

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 281 of 2020

STATE

V

ILIESA SAMULALA

Counsel : Ms. Bhavna Kantharia for the State
Mr. Timoci Varinava for the Accused

Dates of Trial : 20-22 October 2021

Closing Submissions : 25 October 2021

Judgment : 29 October 2021

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Iliesa Samulala, is charged with the following offences:

COUNT 1

Statement of Offence

UNLAWFUL WOUNDING: Contrary to Section 261 of the Crimes Act.

Particulars of Offence

ILIESA SAMULALA, on the 21st day of September 2020, at Lami, in the Central Division, unlawfully wounded **KATARINA BUBU**, by throwing his tool bag which landed on the back of her head and kicking her with his gum boots.

COUNT 2

Statement of Offence

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

Particulars of Offence

ILIESA SAMULALA, on the 21st day of September 2020, at Lami, in the Central Division, had carnal knowledge of **KATARINA BUBU** without her consent.

- [2] The accused pleaded not guilty to the two charges and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Unlawful Wounding, contrary to Section 261 of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

- [6] Section 261 of the Crimes Act reads as follows: *“A person commits a summary offence if he or she unlawfully wounds another person.”*
- [7] Therefore, in order to prove the first count of Unlawful Wounding, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 21 September 2020);
 - (iii) At Lami, in the Central Division;
 - (iv) Unlawfully wounded the complainant, Katarina Bubu, by throwing his tool bag, which landed on the back of her head, and kicking her with his gum boots.
- [8] To further elaborate upon these elements in respect of the count of Unlawful Wounding. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [9] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [10] The fourth and final element the prosecution must prove is that the accused unlawfully wounded, the complainant, Katarina Bubu, (in this instance by throwing his tool bag, which landed on the back of her head, and kicking her with his gum boots). The word “unlawfully” simply means without lawful excuse. The term “wound” has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the complainant as defined herein.
- [11] Section 207(1) of the Crimes Act reads as follows:
- 207. — (1) Any person who rapes another person commits an indictable offence.*

[12] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[13] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic or legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

[14] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.

[15] Therefore, in order to prove the second count of Rape, the prosecution must establish beyond reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 21 September 2020);

(iii) At Lami, in the Central Division;

(iv) Had carnal knowledge with the complainant Katarina Bubu [That he penetrated the vagina of the complainant Katarina Bubu, with his penis];

(v) Without the consent of the complainant; and

(vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[16] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence.

The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

- [17] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [18] The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.
- [19] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [20] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

- [21] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
- [22] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 28 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent. [Her date of birth is 6 February 1992].

The Admitted Facts

- [23] Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

- [24] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. It is admitted that Iliesa Samulala has three children namely, Iliesa Junior, aged 14 years, Maikeli, aged 12 years and Senitiki aged 10 years from his first wife who is now deceased.

2. It is admitted that the complainant, Katarina Bubu, and Iliesa Samulala, together with his 3 children from his first wife, were staying together at Suvavou Village at the time of the alleged incident.
3. It is admitted that on 21/9/2020 the complainant and Iliesa Samulala had exchange of words which resulted in Iliesa Samulala throwing his tool bag at the complainant and because of which the complainant sustained injuries at the back of her head.
4. It is admitted that Iliesa Samulala was interviewed by WDC 3767 Maritina on 21/09/20 at the Lami Police Station.
5. It is admitted that Iliesa Samulala was charged by DC Apenisa on 23/09/20 at the Lami Police Station.
6. It is admitted that the admissibility of the following document is not in dispute and will be tendered by consent:
 - (i) Record of Interview of Iliesa Samulala dated 21/09/20.

[25] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[26] The prosecution, in support of their case, called the complainant, Katarina Bubu, Medical Officer, Dr. Losana Burua, and WDC 3767 Maritina Lewameli, the Investigating Officer in the case. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1**- Medical Examination Report of the complainant.

Prosecution Exhibit **PE2**- Record of Interview of Iliesa Samulala, dated 21 September 2020.

