

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 178 of 2019

STATE

v

TOBIA KORODUVA

Appearances : Ms. Semisi, K for the State
: Ms. Mishra, N for the Accused

Trial : 28 – 30 March 2022
: 1 April 2022

Judgment : 19 April 2022

JUDGMENT

The charges

1. The Accused is charged with 2 counts of Rape contrary to section 207(1) and (2) (a) of the Crimes Act 2009.
2. The information alleges in the 1st Count that between the 1st of March 2018 and 31st August 2018, the Accused had carnal knowledge of the Complainant without her consent.
3. The 2nd Count also alleges that between the 1st of September 2018 and 30th December 2018, the Accused had carnal knowledge of the complainant without her consent.

Representative counts

4. Both counts are representative in nature, meaning the Prosecution alleges that there was more than one separate acts of rape in each count. The Prosecution is required to prove that between the specified dates in each count, at least one act of rape occurred. (Section 70 (3) Criminal Procedure Act 2009; see also *Koro v The State* Criminal Appeal No: HAA0048 of 2002L 2 October 2002; *State v Kabaura* Criminal Case No. HAC 117/10, 9 August 2010, at [9])
5. It is the Prosecution that bears the burden of proving the charges against the Accused, and to do so beyond a reasonable doubt.

Elements of Rape

6. The elements of the offence of rape that the Prosecution must prove are:
 1. The accused
 2. Had sexual intercourse with the Complainant (that is, penetrated Complainant's vagina with his penis)
 3. Without the Complainant's consent
 4. Knowing that the Complainant was not consenting
7. Section 206 (1) of the Crimes Act defines consent as meaning consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. Submission without physical resistance by a person to an act of another person shall not alone constitute consent.

Agreed Facts

8. Both parties filed agreed facts pursuant to section 135 of the Criminal Procedure Act. These admitted facts constitute sufficient proof of the said facts. Where facts admitted constitute elements of the offence, the said elements are proved beyond reasonable doubt.

9. In this case, the ages of the Complainant and the Accused are admitted. The Accused's wife is the biological sister of the Complainant's mother.
10. Between January 2017 and September 2018, the Complainant and her family comprising of her mother, stepfather, step sister and brother had resided with the Accused and his wife in a 3 bedroom house in Tovata, Makoi, Suva. The Complainant occupied one of the rooms of this house.
11. It is also agreed that between 01 March 2018 and 31 August 2018, the Accused had sexual intercourse with the Complainant on more than one occasion at their home in Tovata, Makoi.
12. In September 2018, the Accused and his wife and the Complainant's family moved from Tovata, Makoi to reside at Colo-i-Suva. It is agreed that between 1 September 2018 and 30 December 2018, the Accused had sexual intercourse with the Complainant on more than one occasion at their home in Colo-i-Suva.
13. On 23 April 2019, the Complainant was medically examined at the CWM Hospital and found to be pregnant. She gave birth to a baby boy on 18 August 2019. Paternity test results dated 4 June 2020 showed the Accused as the biological father of the child.
14. These facts are not disputed.
15. From the facts agreed between the parties therefore, the elements of the identity of the Accused and the acts of carnal knowledge with the Complainant in both counts of the information are proved beyond reasonable doubt.
16. The issues for the Court's determination therefore are whether or not the Complainant had consented to sexual intercourse with the Accused. If she did not consent, the issue then becomes whether the Accused, at the time of sexual intercourse with her, knew she was not consenting.

