

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 164 of 2020

STATE

V

PANAPASA NATUI

Counsel : Ms. S. Naibe for the State.
: Ms. J. Singh for the Accused.

Dates of Hearing : 21, 23 June, 2022

Closing Speeches : 27 June, 2022

Date of Judgment : 28 June, 2022

JUDGMENT

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

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

FIRST COUNT

State of offence

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

Particulars of Offence

PANAPASA NATUI, on the 6th day of August, 2020 at Vitawa Village, Rakiraki, Ra in the Western Division, had carnal knowledge of “AA”, without her consent.

SECOND COUNT

State of offence

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

Particulars of Offence

PANAPASA NATUI, on the 2nd day of September, 2020 at Vitawa Village, Rakiraki, Ra in the Western Division, had carnal knowledge of “AA”, without her consent.

THIRD COUNT

State of offence

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

Particulars of Offence

PANAPASA NATUI, on the 6th day of September, 2020 at Vitawa Village, Rakiraki, Ra in the Western Division, had carnal knowledge of “AA”, without her consent.

FOURTH COUNT

State of offence

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

Particulars of Offence

PANAPASA NATUI, on the 9th day of September, 2020 at Vitawa Village, Rakiraki, Ra in the Western Division, penetrated the mouth of “AA”, without her consent.

FIFTH COUNT

State of offence

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

Particulars of Offence

PANAPASA NATUI, on the 9th day of September, 2020 at Vitawa Village, Rakiraki, Ra in the Western Division, had carnal knowledge of “AA”, without her consent.

2. In this trial, the prosecution called one witness and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of all the offences 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 above counts the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina and the mouth of the complainant with his penis on the dates mentioned in the information;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

5. In this trial, the accused has denied committing the offences of rape as charged. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina and the mouth of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

6. The first element of the offence is concerned with the identity of the person who allegedly committed these offences. This element is not in dispute.

7. The second element is the act of penetration of the complainant's vagina and the mouth with the penis. This element is also not in dispute.

8. The third element of consent is in dispute, 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.

9. If this court is satisfied that the accused had penetrated the vagina and the mouth of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above, this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina and mouth without her consent on the dates mentioned in the information then this court must find the accused guilty as charged.
12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina and mouth by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I 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.
15. In this case, the accused is charged with five counts of rape, I have borne in mind that the evidence in each count is to be considered separately from

the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

16. 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.
17. 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

18. The complainant informed the court that in the year 2020 she was residing with her mother and daughter at Vitawa Village, Rakiraki in her 4 bedroom house.
19. On 6th August, 2020 between 9 am and 11 am the complainant was cleaning her house alone when the accused came and asked for her assistance in using the Facebook. The complainant assisted the accused who left after a while. After doing her chores she went to sleep. The complainant and the accused are known to each other she is the aunt of the accused and are also neighbours.
20. After a while the complainant felt someone was touching her breasts when she woke up she saw it was the accused. The accused forcefully touched

her breasts and held her tightly. The accused threatened the complainant by saying if she screams he will kill her. The accused then had forceful sexual intercourse with her. According to the complainant when the accused forcefully touched her breasts she panicked and was frightened. After being threatened the complainant was silent and she did not do anything.

21. Before having sexual intercourse the accused held the complainant's hands and legs tightly and told her not to scream but to just relax he then inserted his penis into her vagina. At his time the complainant was naked because after being told by the accused she had taken off her clothes. The sexual intercourse lasted for 20 minutes. The complainant did not do anything because she did not expect the accused to do that degrading act on her.
22. After the accused left, the complainant sat on the floor and was staring. The complainant did not tell anyone about what the accused had done to her the reason for not telling anyone was if she told anyone he would kill her.
23. In respect of the second allegation, on 2nd September, 2020 at about 11pm the complainant was sleeping in her bedroom with her daughter on the bed. The accused came in her bedroom drunk when he called the complainant she told him to go away. She did this to protect her daughter who was sleeping with her. The accused told the complainant not to talk too much.
24. At this time the accused kissed her and said "*you are my lover*". The accused told the complainant not to do anything or say anything because he wanted to have sexual intercourse and that she was his wife. According to the complainant she was forced by the accused to have sexual intercourse with him. The accused made the complainant lie down, took off her pants and then inserted his penis into her vagina and then both had sex. She had bent

over and the accused inserted his penis from behind into her vagina for about 15 minutes.