[27] **Evidence of the complainant Katarina Bubu**

- (i) *The witness testified that she currently resides at Caukuro Road, Kinoya. She has been staying in Kinoya for the past 5 months. She is working as a Baker in Kinoya. Prior to this she was staying in her village in Nasoqo, Naitasiri.*
- (ii) *The complainant said that she is now 29 years of age. She said that her date of birth was 6 February 1992.*
- (iii) *She testified that in September 2020, she was staying at Suvavou Village in Lami, with her de-factor partner, named Iliesa Samulala, the accused in the case. At the time, she had been staying with the accused for 5 years. They have one son through this relationship (he is now 4 years of age).*
- (iv) *She said: "Sometimes I go to work, sometimes I stay at home. Sometimes I go to work, but if he doesn't allow me to go to work I stay at home."*
- (v) *It is an admitted fact that the complainant and the accused, together with his 3 children from his first wife, were staying together at Suvavou Village at the time of the alleged incident. Her son was staying in the village with her parents.*
- (vi) *The witness testified that she recalls the 21 September 2020. "On 21 September 2020, he (Iliesa) really hurt me and abused me." "He kicked me a couple of times and hit me with his tool bag and he sexually abused me too."*
- (vii) *When asked to explain what had transpired, the witness said: "He doesn't want me to say any truth or express myself." "Because he told me that he was leaving for work and he asked me to stay home and pray for him. And then I nicely replied to him and just told him that we are praying for you and your work. But it is you, whenever you get the money from work, you never think of us – you are buying drinks. And you bring us very less money and telling us to pray for you. And I think he hates me when I tell him that truth. So he told me that it is none of my business. That's when he started hitting me."*
- (viii) *The complainant said that when this exchange of words happened it was around 7.00 in the morning. She and the accused were in their bedroom and the kids were having their breakfast. She had been sitting on the bed. She said: "He kicked me first and I was moving back to save myself but he kept kicking me for 5 times.....he was kicking me with his gum boots on first one in my left shoulder then when I moved, on my back. When I moved towards the end of the bed, that's when he couldn't reach to kick me. That's when he used his tool bag to hit me."*
- (ix) *The witness explained that what she meant by his tool bag was his knapsack that he always takes to work. He has got all his tools, such as screw drivers, inside the bag.*
- (x) *When asked as to how the accused hit her with the tool bag, she said: "He swung the tool bag and it hit the back of my head." The witness demonstrated as to how this took place, by showing the right side of her head. She said as a result of this her head (the part that got hit) got numb and swollen.*

(xi) *The witness said that thereafter, the accused had grabbed her hands and pulled her onto the floor. "He kept saying that I don't want him to go to work. So he can just stay at home and have sex with me."*

(xii) *The following questions were then asked from the witness and she answered as follows:*

Q. *How did you respond to that?*

A. *I resisted.*

Q. *What do you mean?*

A. *I don't want to but he forced me and pulled me to the floor.*

Q. *What do you mean by I didn't want to?*

A. *He was wanting to have sex with me. But at that time I was really angry – but he still forcefully wanted to have sex with me.*

Q. *What did he do?*

A. *He raped me.*

Q. *Can you explain what actually did he do?*

A. *He forcefully took off my clothes.*

Q. *Which clothes did he take off?*

A. *My shorts and my panty.*

Q. *Then?*

A. *He took off his too and he was forcefully trying to penetrate me.*

Q. *What do you mean?*

A. *He was forcefully trying to put his penis inside my vagina.*

Q. *What were you doing?*

A. *I was trying to avoid him by closing my legs. Then he forcefully lifted my legs. Then he forcefully put and have sex with me.*

Q. *Can you explain?*

A. *He put his penis inside my vagina and he was doing it forcefully, angrily and roughly.*

Q. *How did you feel at this point in time?*

A. *I was feeling very angry and upset and I was trying to stop him. I can't talk or do anything because he blocked my mouth with his lower arms.*

Q. *So what did you do?*

A. *I was trying to bite his arms – but he removed his arms from my mouth. And I warned him to stop it or else I will shout and everybody will hear what he is doing. That's the time he stopped.*

Q. *Then what did he do?*

A. *He put on his clothes and he was trying to scare me or he was trying to step on my face with his gumboots. He just stood up and spat on my face.*