The Prosecution case

17. The Complainant was the sole witness for the Prosecution.

18. She gave evidence that in 2017, her family had lived in Nadi. They came to Suva for Christmas and New Year and had lived at Qauia. Before school started, she was told to go live with her aunt and the Accused in Tovata, Makoi. In 2018, she was attending Form 4 in a High School in Suva.
19. During the month of March 2018, on a Wednesday or Thursday, there was a family gathering in Kinoya which her parents, her aunt and the Accused had attended. After the function, her parents had stayed back to help with the cleaning up while the Accused and her aunt returned home about 11pm – midnight. The Accused and her aunt had their shower and went to bed.
20. She was lying down in the living room as it was hot inside the room and it was dark as she had turned off the lights. She heard footsteps inside the house but could not see who it was. Then someone came down and lay down beside her. It was the Accused, her uncle. She could see it was him from the light from the lamp post outside the living room window. She had asked him what he was doing but he said to lie down and sleep. He was lying right beside her and his hand touched her arm. He touched her upper thighs from on top of her shorts. He touched her through her shorts but since her shorts were tight, the Accused could not put his hands inside. She was scared as she could not believe her uncle would do that to her. The Accused then tried to remove her shorts by opening the 3 buttons on her shorts. She had tried to stop him but was not able to do so as he was stronger than her. She tried to push him away. It was hard for the Accused to remove her shorts because she was moving so he put one of his hands on her shoulders to stop her from trying to push him away. She told the Accused not to do it. He did not respond and kept trying to remove her pants.
21. The force with which the Accused opened the first button of her shorts also opened the other buttons as well. The Accused then pulled her shorts down and her shorts went down with her panties as the shorts had been tight on her hips. As soon as her pants came off, the Accused quickly pulled his pants down to his knees and came on top of her. He put his penis into her vagina and moved forward and backward. It was painful and she cried. After

the Accused ejaculated, he got up and put his clothes on. This was the first time the Accused had sexual intercourse with her.

22. She was shocked and scared. She did not shout as it was midnight and she thought everyone would be asleep. Her aunt was in the room at the time and she thought her aunt would have heard her as she had a loud voice. The Accused warned her not to tell anyone or he would do something to her or to her younger sister. After this incident, she went to shower and then took her beddings and went into the room. She did not agree with what the Accused had done to her.
23. She had wanted to tell her Aunt about what had happened but when she went to the kitchen ~~the next morning, the Accused was already there with her aunt so she could not say~~ anything. Her family returned from the function the next day after she had left for school. She did not tell anyone in her family about what had happened as she had been scared the Accused would do something to her or to her younger sister.
24. The Complainant said there were other occasions during the period from 1 March 2018 to 31 August 2018 that the Accused had sexual intercourse with her without her consent.
25. The Complainant also recounted another occasion on a Saturday sometime between 1st September 2018 and 30th December 2018, at a time after their family, together with the Accused and her aunt, had moved to Colo i Suva. They had all stayed in a one room house with only a partition separating the kitchen from the living room that they all shared.
26. On this particular occasion, she had been alone at home watching movies on a phone with her younger sister when the Accused returned from work at around 10 – 11 o'clock in the morning. After having something to eat, the Accused lay down between her and her sister. He touched her body and pulled her close. She had asked him to let her go but he did not do so, only releasing her when her sister cried for milk. She went to get her sister's milk bottle and then lay faced down on the other side of her sister, away from the Accused. When her sister turned to watch her cartoon after finishing her milk, the Accused got up and came to her side. He hugged both her and her sister. She tried pushing him off but

could not do so. The Accused touched her back and told her to take off her t-shirt but she refused. When he started to pull her pants off, she told him not to do it but he paid no heed. He pulled her pants and panties off, then pulled his own shorts and underwear down to his knees. She tried to get up but was not able to do so as he was already on top of her back. He inserted his penis into her vagina and moved forward and backward until he ejaculated. He then got up, put his clothes on and then lay down again beside her and her sister and went to sleep.

27. She did not agree with what the Accused had done to her and she told him it was wrong for him to be doing that to her but he did not respond. She was scared because she had not expected the Accused who was her uncle to do such a thing to her. She heard neighbours but she did not tell anyone as she did not trust them. Nor did she try to leave the house as it was far from the road and she had no money to pay for transport anywhere.
28. She was scared and thought that if she had told someone sooner, what the Accused was doing to her would have stopped already. She felt that if she told anyone now, nobody would believe her because it had been happening for a long time.
29. The matter only came to light when an aunt suspected she was pregnant and confronted her. The matter was reported to the Police and when she told the Police about what had happened, she was scared because of the Accused's threats about doing something to her or her little sister if ever she told.

