

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 174 of 2021

STATE

vs.

- 1. SELEMA WAQANIVALU**
- 2. TEVITA ULUILAKEBA MAKU**

Counsel: Ms. A. Vavadakua for the State
Ms. P. Mataika with Ms. S. Narayan for 1st Accused
Mr. T. Varinava with Ms. A. Dean for 2nd Accused

Date of Hearing: 20th and 21st March 2023

Date of Closing Submission: 24th March 2023

Date of Judgment: 31st March 2023

JUDGMENT

1. The first Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act and the second Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SELEMA WAQANIVALU, on the 4th day of July 2021 at Nasova Levuka, in the Eastern Division, penetrated the vagina of VIKA TUILAKEBA with his finger, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

TEVITA ULUILAKEBA MAKU, on the 4th day of July 2021 at Nasova Levuka, in the Eastern Division, penetrated the vagina of VIKA TUILAKEBA with his penis, without her consent.

2. The hearing of this matter commenced on the 20th of May, 2023 and concluded on the 21st of May, 2023. The Prosecution called Complainant, and the two Accused gave evidence for the Defence. The Court then heard the oral submissions of the learned Counsel for the Prosecution and the Defence. The Counsel then filed in their respective written submissions. Having considered the evidence presented during the trial and the respective oral and written submissions of the parties, I now proceed to pronounce the judgement as follows.

Burden and Standard of Proof

3. The two Accused persons are presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the two Accused are presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the two Accused persons are guilty of the offence without any reasonable doubt.

Elements of the Offences

4. The main elements of the offence of Rape as charged under first count are that:
 - i) The first Accused,
 - ii) Penetrated the vagina of the Complainant with his finger,
 - iii) The Complainant did not consent to the first Accused to penetrate her vagina with his finger,
 - iv) The first Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

5. The main elements of the second count of Rape as charged in the Information are:
 - i) The second Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the second Accused to penetrate her vagina with his penis,
 - iv) The second Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the two Accused committed these two offences against the Complainant. There is no dispute about the correctness of the identification. The two Accused and the Complainant are known to each other. Both the Accused admitted that they were in the house with the Complainant on that particular day.

7. Evidence of the slightest penetration of the vagina of the Complainant with the fingers/penis of the Accused is sufficient to prove the element of penetration.

8. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the

freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.

9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers/penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.
10. The two Accused persons are charged with separate counts of Rape, therefore, the Court must look into these two counts separately.

Admitted Facts

11. The Prosecution and the Defence tendered the following Admitted Facts pursuant to Section 135 of the Criminal Procedure Act; they are that:
 - a) *The Complainant is Vika Tuilakeba, 30 years old, of Nasova Pafco Quarters, Pafco Cadet.*
 - b) *The First-named Accused is Selema Waqanivalu, 27 years old, of Natokalau village, Ovalau, Quality Control Officer at Pafco.*
 - c) *The First-named Accused and the Complainant are related in which the Complainant is the Aunty of the First-named Accused.*
 - d) *On the 4th day of July 2021, the First-named Accused resided at Natokalau Village, Ovalau.*

- e) *On the 4th day of July 2021, the First-named Accused was drinking liquor with the Complainant and the Second-named Accused at the Complainant's quarters at Nasova Pafco Quarters.*
- f) *On the 4th day of July 2021 at 11.13am, the Complainant was medically examined at the Levuka Hospital by Doctor Peniame Baroka.*

Prosecution's Case

12. The two Accused had invited the Complainant to join them for a drinking party at one of their friend's house on the 4th of July 2021. The Complainant and the first Accused are related to each other, and the second Accused was a workmate of the Complainant. Once they finished drinking at the friend's place, they went to the Complainant's quarters and continued drinking. The Complainant had bought the drinks which they consumed at her place. They were sitting in the living room. While drinking, the Complainant had joked with the first Accused about his old button mobile phone. She then took his mobile phone and kept it with her, complaining that the first Accused focused on his mobile phone, not his drink.
13. After a while, the Complainant went to her room, saying that it's enough for her. She locked the door from inside and went to sleep. She awoke in a while, hearing the conversation between the two Accused in her room. She found they had entered her room, opening the connecting door from the adjacent room. She had asked them to leave the room and fell asleep again. The Complainant was weak due to her drinks and also having her menstruation. She woke up again and found the first Accused was touching her breast. She told him to stop it as she was having her menstruation. She was weak but claimed she specifically said to the first Accused to stop it. Irrespective of her request, the first Accused put his hand through her shorts and undergarment and touched her vagina. She felt something cold inside her vagina. The Complainant was feeling weak and fell off to sleep again.