Q. *Did he actually step on your face?*

A. *Not my face. I turned around to save my face – but he stepped on my head.*

Q. *You said he spat on your face. What did you do?*

A. *I just asked him why he did that.*

Q. *Did he respond to the same?*

A. *He didn't say anything but that was the time he stepped on my head.*

Q. *Can you tell us for how long did he have his penis penetrated in your vagina – the duration?*

A. *It was around 2 minutes.*

Q. *And you had said he put his penis into your vagina forcefully, angrily and roughly, how did you feel at that time?*

A. *I was in so much pain.*

Q. *At this time did you try to shout for help?*

A. *I didn't because if I shout I'll be a victim – he will be beating me more.*

Q. *So when he put on his clothes after that what did he do?*

A. *He opened the door and he went out of the room.*

Q. *What did you do then?*

A. *I took my phone and I called the Police.*

Q. *Which Police did you call?*

A. *I just called 919 and one lady answered. I think he heard me talking on the phone and he came back. When he came back I offered the phone. After a few minutes the Police called me.*

Q. *Where was the accused at the time?*

A. *He had left for work.*

Q. What did the Police tell you?
A. They asked me if I had called and I told them that I'm coming to the Police Station.

Q. What did you do?
A. I packed my clothes and I went to the Police Station.

Q. Which Police Station did you go to?
A. Lami Police Station.

Q. What did you do there?
A. I told them everything.

Q. What did the Police do then?
A. They then brought me to the Totogo Police Station. From there they took me to MSP for medical.

- (xiii) The complainant further testified as to what had transpired at the MSP Clinic. She said the doctor had examined her head and her genital area. The doctor had counseled her and also given her medication. A Policewoman by the name of Maria had accompanied her.
- (xiv) Thereafter, she had been taken back to the Totogo Police Station and her statement had been recorded. The Police had then taken her to her friend's house. She had stayed at her friend's house for 2 days and then went to her village in Naitasiri.
- (xv) The witness had stayed in Naitasiri for about 6 months and thereafter, come to Kinoya.
- (xvi) The complainant categorically stated that she had not consented to the accused to have sex with her, at the time the accused had forcefully penetrated her vagina.
- (xvii) The complainant identified the accused in the dock as Iliesa Samulala.
- (xviii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xix) The complainant agreed that the house they were staying in was just a small wooden house. She further agreed that if the edge of the bar table (bar table occupied by the Defence), is the bedroom door, where the witness was sitting at the moment is where the accused and his 3 sons were having breakfast.
- (xx) The complainant said that there was a curtain at the door to her bedroom.
- (xxi) The witness agreed that after having breakfast that morning the accused had come to the room to say goodbye to her. She denied that the argument

between her and the accused had taken place because the bread had finished.

(xxii) The witness further agreed that the house where they were residing was close to a supermarket and that early in the morning people often go past the house.

(xxiii) The following further questions were asked from the witness in cross-examination and she answered as follows:

Q. So during the argument Iliesa (the accused) had asked you to keep your voice low?

A. Yes.

Q. But you kept on talking out loud?

A. Not loud.

Q. Is it true that during your relationship with the accused from 2015-2020, you would usually engage in arguments with him?

A. Yes.

Q. The reasons for those arguments were because the accused would find Facebook messages from other guys on your Facebook account?

A. I was not using Facebook when I was with him, he was not allowing me.

Q. Another reason for the two of you having arguments was because you will see that the accused had female Facebook friends?

A. I knew he had female friends, but we did not fight about that.

Q. Is it correct that you were using Facebook as well during that time?

A. Yes.

Q. During those arguments you had with the accused, he would usually chase you from his residence?

A. Yes.

Q. Due to the accused chasing you, you would be away from his residence for months?

A. Yes.

Q. Since you were away most of the time, you used to tell the accused that if he brings another woman home, he would see what you would do to him – Is that correct?