25. The complainant stated that she did not want to have sex. The accused response was *“my lover I want to have sex with you.”* After the accused was finished he said that he should go home otherwise his wife will find out. Whilst all this was happening the complainant’s daughter was sleeping. After the accused left the complainant did not do anything and also did not tell anyone. The reason for not telling anyone was because if she did tell anyone the accused will cut her head off and kill her.
26. The complainant further stated that after this she was worried about what had happened and she did not expect this.
27. In respect of the third incident, on 6th September, 2020 at around 10 am the complainant was on her way to the bush to cut firewood, she took with her mobile phone. The accused called the complainant and told her that he was returning from town and he had bought some bread for her and for her to wait for him. The accused also told her for them to go to the nearby bush before the farm to have sexual intercourse.
28. Upon further questioning the complainant stated that she waited for the accused, when the accused came he wanted to go into the bush. The complainant went with the accused. The reason why she went with him was because she was afraid he might kill her because she had a knife and the rope with her. When the accused came he forced her to go with him by holding her hand. Here the accused told her to take off her pants. He also removed his pants and both had sexual intercourse for about 20 minutes.

29. After this, the accused went away and she went to cut firewood, the complainant did not tell anyone about what had happened because she was afraid the accused will kill her.
30. In respect of the fifth count on 9th September, 2020 at about 9 am the complainant was alone at home after finishing her chores she went to lie down and sleep in her bedroom.
31. All the doors of the house were open, the complainant does not know from which way the accused came into the house. When in the bedroom the accused closed all the curtains and windows and brought down the mosquito net and closed the door. The accused hugged the complainant, touched and sucked her breasts and then forced her to remove all her clothes.
32. The accused was wearing his underwear but he had his penis out, he hugged her and forcefully made her lie down, forcefully held her hands and legs came onto the bed for both to have sexual intercourse. The sexual intercourse lasted for about 20 minutes.
33. On the same occasion before sexual intercourse the accused had penetrated his penis into the mouth for the complainant. She stated that if she did not do what he wanted he would kill her.
34. After the sexual intercourse both wore their clothes and at this time the complainant heard her nephew calling from outside the house and saying what the accused was doing inside the house. The complainant went outside first followed by the accused.

35. The complainant did not do anything after the accused left and she did not tell anyone about what happened because she was frightened the accused would kill her. After one week the complainant wrote a letter to the police and reported the matter, the reason for the delay was, because she was afraid the accused might do something to her. On all occasions the complainant did not consent.
36. In cross examination, the complainant agreed that in the year 2020 between August and September she was living with her mother, her nephew Sekove, her daughter and her sister. Her nephew would go around 6 am to the sugar cane field and would come back sometimes at 9 am or around 11 to 12 midday. The complainant also agreed that the accused assisted her and her family with groceries and money.
37. The complainant had met the accused before and she would usually talk to him over the phone before 6th August, 2020 but she denied calling him. The complainant also denied that on 6th of August when the accused went to the complainant's home she had said to him "*he missed his luck*" and both had not sat down and talked to each other and also she denied that she had called the accused a day before that is on the 5th.
38. The complainant denied she was having a relationship with the accused and it was the accused who was proposing to her to be in a relationship with him. The complainant agreed that she went around the village and to the town alone and yet she did not tell anyone about what the accused had done to her. She denied she had agreed to have sex with the accused in the bush near the farm. She told the court the accused had forced her to have sex with him.
39. When it was suggested that after the first incident she could have told her mother or her nephew the complainant said that no one was at home at that

time. When further questioned that she could have told her nephew after he came home the complainant agreed but said that she was afraid to tell her nephew because the accused had threatened her.

40. The complainant also stated the reason she did not wake her daughter was because the accused had told her not to tell anyone and she was afraid of the accused. The complainant denied on the 2nd of September, her sister was sleeping in the sitting room and that she had not sneaked the accused into her room and both had sexual intercourse on the bed while her daughter was sleeping.
41. The complainant agreed that on 6th of August and 2nd of September she had consensual sexual intercourse with the accused. According to the complainant most of the time the accused would call her and they would talk to each other.
42. The complainant agreed on 9th September at about 9 am she was in her bedroom with the accused and she did not run away from the accused because she wanted to know what the accused had come to do even though she was scared. When it was put to the complainant that she was not scared of the accused the complainant said that she just followed his instructions because she was afraid he would kill her although she had enough opportunities to escape, she did not do so.
43. The complainant stated on 9th September when the accused came home she was lying on her bed. She was referred to her police statement paragraph 5 which was read as:

“On 9th September, 2020 I was at home cleaning the house at about 9 o’clock Panapasa came home he told me to go to the bedroom”.

