

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 10 of 2021

STATE

vs.

PENI TANIELA

Counsel: Ms. U. Tamanikaiyaroi for the State
Accused In Person

Date of Hearing: 14th to 15th September 2022

Date of Closing Submission: 15th September 2022

Date of Judgment: 27th September 2022

JUDGMENT

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 21st January 2021:

COUNT ONE

Statement of Offence

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

Particulars of Offence

PENI TANIELA on the 04th day of December 2020 at Suva, in the Central Division penetrated the vagina of **KELERA MARAMANIVALU** with his fingers without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

PENI TANIELA on the 04th day of December 2020 at Suva, in the Central Division penetrated the anus of **KELERA MARAMANIVALU** with his fingers without her consent.

2. Upon reading of the charges, Mr. Peni Taniela understood and pleaded not guilty to the same. The prosecution led the evidence of 3 witnesses namely, the complainant Kelera Maramanivalu, PW2 Sergeant 4218 Taniela and PW3 WDC 3727 Kara and closed their case. At the end of the prosecution's case as there was no evidence in respect of count number 2 the defence was called for only in respect of the first count of digital rape. The accused was acquitted from count number 2. Upon the rights of the accused been explained the Accused opted to give evidence and that was the defence case. Considering the submissions the Prosecution and the written submission of the Accused this was set for Judgment. Accordingly, I will now endeavor to pronounce my judgment.

Element of the offence

3. For the Accused to be found guilty of the 1st count of Rape in the present case based on sub sections 1 and 2(b) of Section 207 that in addition to the date stated in the respective count the prosecution must prove beyond reasonable doubt, the following elements, that;
 - (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 reckless that the Complainant was not consenting for him to insert his finger in that manner. The slightest penetration of the complainant's vulva by the Accused's finger is sufficient to satisfy penetration.
4. If I may further elaborate under Section 207 (2) (a) of the Crimes Act 2009, the offence of Rape is defined as follows: *a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent.* In the context of this case, 'carnal knowledge' is defined as an act of penetration of the vagina or the anus of the complainant with the fingers of the accused. A slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

Burden of proof

5. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. 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, or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour. Having so refreshed lets now consider the evidence placed before this court.

Prosecution's Evidence

6. The prosecution led the evidence of the complainant Kelera Maramanivalu, PW2 Sergeant 4218 Taniela and PW3 WDC 3727 Kara and closed their case.
7. According to **Kelera Maramanivalu** she is around 38 years old and was in defacto relationship with the accused for over 16 years. She has 4 children the eldest is 21, second 19, the third 15 and the youngest is 3 years old. According to the age of the eldest child it appears that she had been in relationship with the accused for atleast 21 years.
8. At the time of the incident in December 2020, she was living with the accused at his family house in Nanuku Settlement, Vatuwaqa. It is a house with 3 rooms in which the accused's mother and two sisters with their children also lived. The husband of one of the sisters-in-law too was living there. The victim and the accused had been occupying one of the rooms.
9. On the 3rd of December, 2020 she had prepared food in the evening but the accused had refused to eat. She had cleaned up and gone to the room with the youngest child. Little late in the night the accused had wanted food again she had brought some food but the accused had not eaten. Then they were both in the room when the accused asked her if she was having an affair with another. She had denied and the accused had asked her to lie down. She had been afraid and laid down on her chest face downwards. The accused had continued to question her. Then threatened that he will bring a hammer and hit on her head. The accused had come beside her, removed her pants and busted her panty and continue to ask about the alleged affair whilst asking he had inserted four fingers into her vagina. As and when he questioned she says that he pushed his hand further in. This according to her is gone for about an hour. She had felt pain and she specifically stated that she did not consent to this.
10. Then he had choked her with his hand whilst his other hand was in her vagina. He had also punched her face. At this point she had seen a light falling through the window. When she

had run out and asked for help the accused had tried to stop her but she had managed to get out. It was the police who had arrived. She had told the police officer what the accused had did to her. She had told them that he inserted his fingers into her vagina and was sniffing glue. The police had come into the house and handcuffed the accused and both of them having taken to the Nabua Police Station.

11. She had made a statement to the police and was taken to the CWM hospital where a doctor had examined her. She had told everything and the doctor had made a note of it in her medical. She identified her signature on the said medical report. Finally she said that she did not do anything to the accused that night.
12. Accused himself cross-examined her and she admitted that her brother-in-law was at home but did not see him in the sitting room. It was suggested that the story about sniffing glue is false. She admitted not seeing a hammer. She could not recall the colour of her clothes that night. She could not remember as to which hand was inserted into her vagina. When she was asked “how many times did I forcefully put the hand in and out of your vagina?” Her response was that it was not put in and out but just kept it inside and went deeper as it went by. She admitted that the photographs and the sketch plan of the house is different as the house is under renovation now.
13. She also admitted that he gave a statutory declaration when he was taken into the cell block which she gave to the public prosecutor.
14. Sergeant Taniela had been on mobile duty on the night of the 3rd December, 2020 an early hours of the 4th covering Nabua area. He had received a message of fighting in a house and reached that house. When he called out and asked if anyone had asked for help the complainant had suddenly ran out and come to him. She had told that her husband is trying to cause trouble and she needs assistance. The other officer with him had told her to get dressed and when she was to be escorted to the police the accused had tried to stop her.