- A. No.
- Q. *Around November 2019, is it correct that your son and your sister were at home in Suvavou?*
- A. Yes.
- Q. *Around this time you had an argument with the accused?*
- A. Yes.
- Q. *And then he chased you, your sister and your son from the house?*
- A. *He didn't chase. We just left.*
- Q. *You left because of that argument?*
- A. Yes.
- Q. *Is it correct to say that you were hurt due to that argument, because your sister was also there?*
- A. Yes.
- Q. *You only returned back to Suvavou around August 2020?*
- A. *Yes. I think so. I am not sure.*
- Q. *Just after returning to Suvavou after November 2019, you had an argument again with the accused around September 2020?*
- A. Yes.
- Q. *After this recent argument you were hurt for being continuously chased from the house?*
- A. *Yes. It was not continuous chase, I always leave.*
- Q. *And the reason for your leaving is the continuous arguments?*
- A. Yes.
- Q. *So you were then determined to do something to the accused?*
- A. *The witness asks: "Do something meaning?"*
- Q. *Meaning to get back at the accused for all the arguments and hurt that he had caused you?*
- A. *That is not the reason.*
- Q. *Is it correct that the only reason why you had reported the accused that morning for raping you was because you were unhappy with him for hitting your head?*

A. *I reported whatever he did to me.*

.....

Q. *I will take you back to the morning of 21 September 2020 – when this argument was happening the children were still having breakfast?*

A. *They were in their room.*

Q. *Is it correct the partition of this room is just a ply board?*

A. *Yes.*

Q. *And everything that was happening inside your room they would have been able to hear it?*

A. *Yes.*

Q. *Is it correct when you looked out Senitiki was observing what the two of you were doing?*

A. *He was not observing – when he opened the door to go to work the son came to look.*

.....

Q. *Is it correct that when you had alleged that the accused was assaulting you, Senitiki as well as the other 2 sons were observing what the two of you were doing?*

A. *They were not observing they were in their room.*

Q. *Is it correct that when the accused stood up to come to the room, his 3 sons were still having breakfast?*

A. *I didn't see that.*

Q. *So you will not be able to confirm whether the children were having breakfast when you two were having an argument?*

A. *I can hear them talking in the room at the time we were fighting.*

Q. *But because it is a small house you will not be able to confirm if they were inside their room or in the sitting room?*

A. *They were in their room.*

Q. *I put it to you that these 3 boys were observing the two of you throughout the time you were having an argument?*

A. *That's a lie. It's impossible.*

Q. *The accused did not sexually abuse you that morning?*

A. *He did.*

Q. *Do you talk to the accused's relatives specifically his Uncle Orisi and Aunt Laisani?*

A. *I have never talked to them.*

Q. *I put it to you that on that particular morning Iliesa never kicked you?*

A. *Iliesa kicked me.*

Q. *Isn't it correct the only reason you are blaming the accused is due to the emotional hurt that he caused you?*

A. *No.*

Q. *Is it correct that you were calling the accused after you lodged the report, specifically before he went into remand?*

A. *He called my parents I didn't call.*

Q. *Is it correct that you had recently called him and he had told you to stop calling him?*

A. *No.*

Q. *I put it to you that you had been calling the accused, and the only reason you had been calling him is because you felt the guilt of making a false report against him?*

A. *I never called him.*

(xxiv) In re-examination, the State Counsel clarified from the witness certain answers given by her in cross examination.

(xxv) The complainant clarified that the arguments between her and the accused would be due to the financial problems and he will be putting it on her (blaming her). There will be no food for the children and he will be putting it on me.

(xxvi) As to Facebook, she clarified that she does have a Facebook account. She said: "But I was hardly using it because he was not allowing me. It is what he is doing and he is blaming it on me."

(xxvii) As to how she knew that the children were in their room at the time the incident took place, the complainant clarified thus: "We were fighting. I can hear them playing in their room. The only time the youngest one was observing was when Iliesa opened the door to go out and he came back into the room – he was trying to hit me again – the son was standing right at the door."

- (i) *The Doctor testified that she is a General Practitioner and is currently working at the Premium Care Medical Centre.*
- (ii) *She had obtained her MBBS Degree from the Fiji School of Medicine in December 1998. Thus she has been a Medical Practitioner for the past 21 years.*
- (iii) *She testified that she had joined Medical Services Pacific (MSP) in Suva in April 2020 and worked there until June 2021. Since July 2021, she is working at Premium Care Medical Centre.*
- (iv) *The witness said that a medical examination on the complainant, Katarina Bubu, was conducted by her, on 21 September 2020, at 11.30 a.m. at the MSP Clinic. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE1. Woman Sergeant Maria, who had accompanied the complainant, was present during the medical examination.*
- (v) *As per the initial impression of the person examined (Column D11) it is stated that she was very upset and emotionally tormented.*
- (vi) *The Doctor testified as to the specific medical findings as found in column D12.*

- a) *There was a superficial abrasion and swelling (2cm x 2cm) on the right side of the head (occipital area) – right lower back of the head. She explained that an abrasion was like a graze or scrape on the scalp. By superficial it meant on the top layer of the skin.*

There was swelling on the area which means there is a collection of fluid or blood under that surface which had been grazed.

