

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 006 of 2020

STATE

V

RATU LIVAI VOLAVOLA

Counsel : Ms. P. Lata for the State.
: Ms. K. Vulimainadave and Ms. R. Nair for the
Accused.

Dates of Hearing : 07, and 09 March, 2023
Closing Speeches : 10 March, 2023
Date of Judgment : 13 March, 2023

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "S.N")

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

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

Particulars of Offence

RATU LIVAI VOLAVOLA on the 23rd day of December, 2019, at Nadi in the Western Division, penetrated the vagina of “S.N” with his fingers, without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the lesser offence of sexual assault and not for the offence of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. To prove the offence of sexual assault the prosecution must prove the following elements beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by touching her vagina with his hand.
5. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence.

6. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
7. The final element of assault is the unlawful use of force on the complainant by touching her vagina.

In this regard this court has to consider:

- (a) whether the force used in touching her vagina were sexual in nature;
and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
8. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching her vagina.
 9. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.
 10. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given

by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

11. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
12. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

13. The complainant informed the court that on 23rd December, 2019 she was residing at Namotomoto Village with her boyfriend Nemani, Nemani's uncle and aunt and their five children. The house had three bedrooms, one bedroom was occupied by the complainant and Nemani. This bedroom did not have any doors but there was a door curtain. In the night of 22nd December, 2019 the complainant and Nemani's cousin Kinisimere Marama were sleeping in the bedroom. Kinisimere was about 14 or 15 years of age at the time.
14. The male cousins of Nemani were sleeping in the living room. The complainant was wearing a top and skirt, whilst sleeping she felt someone climb on the mattress and then she felt the lifting of her skirt touching of

her thigh and then a hand went inside her private part. The complainant was shocked and scared.

15. The complainant turned around and saw it was the accused, at this time she touched the accused face and she was able to see the accused face from the outside lights. The complainant had seen the accused once before in the house. The complainant did not scream or shout because the accused told her not to do so and also he had put his index finger on his mouth gesturing her to keep quiet.
16. The complainant immediately left the bed and rushed out of the bedroom into the living room in the process she tripped on the door curtain. The complainant was crying, Eliki Naivalulevu woke up and asked what happened. The complainant told him that the accused had harassed her and that the accused was inside the bedroom. When Nemani's aunt Julie Salabo came to know about what had happened the incident was reported to Namaka Police Station. She also identified the accused in court.
17. In cross examination the complainant agreed one can enter her bedroom from the living room and the other entrance was from the verandah which was locked with a nail. To open this door pieces of wood or nail could be used to tap the nail on the door for it to open and that it is how someone from outside could enter her bedroom.
18. The complainant agreed she was able to see the face of the accused from the outside light coming into the bedroom at first she thought it was Nemani who was touching her.
19. According to the complainant this incident happened at around 1am and when the boys went to check who was in the bedroom there was no one in

the room except Kinisimere who was sleeping. The complainant denied that she was mistaken she maintained that it was the accused who was in her bedroom. The complainant also explained that when the accused had come on the mattress she woke up because the mattress had moved but she did not turn because she thought it was Nemani. At this time she was facing the wall.

20. Furthermore, when the mattress moved she thought it was either Nemani her boyfriend or Kinisimere who was sleeping on the same bed had turned. The complainant agreed when she felt someone lift her skirt, touch her thigh and private part the first thought that came to her mind was that it was Nemani.
21. The complainant further clarified that when she was sleeping she was facing the wall and when the incident happened she turned to face the person and at this time she was able to recognize the accused from the outside light.
22. Another reason why the complainant was able to recognize the accused was that the curtain in the small window was not drawn. According to the complainant on that night Nemani was to have slept over at his work place, however, despite this she thought it was Nemani who was touching her.
23. In re-examination the complainant said the sleepover of Nemani had not been confirmed so she thought Nemani was back.
24. Eliko Naivalulevu informed the court that in the year 2019 he was 13 years of age. On 22nd December 2019, Eliko was at the house of his aunt Julie Salabo he was in the living room with five other boys who were all sleeping. The witness was awake since he was doing something on his Facebook.