The Defence case

30. When explained his rights following the close of the Prosecution case, the Accused chose to give evidence and also called his wife as a witness in his defence.
31. The accused said that during the period from March 2018 to August 2018, he was in a relationship with the Complainant. They had been playful with each other and eventually became intimate and had sexual intercourse. As to the incident recounted by the Complainant in respect of the charge in Count 1, the Accused says that on that particular night, he and the Complainant had planned for the Complainant to sleep in the living room.

When he came to her in the living room, she did not push him away nor did she object to having sexual intercourse with him.

32. He denies raping the Complainant saying she had fully consented to each act of sexual intercourse with him. She did not resist, did not say anything to him and did not stop him from touching her.
33. When their families moved to Colo i Suva, his relationship with the Complainant continued during the period from September 2018 to December 2018. On the Saturday relayed by the Complainant in her evidence, he says did not rape her. Instead, they had consensual sexual intercourse on this and other occasions during this period.
34. He admitted that when interviewed by the Police, he had denied having sexual intercourse with the Complainant and that his defence in Court had initially been one of denial. He said he had denied sexual intercourse with the Complainant and denied the child was his as he had been frightened since the Police had threatened him and told him about the rape charge. He admitted lying to the Police about not having had sexual intercourse with the Complainant. He agreed he had changed his defence from complete denial to consensual intercourse only after receiving the paternity test results showing him as the father of the child born to the Complainant.
35. The Accused person's wife was called as a defence witness. She said she did not see anything out of the ordinary between the Accused and the Complainant. Between March 2018 and August 2018, the Accused and Complainant's relationship was like that of father and daughter. She had not suspected anything was going on between the Accused and the Complainant until she heard a rumour that the Accused and Complainant had been caught kissing. She had confronted them about it and both of them screamed back at her denying the rumour. The Complainant had said nothing was happening.
36. When the family moved to Colo i Suva during the period from September to December 2018, the Accused and Complainant had behaved as normal and she had not known anything was happening between the two of them.

Analysis

37. It is not disputed that there had been penetrative sexual intercourse between the Accused and Complainant on both incidents recounted by the Complainant in both counts of the information, and other occasions as well within the periods given in both counts.
38. The only issues remaining for the Court's determination therefore are:
- (i) whether the Complainant had consented to sexual intercourse in each count, and;
 - (ii) whether the Accused had known that the Complainant was not consenting to sexual intercourse with him.
39. The Prosecution case stands or falls on the Complainant's evidence and credibility. If I accept as true her version of events that she had not consented to sexual intercourse with the Accused on both counts and the accused knew she was not consenting, I must find the Accused guilty as charged.
40. The fact that the Complainant had a child as a result of sexual intercourse with the Accused is proof only of sexual intercourse. It is not evidence of consent or lack thereof. It is the same with the paternity test results showing the Accused as the father of the child.
41. The matter came to light only when the Complainant became pregnant. Prior to this, the Complainant had not complained to anyone about the Accused having sexual intercourse with her without her consent.
42. It is possible to view the failure to shout for help from her aunt in the room or from neighbours in respect of the Complainant's evidence in the 1st Count as meaning the Complainant had consented to sexual intercourse, but not necessarily. The failure to shout or to complain does not inevitably amount to consent.
43. Victims of sexual assault do not all react in the same or similar manner. Some may shout, others may not. Some may report immediately after the incident, others may not do so for a while, and then only to those they trust. Some may even report to a stranger. Others may

not report for years, or at all. The reaction of sexual assault victims therefore cannot be straitjacketed.