44. When asked which version was correct the complainant said the version that she was already in the bedroom.

PREVIOUS INCONSISTENT STATEMENT

45. This court directs its mind to the fact that the defence counsel during the cross examination of the complainant had questioned her about some inconsistency in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.
46. This court is allowed to take into consideration the inconsistency between what this witness told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents.
47. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
48. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
49. The complainant agreed that on 9th September she had consensual sexual intercourse with the accused in her bedroom. Whilst both the accused and

the complainant were in the bedroom her nephew Sekove came and he knocked on the door of her bedroom.

50. After 10 minutes Sekove again came back and knocked on the door and this time the accused opened the door, by this time both the complainant and the accused were wearing their clothes and they walked out of the room. The complainant told Sekove that the accused was inside her bedroom.
51. The complainant agreed that she did not tell anyone about any of the incidents of rape, she denied the suggestion that only after Sekove saw the accused inside her bedroom with her that she had come up with these allegations of rape. However, she agreed that when the accused had asked her to suck his penis she had agreed. From 6th August to September she had been in contact with the accused on the phone.
52. Finally, the complainant agreed that she had consented on all the occasions she had mentioned.
53. In re-examination, the complainant clarified that she had said yes to all allegations put to her was by her consent because at the time she was worried he might do something to her. He told her to do, or he would do something to her so she said yes to whatever he wanted to do and if she refused he would kill her.
54. This was the prosecution case.

DEFENCE CASE

55. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and called one witness that is his right and

no adverse inference will be drawn from the fact that the accused decided to remain silent. This court must take into account what the defence adduced in evidence through the defence witness when coming to its conclusion.

56. The defence witness Sekove Nawaimalua informed the court that the complainant is his aunt. On 9th September, 2020 he was residing at Vitawa Village with his aunt in her house. The witness was a sugar cane cutter, on 9th September he left home at about 6 am and was back at around 8.45 to 10.00 am. When he reached home he saw the accused son outside the house.
57. The witness went inside the house to put his knife and he also called the accused name but there was no response. He then went outside and told the accused son that his father was not inside but the accused son did not leave.
58. Again the witness went inside the house and saw the bedroom door of his aunt closed so he started knocking on the door. The complainant came out of the room and told him that the accused was not in the room. The witness went to his room to get his towel when he returned he saw the accused son inside the house.
59. The witness again went and knocked on the door, this time the accused opened the door, he observed that the accused was sweating. He saw his aunt and the accused were normal but pretending that nothing had happened. The accused and his aunt went into the sitting room, sat down and told stories. After 5 minutes the accused left and the complainant started cleaning the house. The witness did not tell anyone about what he had seen since the complainant is his aunt and the accused his brother. His aunt did not say anything to him.

60. In cross examination, the witness agreed when he left home early in the morning the complainant was alone at home. He did not know what had happened between the accused and his aunt. The witness maintained that his aunt and the accused came into the living room and told stories.
61. When it was suggested that his aunt and the accused did not have any conversation in the sitting room the witness stated that his aunt and the accused had sat down but it was only the accused and him talking about sugar cane cutting while his aunt was listening.
62. On this day it was the first time he had seen the accused inside his aunt's bedroom with his aunt.
63. In re-examination, the witness stated that when he was talking to the accused his aunt and the accused were sitting together in the house.
64. This was the defence case.

ANALYSIS

65. The prosecution alleges that on the dates mentioned in the information the accused had forcefully penetrated the vagina and the mouth of the complainant with his penis after threatening her that he will kill her if she screamed or told anyone about what he had done to her. The complainant was alone on all occasions and she was frightened of the accused who was her nephew and neighbour.
66. On most occasions, the accused would enter the house of the complainant and walk into her bedroom and have forceful sexual intercourse. It was on only one occasion the accused after calling the complainant on her phone told her to wait for him so that he could give her bread forcefully took her to the bush by holding her hand and had forceful sexual intercourse.

67. On all occasions the complainant did not consent she was only following the instructions of the accused does not mean that she was freely and voluntarily agreeing to what he was doing to her. She did not tell anyone because of the constant threat by the accused to kill or harm her which had instilled fear in her. In this case the complainant had made it clear that she did not consent to what the accused had done to her.
68. There is no reason for the complainant to lie or any ulterior motive to falsely implicate the accused and she told the truth about what the accused had done to her and she was also consistent in what she told the court. She only did what she was told by the accused and in all honesty she did not want to have sex with him.
69. On the other hand, the defence says this is not a case of rape at all. The complainant and the accused were in a relationship which got out of hand when on the 9th the nephew of the complainant came and saw both his aunt and the accused in his aunt's bedroom. The complainant had no choice but to cry rape. The defence is asking this court to look at the dates in question and to consider the delay between the allegations. The complainant was a matured adult who was not living alone but was in the company of her mother, grown up nephew and daughter. The complainant was not under any constant threat or scrutiny of the accused that she could not tell anyone about what the accused was doing to her.
70. The defence also says that the majority of the allegations raised by the complainant in respect of what happened to her were in her house during day time and on one occasion during late night. The accused entered the house through the door which was left open by the complainant and no one else.