14. The Complainant woke up again and felt something heavy on top of her. She found the second Accused was on top of her, penetrating her vagina with his penis. She told him to stop and get off her, but he continued. The Complainant then fell to sleep again and did not know when the second Accused stopped this alleged sexual intercourse. She eventually woke up at around 10 a.m. on the following morning. She received a call from her boyfriend, who was in Nadi. The Complainant cried and told him about this incident. The boyfriend then reported the matter to the Police.
15. The two Accused denied these allegations. The first Accused admitted that he went to the Complainant's room through the connecting door, not to molest her sexually, but to ask her to return his mobile phone, which she took while they were drinking. The second Accused also admitted that he had sexual intercourse with the Complainant. He had gone to the room to tell the Complainant he was leaving. She was sitting on the floor beside the bed. He then tried to put her back on the bed. She then put her arms around him and started kissing him, which eventually ended their consensual sexual intercourse.
16. The Complainant stated in her evidence that she was aware of what the two Accused were doing inside the room though she was weak and fell off to sleep. She claimed she specifically told the two Accused to stop what they were doing. The two Accused persons, in their evidence, did not mention that the Complainant was completely drunk and not aware of her conduct. Accordingly, I find that the Prosecution did not raise the issue of drunken consent.
17. In view of the evidence presented by the Complainant and the two Accused, it appears that the different versions of evidence presented by the Complainant and the Accused. In such circumstances, the Court must consider the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed this crime. The task of the Court is not to decide who is credible between the Complainant and the two Accused. (*vide: Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) R v Li (2003) 140 A Crim R 288, at 301, Goundar v State [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015).*

18. The Accused persons are not required to give evidence. They do not have to prove their innocence as their innocence is presumed by law. However, the two Accused persons decided to provide evidence in this case. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case.
19. In evaluating the evidence, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide *Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022))*).
20. The Court observes certain contradictions and inconsistencies in the evidence of the Complainant. The Complainant stated that she told her boyfriend that two boys had done something to her but did not reveal the identity of the two Accused. It was because the boyfriend did not know the two Accused. However, she contradicted her version during the cross-examination, admitting that her boyfriend knew about the second Accused. Furthermore, the boyfriend had called and swore at the second Accused once.
21. In addition, the Complainant initially stated that the second Accused was a workmate and she had no relationship with him. However, she admitted during the cross-examination that he was a very close person to her and once they had consensual sexual intercourse as well. Furthermore, the Complainant claimed she did not want to drink more and wanted to go home when they finished drinking at the friend's place. Later, she admitted that she was the one who bought more alcohol and invited the two Accused to her place.
22. The Complainant acknowledged in her evidence that she took the mobile phone of the first Accused as he was focusing on communicating with his girlfriend. She did not return it while they were drinking in the living room. It is not disputed that the first Accused communicated

with his girlfriends via his mobile phone while drinking. Considering this evidence, it is probable that the first Accused entered the room using the connecting door, which he could open from the outside as the Complainant locked the main door from the inside to look for his mobile phone but not to molest the Complainant sexually.

23. The Prosecution did not provide any explanation for the above-discussed contradictions and inconsistencies, thus, creating reasonable doubt about the credibility and reliability of the evidence given by the Complainant. Accordingly, I find the Prosecution failed to prove the two counts against the Accused beyond a reasonable doubt.
24. In conclusion, I find the first Accused not guilty of the first count of Rape, contrary to section 207 (1) and (2) (b) of the Crimes Act and the second Accused not guilty of the second count of Rape, contrary to section 207 (1) and (2) (a) of the Crimes Act and acquit them of the same accordingly.
25. Thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

31st March 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the 1st Accused.

Office of the Legal Aid Commission for the 2nd Accused.