the scrotum to penetrate a vagina and/or anus and it was impossible for a scrotum to cause a laceration to the anus, as found on the complainant. The above was the doctor’s evidence. Again, the defence did not cross-examine Doctor Prasad. Neither was there any re-examination.
12. Before the prosecution closed her case, she verbally applied to amend the information. She submitted that she was applying to amend the information by charging the accused for “rape”, pursuant to section 207 (1) and (2) (b) of the Crimes Act 2009. She also applied to amend the particulars of offence, by deleting the previous one and replacing the same as follows; “Marika Savirio on the 21 day of March 2021 at Nakadi Settlement, Navuso in the Eastern Division, had penetrated the anus of Maria Nora, with his scrotum, without her

consent.” The defence objected to the proposed amendment. They said, it was prejudicial to the accused. The court overruled the defence’s objection on the ground that the prosecution always had the right to amend the information before they closed their case.

13. The amended information looked as follows:

“Statement of Offence

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

Particulars of Offence

MARIKA SAVIRIO on the 21st day of March, 2021 at Nakadi Settlement, Navuso in the Eastern Division, had penetrated the anus of **MARIA NORA**, with his scrotum, without her consent.”

14. The above information was then read and explained to the accused by the court. The accused said he understood the same, and pleaded not guilty to the same. The prosecution then closed her case. The defence made a submission that there was no case to answer against the accused on the ground that a scrotum was incapable of penetrating the complainant’s anus, at the material time. The prosecution submitted there a case to answer on the ground that the complainant had said that the accused’s scrotum penetrated her anus at the material time, without her consent. The court agreed with the prosecution and ruled accordingly. The standard options was put to the accused.
15. Through his counsel, the defence chose to remain silent and chose not to call any witness. The parties later made their closing submissions.
16. The court had carefully listened to and considered the evidence of the two prosecution’s witnesses, that is, the complainant (PW1) and Doctor Rachel Joselyn Prasad (PW2). The complainant, while being examined in chief, said

that, at the material time, the accused penetrated first, her anus, and second, her vagina with his “scrotum”, in the itaukei language, she mentioned the word “soresore”. She repeatedly said that her anus and vagina, were penetrated by the accused’s “soresore” (scrotum). She said, nothing else penetrated her, but the accused’s “soresore” (scrotum). The complainant is the mother of 6 children, three boys and three girls, aged between 11 years and 2 months old. So, logically it would appear that the act of sexual intercourse, and the terms of the male and female genitalia in the “i-taukei” language was nothing new to her, having brought six children to the world. In a rape trial, it is always important for adult complainants, let alone child complainants, to know exactly the terms of the female and male genitalia. Its functions must also be understood by the complainants, because they are the ones making the rape allegations against the accused. The act of sexual intercourse, either by the accused’s alleged penetration of the complainant’s vagina and/or anus via his penis, is the subject of inquiry in a rape trial and as a matter of law, the prosecution must prove the above beyond a reasonable doubt. Although the acts of sexual intercourse are taboo subject for discussion in normal human conversation, such a taboo subject are the central issue in a rape trial and must be ventilated in a courtroom, to determine whether or not the rape offence had been committed.

17. Because of the above, it was often mandatory for prosecutors and defence lawyers to let go of their natural inhibition to discuss the act of sexual intercourse, when examining-in-chief rape complainants, including their being cross-examined and re-examined. In this case, the prosecution failed to elicit from the complainant whether or not the accused’s penis penetrated her anus and/or vagina, at the material time. When the complainant said that the accused’s “soresore” (scrotum) penetrated her anus and/or her vagina, at the material time, it was mandatory for the prosecution, the burden of proof being on her, to take the complainant slowly through the alleged act of sexual intercourse and elicit from her, her knowledge of the “soresore” (scrotum) and

the “penis”, and what those body parts did in the alleged rape allegation. The prosecutor failed to do the above, and the end result was the complainant’s evidence that the accused’s “soresore” (scrotum), as opposed to his penis, penetrated her anus and/or vagina, at the material time. Had the prosecutor not amended the information before they closed their case, the accused would have been found not guilty as charged and acquitted at the no case to answer stage, simply because the first element of rape, as discussed in paragraphs 4 (ii) and/or 4 (iii), had not been made out by the prosecution.

18. The verbal amendment of the information before the prosecution closed their case, allowed the case to go on for a while. A prima facie case was found against the accused. He chose to remain silent and called no witness. The end result was there were only two witnesses, the complainant (PW1) and Doctor Prasad (PW2). Doctor Prasad said the “soresore” (scrotum) cannot penetrate the complainant’s anus and/or vagina, at the material time, as the same was a soft organ. The effect of Doctor Prasad’s evidence was to cast a doubt on the complainant’s evidence that the accused’s “soresore” (scrotum) penetrated her anus and/or vagina, at the material time. The only two prosecution’s witnesses on the issue of penetration were inconsistent with each other, thus leading to a reasonable doubt on the prosecution’s case. As a matter of law, if there was a reasonable doubt in the prosecution’s case, the benefit of that doubt, must go to the accused.

19. As a result of the above, I find the prosecution had not proven its case against the accused beyond a reasonable doubt, and I find the accused not guilty as charged. I acquit him accordingly.




Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Suva
Solicitor for Accused : Legal aid Commission, Suva.