They have arrested the accused and taken him also to the Nabua Police Station. The officer identified the accused in court.

15. Witness number 3 WDC Kara had been on duty 4/12/2020 at the Nabua Police Station when the accused was brought. On the 4th of December, 2020 around 1635 hours the accused had complained about an injury and on the 5th he had told that his wife bite his penis. This witness admits taking him to Medical Centre for an examination.

Accused's Evidence

16. Accused **Peni Taniela** gave evidence on his behalf. According to him on the 4th December 2020 he admits being at home with the victim who was his wife for 21 years. She had shortly before the incident left him taking the youngest kid and leaving the other three children with him. However, she had come back and the accused had accepted her again. On the night of the said day they have gone to sleep after dinner. However, the complainant has woken him up and demanded that they have sexual intercourse. However the accused says that the he found it difficult to engaging intercourse and told her that they should sleep. At that point the complainant had asked whether he had visited any other girl and alleged that he was having an affair with another. She had insisted on having sexual intercourse that night and in the course of it she is alleged to have bitten his penis. The accused at this moment has held from her head and neck and admits that there was a scratch on her neck. He denies putting his hand into her vagina or the anus that night.
17. Under cross-examination he said that they had a meal in the evening but did not have dinner. He denies sniffing glue or going to his mother's room that night. He also denied asking the victim if she had any affair. He admits that the police arrived at the house but says that it was he who opened the door and he was arrested and his wife along with him were taken to the police.
18. He had told the police officer that his wife did bite his penis however that officer had not recorded it. The accused said that his wife threatened that she will teach him a lesson and the position taken up by the accused is that this is a false allegations made by her.

Evaluation of the Accused's Evidence

19. The accused was undefended and he conducted his own defend. I would make an allowance in view of this fact in favour of the accused in evaluating his evidence. The accused main defence is that his wife had threatened to teach him a lesson and she suspected him to be having an affair with another. These are the reasons the accused claims at this false allegations had been made. When the complainant gave evidence this was not suggested to her. As I mentioned above accused did not have any legal representation, however he cross examined the victim and many suggestions were made to her. This clearly shows that the accused was aware of his right to make suggestions and that suggestions can be made. Therefore, his failure to suggest his main defence show that the said position taken up at the end of the case lacks consistency. If that be his main reason, I would expect him to have suggest the same.

20. However, in cross-examination it was elicited that he made a statement a day after his arrest and in fact he was produced before a doctor for an examination. The officer who escorted the accused to the doctor admitted that the accused had complained that his wife had bitten his penis so he had been taken for a medical examination. For reasons unexplained the Medical Centre informed that the medical report of the accused is not available at the hospital. It was never brought to court notwithstanding several request made by the accused. However the fact remains that he had informed of an injury to his penis and he had been examined by a doctor. No omissions were raised from a statement as regard to this issue as a matter of fact there were no contradictions marked or omission raised on the statement of the accused. This leads to the inference that the evidence of the accused is consistent with his statement. The accused admits of some dispute between him and the complainant that night. But he denies the insertion of his fingers into her vagina. However the biting of the penis too was not suggested to the Complainant. Therefore, his failure to suggest this defence position shows that the said position had been taken up at the end thus, it lacks consistency. These being his main reasons and defences and if they were so, I would expect him to have suggested the same to the victim when she gave evidence. He did not do so. This failure certainly leads to the inference that this is an

afterthought. Further if she was the aggressor that night it is not probable for her to run to the police officers and complained and acted in that manner. Thus the evidence of the accused is not probable and lacks consistency. For these reasons I reject the evidence of the Accuse as being untruthful.

Considering the totality of the evidence

21. I do not believe Accused's evidence, but this by itself does not lead to a finding of guilt, because to do so would be to forget who has to prove the case. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused's guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused as innocent until the State has proved his guilt. The presumption of innocence means that Peni Taniela does not have to establish his innocence. The State must prove that Accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused is probably guilty or even that he is very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused is guilty is when I can find him guilty. On the other hand, if I am not sure that he is guilty, I cannot find him guilty. Now let's evaluate the prosecution evidence.

Evaluation of the Prosecution evidence

22. The proving of the charge solely depends on the evidence of the victim and her credibility. Her complaint is prompt. Immediately that night when the incident was taking place the police had arrived. She had gone to the police and made a statement. There is no delay.
23. Her main item of evidence is that the accused had put four fingers into her vagina. She on her own testified that she was lying face downwards on her stomach whilst she was so