This injury could have been caused by a blunt object – something which could have hit that area.

- b) *Under genitalia, it is stated:*

- *Superficial laceration at perineum,*
- *Abrasion at bilateral labia minora – on the right and the left.*

There was bleeding from these injury sites.

The Doctor explained that the labia minora, commonly referred to as the inner lips, had grazes on the left and right hand sides. The labial injuries and injuries on the perineum were fresh (within a few hours) as it was still bleeding.

She explained further that a laceration was like a small cut. By superficial it meant on the top layer of the skin. The perineum is the space between the vagina and the anal area. There was a small cut in that area.

- (vii) *The Doctor further explained these findings with reference to diagram drawn by her at Appendix 1.*
- (viii) *The Doctor said that the injuries on the genitalia could have been caused by a blunt force trauma and confirmed that it could be caused by a forceful penetration of the vagina by an erect male penis. She further confirmed that the head injury could have been caused due to an object being thrown at the complainant compounded by her head hitting the floor due to falling.*
- (ix) *Dr. Burua further testified that when the vaginal anatomy is ready for sexual intercourse it would usually have to be relaxed – muscles should be relaxed and well lubricated. This also depends on the age of the woman and whether she has got any children. When the muscles are relaxed and well lubricated, you can hardly get any injury.*
- (x) *However, when the vaginal anatomy is not ready for sexual intercourse, the muscles will be tightened and not relaxed. And the vaginal area would be dry. In such circumstances, if there is penetration it would be a painful process for the woman. She may or may not have injuries – but she may have some discomfort or burning sensation.*
- (xi) *The Doctor confirmed that in her professional opinion, the injuries caused to the complainant in her vaginal area could have been caused due to the fact that she was not ready for sexual intercourse.*

[29] Evidence of WDC 3767 Maritina Lewamoli

- (i) *The witness testified that she has served in the Fiji Police Force for 15 years. Currently she is based at the CID Headquarters in Toorak. Prior to this she was based at the Lami Police Station.*
- (ii) *In September 2020, she was based in the CID Department at the Lami Police Station. On 21 September 2020, she received instructions to conduct investigation into this case. She was appointed as the Investigating Officer.*
- (iii) *Apart from being the Investigating Officer, she was also the Caution Interviewing Officer. She testified that the accused's caution interview was conducted at the Crime Office of the Lami Police Station. PC Luke was the Witnessing Officer.*
- (iv) *The recording of the caution interview had commenced at 20.00 hours on 21 September 2020, and was concluded at 14.40 hours on the next day.*
- (v) *The witness testified that the accused gave his answers to all the questions voluntarily and no force or false promises were made to him.*
- (vi) *The Record of Interview of Iliesa Samulala, dated 21 September 2020, was tendered to Court as Prosecution Exhibit PE2.*
- (vii) *In cross-examination the witness confirmed that she had not taken down the statements of the accused's 3 sons, who were at home at the time of the alleged incident, during the course of her investigations.*

[30] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[31] The accused decided to testify on his own behalf and also called his son Maikeli Baleinaverelala Tabuakuro, to testify on his behalf.