44. The Complainant says she had not told anyone as the Accused had threatened to do something to her or her younger sister if she did so. She had wanted to tell her aunt, the Accused's wife the day after the first incident she recounted in Count 1 but the Accused had been around at the time. She says that even when telling the Police what had happened, she was still scared that the Accused would do something to her or her sister.
45. When the incident relied on in Count 2 happened, she said she felt that if she had told someone earlier, the Accused would have stopped what he was doing to her, and she felt no one would now believe her if she told at that point as it had already been happening for a long time.
46. This was this Complainant's reaction. I do not doubt that the Accused was not around the Complainant's aunty all the time such that the Complainant was totally without an opportunity to speak with her aunt and make a complaint. I accept that the Complainant did have the opportunity to complain and chose not to. She says she was scared on account of the Accused's threat to do something to her or her younger sister if she told. Later, when the Accused continued to have sexual intercourse with her, she felt no one would believe now if she told as it had been going on for a long time.
47. I find her reaction to be not unreasonable and I do not consider the lack of complaint affected the truthfulness of her evidence in Court.
48. I have considered the Accused person's evidence. He did not have to give evidence as he is not required to prove his innocence. It is for the Prosecution to prove his guilt beyond a reasonable doubt. If I find that it is possible his version of events could be true, I must find him not guilty of rape and consider whether the facts proved beyond reasonable doubt could support a conviction on a lesser or any other sexual offence. Even if I do not believe his evidence, I must still be satisfied that the Prosecution evidence before the Court is sufficient to prove his guilt before I can find him guilty.

49. The Accused does not dispute having had sexual intercourse with the Complainant in both incidents she recounts. He says however that they had been in a relationship and had had consensual sexual intercourse. On oath, he stated in respect of the allegation by the Complainant in Count 1 that he and the Complainant had planned for her to sleep in the living room for them to have sexual intercourse there. This however was not put to the Complainant in cross examination.
50. The Accused person's wife is neither an independent witness nor did she witness any of the incidents of sexual intercourse relayed by the Complainant and the Accused, saying she had not suspected anything was happening between the pair. She had been in a de facto relationship with the Accused for many years and married him in September 2020. This was after it was discovered that the Accused had fathered the child born to the Complainant in August 2019. She gave evidence that when she confronted the Accused and Complainant about the rumours of them kissing, they had both screamed back at her saying the rumours were not true. I treat her evidence as I do all other evidence in this matter, and note that being his wife, she has an interest in ensuring the Accused does not get into trouble.
51. I decide the allegations against the Accused and the evidence before the Court dispassionately and without partiality or emotion.
52. On the whole of the evidence at trial, I believe the evidence of the Complainant who struck me as a truthful, consistent and credible witness.
53. I accept and believe her evidence that on a weekday in March 2018, the Accused had sexual intercourse with her without her consent. I accept she had struggled in resistance of the Accused person's efforts to remove her clothing and have sexual intercourse with her. I am satisfied beyond a reasonable doubt that at the time, the Accused knew that the Complainant did not consent to sexual intercourse with him.
54. On the second representative count of rape, I am satisfied beyond a reasonable doubt that on a Saturday sometime between September 2018 and December 2018, the Accused, after returning from work in the morning, had forceful sexual intercourse with the Complainant

in the living room of the house they lived in in Colo i Suva, without her consent. I feel sure that the Accused knew the Complainant was not consenting to sexual intercourse with him.

55. I accept that there were other occasions during the period within the 2 counts in the information when the Accused had sexual intercourse with the Complainant without her consent.
56. I reject as untrue the Accused's person's defence that he had been in a relationship with the Complainant and that she had consented to sexual intercourse with him. I found him evasive when confronted in cross examination with his answers to the Police denying any sexual intercourse with the Complainant, and later admitting the same after the results of the paternity test for the child born to the Complainant in August 2019 were known. In any event, I do not accept his evidence of consensual sexual intercourse with the Complainant.
57. I find the Accused guilty and convict him of both charges.




Stainiu F. Bull
Acting Judge

Solicitors:

Office of the Legal Aid Commission for the Accused
Office of the Director of Public Prosecutions for the State