71. Another interesting aspect of one of the allegation's raised is that in the middle of the night the complainant's 10 year old daughter was sleeping on the same bed as the complainant and the description given by the complainant of what the accused had done to her just does not make sense with a child sleeping on the same bed. The least the complainant could have done was to wake her daughter but she did not.
72. Another thing is that Sekove had seen the complainant and the accused in the complainant's bedroom after the complainant had opened the door. Both came out of the bedroom and sat in the sitting room. The complainant did not tell anything to Sekove about what the accused had done to her. According to Sekove when the complainant and the accused had seen him they were pretending that everything was normal.
73. The defence finally submits that the complainant lied in court when she said the accused had penetrated her vagina and mouth with his penis without her consent and that the accused had threatened her. The allegations only came about after the complainant was seen with the accused in her bedroom by her nephew Sekove and she cried rape to avoid humiliation. It does not add up that despite being raped the complainant would wait for the accused to bring her bread and also she would wait for him in her house to hear what the accused wanted to say to her or would continue to talk to him over the phone which suggests the complainant did not fear the accused.

DETERMINATION

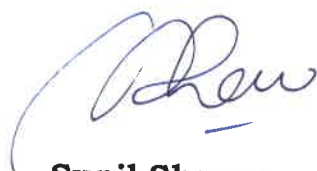
74. The only issue in this trial is whether the complainant had consented to what the accused had done to her. After carefully considering the evidence adduced by the prosecution and the defence, this court is unable to accept the evidence of the complainant as truthful and reliable. From the

evidence before the court it is glaringly obvious that she had falsely implicated the accused.

75. The complainant and the accused were no strangers they were known to each other and as the complainant had told the court they were talking to each other over the phone even after the first alleged incident. The allegations advanced by the complainant are founded on numerous dates, however, there are some days delay between one incident to the other. This in my view gave the complainant more than enough time or opportunity to tell someone about what the accused had done to her. Moreover, the accused was not living with the complainant which would have made her fearful of the accused presence and would have prevented her from telling someone about what the accused had done to her.
76. The complainant was not living alone either she had her immediate family members living with her. It is also surprising to note that each time the accused went into her house either during the day or night time the doors were open. There is no allegation that the accused had gone into the house stealthily. This suggests to me that the complainant knew when the accused would come and she was waiting for him by leaving the door open.
77. Furthermore, in respect of the second incident the complainant told the court that she had bent over to allow the accused to penetrate her vagina from behind and also before the incident in the bush the accused had called the complainant to tell her that he was coming over to give her bread. The complainant had enough time to alert someone or leave her house or the bush, I do not accept that despite carrying a knife and rope with her the accused had forcefully pulled her hands and taken her to the bush. I also reject the evidence of the complainant that she was threatened by the accused that he will kill on all occasions as unworthy of belief.

78. The complainant struck me as a person who could not be forced to do something she was not willing to do, in my judgment she knew what she was doing and she had consented without any force or pressure from the accused. The complainant changed her tune when Sekove saw her with the accused in her bedroom.
79. The complainant narrated all the incidents to make it look like a genuine happening which did not add up. The evidence of the complainant was improbable she was a free agent at all times and she had the opportunity to tell someone about what the accused had done to her. I do not accept that the complainant did not tell her family members about what had happened to her because she was threatened by the accused as unbelievable as well. This court is unable to give any weight to the complainant's evidence in respect of the allegations raised.
80. On the other hand, I accept the evidence of the defence witness Sekove that he had seen the accused and his aunt together in the bedroom and they were pretending that nothing had happened as an honest and truthful observation. I have no doubt in my mind that this witness told the truth in court.
81. On the basis of the evidence before this court it is unsafe to find the accused guilty upon the unreliable evidence of the complainant. In cross examination the complainant had admitted that she had consented to what the accused had done to her was an honest admission. This court is not satisfied beyond reasonable doubt that on the dates mentioned in the information the accused had penetrated the vagina and the mouth of the complainant without her consent.
82. For the above reasons, I find the accused not guilty of all the offences as charged and he is acquitted forthwith.

83. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

28th June, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.