lying the accused is alleged to have removed her shorts and busted her panty and put his hand in to her vagina. She does not explain how the accused had put his 4 fingers into her vagina when she was on a face down position. She says that it was painful but does not say she was injured during this incident. She claims to have been questioned for almost one hour with the accused's hand being pushed in to her vagina. At the initial stages and in cross-examination she did specifically say that there was no taking out and putting in the hand but it was inside right throughout. However, later on she does change her position and say that during the one hour as and when questioned he inserted his hand deep into her vagina. In the normal course of event if she was lying down on her stomach considering the nature of the human anatomy inserting the hand into the vagina would not be so easy unless her legs were parted to some extent and even if the hand was so inserted keeping it in continuously does not sound probable. On the other hand inserting as and when he questioned her too is not that probable. She had been married to him for almost 21 years. He is not a stranger and in these circumstances it is not realistic to expect her to just remain passively until he inserts his hand on multiple times within an hour. If it was so done forcibly for almost an hour as I mentioned earlier some form of injury would have been caused. She does not say so and neither is there any medical evidence led. For some reason the prosecution at the last moment did not produce the medical report of the victim. Victim says that she was examined by a doctor and she also told everything to the Doctor. As far as the evidence is concerned there is no evidence of any form of injury to the victim. Is this version probable and realistic?

24. In these circumstances firstly the alleged insertion of the hand for one hour be it continuously or repeatedly by itself does not sound realistic and on her own evidence the position she claims to have been in at that time makes the insertion of the hand in that manner improbable. Be that as it may admittedly there were several other occupants in this house. She had not alerted or raised cries seeking help from them. As a matter of fact her evidence is that others were asleep. In this scenario and sequence of events suddenly she sees a light falling on the window. She says that she knew it was the police and she ran out for help. Merely by seeing a light it is not possible to identify that is a light flashed is by

the police. But she says that she knew it was the police, which she could not explain why or how she knew.

25. According to the police officer someone had informed the police of an incident and on that information a message had been relayed to the mobile patrol car and the police have arrived at this location. The victim does not say that she informed the police then who did? Could it be a neighbor? For a neighbor to hear there should have been a noisy commotion to alert them. If there was such a noise why did not the inmates of the house be alerted? Therefore, could it be that the victim herself had alerted the police due to the harassment by the accused? The accused admits that there was a dispute between them that night. He gives a different version. However, the accused takes up the position that she had threatened to *teach him a lesson*, so to say.
26. In this backdrop without doubt the accused had been harassing the victim that night. So did the victim inform the police to escape the harassment? In doing so did she exaggerate or make out the case of rape to make things serious and difficult for the accused? Shortly before the time of the incident she had left the accused's house and had returned once again to live with him. Most certainly an ongoing marital dispute had been brewing between the two. In these circumstances, there is a possibility of the victim exaggerating or even making a false allegations to save herself from the harassment of the accused. The improbabilities of her story makes this false imputation probable.
27. The original information had two counts of rape; one of anal digital penetration. There was no evidence of whatever nature in respect of this count. No doubt there were contradictions or omissions raised during her evidence. But in the normal course of the event the DPP will not without good reason add a charge of this nature. Though the doctor was not called and the medical report was formally not marked and produced the prosecution did elicit from the victim that she told the doctor and in fact the medical document was shown to the victim in court and she identified her signature on paragraph 'D' on the said medical report. What was shown to her was the medical examination form that was made available

with the disclosures. To that extend the prosecution has put in evidence the said medical examination form though the form document was not assigned marking. Therefore, this court is entitle to peruse the case history of the said medical examination report to ascertain what the victim has told. According to paragraph 'D10' she had told the doctor in addition to inserting 4 fingers into her vagina that the accused had also inserted two fingers into her anus. For reasons best known to her she made no mention of this fact in her evidence. This I would consider as an omission which had a bearing on her credibility.

28. As evaluated above to a great extend her evidence appears to be improbable to that extent in that scenario. This omission creates a serious doubt as to whether she had exaggerated the actual act of harassment and some form of domestic violence committed by the accused. For these reasons I am of the view that the victim's evidence lacks consistency and also is not probable. On evaluation of the totality of the evidence without doubt the accused certainly had been in a cruel and in an oppressive manner perpetrating violence on the victim. However, on this evidence the issue this court is required to determine is whether he had inserted the hand as alleged and committed rape. For the above reasons the said act in these circumstances is certainly not credible and to be very precise it is improbable. As such a criminal charge of this nature cannot be proved on the required criminal standard on such evidence.

Conclusion

29. The proof of the charge depends solely on the evidence of the Complainant. For the reasons stated above, her evidence becomes unreliable and unsafe to act on because there appears to be a possible motive or reasons to falsely implicate the accused at least as a way out of the harassment. This is further compounded by the fact of her version being improbable. The combined effect is that this gives rise to the inference that she may be not truthful that extent and that she had deliberately exaggerated and added this act of insertion of the fingers to the vagina to the actual events of that night. Thus it is unsafe to rely on this evidence.

30. In the present case whilst it is possible to conclude that the accused himself may have committed the alleged act but simultaneously there is this inference that the said allegation may also be false. Thus this is a classic instance of a reasonable doubt. This court does not even for a moment find that the accused did not commit the act as alleged, but it is just that there is a reasonable doubt as to whether he did actually do so arising out of the totality of the evidence. For these reasons I hold that the prosecution has failed to prove the charge beyond reasonable doubt. Accordingly, the accused is hereby acquitted.



At Suva
27th September, 2022.

Solicitors
Office of the Director of Public Prosecutions for the State.
Accused In Person