Case for the Defence

[32] Evidence of Iliesa Samulala

- (i) *The witness testified that he is 41 years old. He is an Electrician by profession and resides at Suvavou Village in Lami.*
- (ii) *The witness said that at around 7.00 a.m. on 21 September 2020 he was at home. He was getting ready to go to work. He had had breakfast with his children. After having breakfast he went inside his room to get his tool bag.*
- (iii) *When he went inside the room, Kata, the complainant, was sitting on the bed. She had asked if the bread had finished. He had told her that she should know because she had prepared breakfast. After that the complainant and he had started an argument. At that time his 3 sons were having breakfast in the sitting room.*
- (iv) *He testified further that when he came out to go to work, the complainant had called out something to him which made him go back inside the room. He had told the complainant to keep her voice down because people were passing by. And he had told the complainant to pack her stuff and leave the house.*
- (v) *The witness said that the complainant had kept talking out loud. He was thinking about his work because his pick-up was supposed to pick him up at 8.00 from the Flea Market and he was late. He had then thrown his bag at her and gone out to work. Later he explained that he had swung the bag at her.*
- (vi) *He had finished work after 7.00 p.m. and arrived home around 8.00 p.m. or a little after. When he came home his children were there but the complainant was not there.*
- (vii) *He had cooked dinner and had dinner with his children and was resting for a while before having a bath. He heard the Police knocking on the door to take him to the Police Station.*
- (viii) *The accused totally denied that he sexually abused the complainant.*

- (ix) *When asked as to why the complainant would make such an allegation against him he said as follows: "During the time we were together, usually we would fight. And most of the time I told her to leave the house. In 2019, in November, we fought and I told her to leave. My children were there when I told her to leave and her child was there as well, including her younger sister. She left our home for 8 months and around August 2020 she returned. That was when this incident occurred. During the time she was not at home I brought one girl one time at home and I took a picture of her while she was baking at home and I posted it on Facebook."*
- (x) *When asked again as to why the complainant would blame him or make up this allegation he said: "Because when I chased her in front of my children, her sister and her child and because of the photo of the girl I posted on FB. Before when I used to chase her it was just between the two of us. And on that day my children, her child and her sister were witnesses when I asked her to leave the house. When she wants to leave she would cause arguments between us and I would chase her out of the house."*
- (xi) *The witness was cross examined at length by the State Counsel. The prosecution's version of the events were put to the witness as suggestions. The witness continued to deny the allegation of Rape.*

[33] Evidence of Maikeli Baleinaverelala Tabuakuro

- (i) *The witness is the second son of the accused and is 13 years of age. He is attending Suva Adventist District School and is in Class 8.*
- (ii) *The witness testified that in 2020 he was residing with his father, brothers and Kata (the complainant).*
- (iii) *On 21 September 2020, at around 7.00 a.m., he was having tea with his father and his brothers. At that time an argument started between his father and the complainant in their room. The witness was in the sitting room. He said: "I just saw my dad swung his bag at Kata and then he went to work." He testified that he could see what was happening because the door to the room was open.*
- (iv) *His father had returned home after work around 8.00 in the evening.*
- (v) *When asked who Kata was the witness said it was the girl who his father had argued with.*
- (vi) *The witness was cross examined at length by the State Counsel. The prosecution's version of the events were put to the witness as suggestions.*

Analysis

- [34]** As stated before, the prosecution in support of their case, called the complainant, Katarina Bubu, Medical Officer, Dr. Losana Burua, and WDC 3767 Maritina Lewameli, the Investigating Officer in the case. The prosecution also tendered the Medical

Examination Report of the complainant, and the Record of Interview of the accused, dated 21 September 2020, as Prosecution Exhibits PE1 and PE2 respectively.

- [35]** The accused testified on his own behalf and also called his son Maikeli Baleinaverelala Tabuakuro, to testify in support of his case.
- [36]** As I have stated earlier, the burden of proving each ingredient of the two charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the two charges beyond reasonable doubt.
- [37]** As I have again stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [38]** Based on the said agreed facts and the testimony led during the trial, it is confirmed that the complainant and the accused, together with his three children from his first wife, were staying together at Suvavou Village, in Lami, at the time of the alleged incident. The complainant and the accused were in a de-facto relationship at the time of the alleged incident.
- [39]** Therefore, the first three elements of each count, namely the identity of the accused, the date of the incident and the place where the offending took place, are proved beyond reasonable doubt.
- [40]** In respect of the first count, the prosecution has to also prove beyond reasonable doubt that the accused unlawfully wounded the complainant, Katarina Bubu, by throwing his tool bag, which landed on the back of her head, and that he kicked her with his gum boots. In fact, the accused agrees that he threw his tool bag at the complainant, due to which the complainant sustained injuries at the back of her head. However, the accused denies that he kicked the complainant with his gum boots.
- [41]** In addition to the evidence of the complainant, the prosecution is relying on the admissions made by the accused in his caution interview statement, which was recorded by WDC Maritina, beginning on 21 September 2020 and concluding on 22

September 2020. The admissibility of the said caution interview statement is not in dispute and the said Record of Interview of the accused has been tendered to Court as Prosecution Exhibit PE2.