25. It was after midnight the accused came into the living room and then he went into the bedroom where his sister Kinisimere and the complainant were sleeping. Shortly after the accused came out went into the kitchen took out his dinner and came into the living room which the witness said was the boys room. The accused is related to his aunt Julie.
26. After finishing his dinner the accused switched off the light in the boys room and after drawing the curtains of both room doors went into the complainant's bedroom.
27. After some time the complainant came running out of the bedroom crying and said the accused had touched her thigh. After saying this, the complainant went and set beside the witness. The witness recognized the accused in court.

RECENT COMPLAINT DIRECTION

28. Complainant's of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
29. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant immediately told Eliki after running out of her bedroom that the accused had touched her thigh.

30. This is commonly known as recent complaint evidence. The evidence given by Eliko is not evidence of what actually happened between the complainant and the accused since he did not see what had happened between the complainant and the accused.
31. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says that the complainant told Eliko the accused had touched her thigh immediately after she came into the living room meant something had happened to the complainant.
32. The prosecution is asking this court to consider the age of the complainant who was 22 years at the time and the age of Eliko who was 13 years at the time and the relationship between the two that is Eliko was the cousin brother of Nemani the complainant's boyfriend. The prosecution submits that considering the age difference between the complainant and Eliko and their relationship it could not be expected that the complainant would tell Eliko everything in detail about what had happened to her. Despite this, the complainant relayed relevant and important information about the conduct of the accused to Eliko and therefore she is more likely to be truthful.
33. On the other hand, the defence says the complainant made up a story against the accused that he had touched her vagina when it was not the accused but someone else. Although it was someone else the defence points out that immediately after the incident she told Eliko about the touching of her thigh but not her vagina. The complainant was a matured person she could have told Eliko about the touching of her vagina but she did not. The defence submits that the complainant was making up a story in court to falsely implicate the accused she made a mistake in identifying the alleged perpetrator and therefore she should not be believed.

34. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
35. In cross examination when it was suggested to the witness that after having his dinner the accused had gone to sleep the witness said he saw the accused switch off the lights, draw the curtains and went into the bedroom where the complainant was sleeping. Upon further questioning the witness said that his earlier answer that he saw the accused go into the complainant's bedroom was not true.
36. The witness said the house they were in had two doors the second door is closed with a nail while the main door had a lock and anyone could enter the house through the other door.
37. In re-examination the witness stated that the complainant had told him that the accused had caressed her thigh and she woke up. The witness also said after switching off the lights and drawing the door curtains the accused went to the complainant's bedroom.
38. This was the prosecution case.

DEFENCE CASE

39. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his

right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.

40. From the line of cross examination the defence took the position that the complainant did not tell the truth in court of what had happened. The accused did not at any time enter the bedroom of the complainant and touch her vagina as alleged. The complainant is mistaken, it was not the accused but someone else.
41. Finally, the defence is asking this court not to believe the complainant.
42. This was the defence case.

ANALYSIS

43. The prosecution alleges that the complainant in the year 2019 was living with her boyfriend Nemani in the house of Nemani's uncle. On 23rd December, 2019 at about 1 am the complainant was asleep in her bedroom with one Kinisimere Marama.
44. The accused entered the room of the complainant climbed on the mattress where the complainant was sleeping lifted the complainant's skirt touched her thigh and then put his hand inside her private part. The complainant did not do anything because she thought it was her boyfriend. When she turned around she recognized the accused, she was able to see the accused clearly from the outside lights. The complainant did not scream or shout because the accused told her not to shout and also he had put his index finger on his mouth gesturing to the complainant to keep quiet. The complainant was shocked and scared by what had happened to her.

45. As a result the complainant left the bed and rushed out of the bedroom into the living room crying. Eliki Naivalulevu was in the living room he saw the complainant crying. The complainant did not consent to what the accused had done to her. The incident was promptly reported to the police. In respect of making up a story the prosecution submits that there was no motivation by the complainant to falsely implicate the accused. She told the court what had happened.
46. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. A close scrutiny of the evidence given by the complainant would show that whatever the complainant told the court is improbable and it does not make sense. When the complainant told the court she saw the accused it was a mistake.
47. Furthermore, Eliki did not tell the court that the complainant had told him about the touching of her private part. The complainant was 22 years of age at the time and she was matured enough to tell Eliki in detail about what had happened to her but she did not because it was not the accused.
48. Finally, the defence is asking this court not to give any weight to the evidence of the complainant which is not the truth of what had happened.

DETERMINATION

49. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.

50. Before going any further it is important to consider the defence argument that the complainant mistakenly took someone else for the accused.