[42] Therefore, the accused agrees that he made his caution interview statement voluntarily and fairly, without any inducement, threat or promise. The statement sets out the manner in which the offence stated in the first count took place. Accordingly, I am of the opinion that the said admissions are true and can be accepted and relied upon by this Court.

[43] As per his caution interview statement the accused admits that he had an argument with the complainant in the morning of 21 September 2020. During the course of the argument he admits that he swung his tool bag, containing screw drivers, at the complainant. The bag had hit the back of her head. In the admitted facts it has been admitted that due to this the complainant had sustained injuries at the back of her head.

[44] In the Medical Examination Report of the complainant (Prosecution Exhibit PE1), it is stated that she had a superficial abrasion and swelling on the right side at the back of the head (occipital area). Dr. Losana Burua, explained the nature of the said injury.

[45] However, in my opinion, this injury does not tantamount to a "wound", which has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane.

[46] Therefore, the accused cannot be found guilty of Unlawful Wounding, in terms of Section 261 of the Crimes Act.

[47] Section 162 (1) of the Criminal Procedure Act provides that *"Where a person is charged with an offence but the Court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the Court may record a conviction made after due process (for the lesser or alternative offence)"*.

- [48] Accordingly, I am satisfied that the evidence adduced in the trial supports a conviction for the alternate offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act, in respect of Count One.
- [49] In terms of Section 275 of the Crimes Act “A person commits a summary offence if he or she commits an assault occasioning actual bodily harm.”
- [50] The term ‘harm’ (or bodily harm) has been defined at Section 4(1) of the Crimes Act to mean: *“any bodily hurt, disease or disorder (including harm to a person’s mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).”* Whereas, “dangerous harm” has been defined to mean as *“harm endangering life”*.
- [51] The injury caused to the complainant, namely the superficial abrasion and swelling on the right side at the back of the head (occipital area) clearly falls within the above definition.
- [52] In the circumstances, I find the accused guilty of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act. Accordingly, I convict the accused of the said charge.
- [53] In relation to the count of Rape, it is the duty of the prosecution to prove the remaining elements of the charge beyond reasonable doubt. The said elements are: That the accused penetrated the vagina of the complainant Katarina Bubu, with his penis; that this occurred without the consent of the complainant; and that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [54] I have summarized the evidence of all the witnesses led during the trial. The complainant had clearly testified as to how the accused had assaulted her and then sexually abused her.
- [55] The accused although admitting that he threw his tool bag at the complainant, totally denies that he sexually abused her. He called his 13 year old son to testify on his behalf.

[56] The accused states that it was not possible for him to sexually abuse the complainant as his 3 children were observing what was happening inside the room as they were having breakfast in the sitting room. The complainant testified that during the incident the door to the room was closed and that the 3 children were in their room and not in the sitting room. In any event, the complainant said there was a curtain at the door to the room.

[57] In the Record of Interview of the accused which has been tendered to Court as Prosecution Exhibit PE2, the following question had been asked from the accused at Question 50: It is alleged that you pulled both her hands and dragged Katarina from the bedroom onto the straw mat which was on the bedroom floor. What can you say to this?

He answered as follows: Not true. The bedroom door was open and my children are inside their bedroom.

[58] The answer to the above question is consistent with the complainant's testimony that the accused's 3 children were in their room at the time of the alleged incident and not in the sitting room as stated by the Defence.

[59] For the above reason and having analysed all the evidence, it is my opinion that the defence version cannot be accepted as truthful and credible.

[60] Having analysed all the evidence, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable.

[61] Although in terms of the provisions of Section 129 of the Criminal Procedure Act which provides that, "Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted", the complainant's evidence has been corroborated by the medical evidence of Dr. Losana Burua.

[62] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Rape with which the accused is charged in Count 2.

[63] In the circumstances, I find the accused guilty of the charge of Rape with which he is charged.

[64] Accordingly, I convict the accused of the charge of Rape.

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 29th Day of October 2021

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.

Solicitors for the Accused : Office of the Legal Aid Commission, Suva.