TURNBULL DIRECTIONS

51. The defence has taken the position that the complainant made a mistake in thinking that it was the accused who had sexually assaulted her for someone else so she had identified the wrong person in court.
52. This case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.
53. I have carefully looked at the following circumstances in which the identification by the complainant was made:

How long did she have the person she says was the accused under observation?

According to the complainant she knows the accused and she had seen him in her house once before. After she had turned she touched the accused face and she saw his face from the outside light.

At what distance?

This person was touching her when she turned, his hand was still on her vagina.

In what light?

According to the complainant there was outside light there was also a small window whose curtain was apart.

Did anything interfere with that observation?

The complainant did not say there was any obstruction or interference she was able to see the face of the accused.

Had the witness ever seen the accused before?

The complainant said she had seen the accused in her house once before.

54. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. The complainant did not say for how long she had touched the face of the accused.
55. I have given the above directions as a matter of caution after the defence raised the issue of identification of the accused in the circumstances narrated by the complainant.
56. Finally, I would like to state that the complainant had made it known to the court that she had seen the accused once on a previous occasion and Eliko had also seen the accused having his dinner in the living room where he was and he had also seen the accused go into the bedroom of the complainant two times. It was after the accused had gone into the

complainant's bedroom the second time that the complainant ran out of her bedroom. It is not disputed by the defence that the accused was in the house at the material time. Moreover all the others in the house were sleeping except Eliko who saw the complainant run out of the bedroom crying.

57. In view of the above, this court accepts that it was the accused and no one else who was seen by the complainant that early morning. There was no mistake in recognition of the accused by the complainant. I have also noted that Eliko was not cross examined on whether he had made a mistake when he said he saw the accused enter the complainant's bedroom.
58. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I accept the evidence of the complainant as truthful and reliable. She gave a consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegation.
59. The complainant was firm and unwavering in what she had encountered that early morning. I have no doubt in my mind that there was no one other than the accused who had gone into the bedroom of the complainant. Eliko had seen the accused switch off the lights in the living room and had drawn the door curtains before going into the bedroom of the complainant.
60. After some time Eliko saw the complainant run out of her bedroom. I accept that in the process of running out of the bedroom the complainant had tripped on the door curtains. The fact that the complainant did not shout or yell is immaterial since the accused had told her to be quiet and the gesture by the accused was enough for the complainant to be silent.

61. Experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or push the accused away in the circumstances of this case does not mean that she was consenting to what the accused had done to her.
62. The complainant struck me as a simple, shy and reserved person who would not have openly spoken to Eliko about what the accused had done to her. The fact that the complainant narrated crucial information about what the accused had done to her in my considered judgment was enough to alert Eliko that something was not right.
63. The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 39 made an important observation about the above as follows:
- The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.*
64. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. It is not expected of anyone who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.
65. In this case the complainant had relayed crucial information to Eliko that the accused had done something to the complainant. I also accept the

observations of Eliko that the complainant was crying when she went into the living room.

66. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. It is also noteworthy that the complainant had promptly reported the matter to the police.
67. I also accept that the complainant did not consent to what the accused had done to her. In law consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
68. The complainant's reaction to the accused had alerted him hence he told the complainant not to shout and followed this with a gesture. The complainant also rushed out of the bed and in the process of going into the living room she tripped shows the panic she had undergone.
69. The defence also did not raise any motivation by the complainant to falsely implicate the accused. The complainant had promptly told Eliko that the accused had done something to her although not in complete detail does not affect the credibility of the complainant. It is not expected that a complainant will immediately tell every detail about an unexpected sexual encounter to the first person seen. Eliko was a 13 year old cousin of Nemani who was much younger than the complainant and in my considered judgment the complainant would not have felt comfortable in narrating every detail of what the accused had done to her at that point in time.

70. Finally, the complainant was not shaken as to the basic version of her allegation and this court accepts the evidence of both the prosecution witnesses as reliable and credible.

CONCLUSION

71. This court is satisfied beyond reasonable doubt that the accused on 23th December, 2019 had unlawfully and indecently assaulted the complainant by touching her vagina. This court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant. Finally, the act of the accused has some elements of indecency that any right minded person would consider such conduct sexual in nature.

72. In view of the above, I find the accused not guilty of one count of rape as charged and he is acquitted of same but guilty of the lesser offence of sexual assault and he is convicted accordingly.

73. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka
13 March, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.