

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 185 of 2019

STATE

V

VILIAME EREINADI

Counsel : Mr. Joeli Nasa for the State
Ms. Esiteri Radrole for the Accused

Dates of Trial : 2-4 May 2022

Closing Submissions : 6 May 2022

Judgment : 27 July 2022

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "KN".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Viliame Ereinadi, is charged with the following offence:

ONE COUNT

Statement of Offence

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

Particulars of Offence

VILIAME ERANADI, between the 1st day of October 2017 and the 31st day of October 2017, at Sigatoka, in the Western Division, penetrated the vagina of **KN**, with his penis, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 3 days. Thereafter, the Learned Counsel for the State and Defence 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 Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

- [7] 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.

- [8] 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.
- [9] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.
- [10] Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case between 1 October 2017 and 31 October 2017);
 - (iii) At Sigatoka, in the Western Division;
 - (iv) Penetrated the vagina of the complainant KN, 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.
- [11] 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.
- [12] The second element relates to the specific period during 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.
- [13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] 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 15 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

The Admitted Facts

[18] 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.

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

1. THAT Viliame Ereinadi (hereinafter referred to as the “accused”), is 27 years of age and is a farmer.
2. THAT the accused and the complainant reside with their respective families at Vavinaqiri Settlement, Emuri Village, Sigatoka.
3. THAT the accused and the complainant are cousins.

[20] 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

[21] The prosecution called the complainant, KN, in support of their case. She was the sole prosecution witness. A copy of her Birth Certificate was tendered to Court as Prosecution Exhibit PE1.

[22] Evidence of the complainant KN

- (i) *The complainant's evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused during the time her evidence was being recorded. A Counsellor from the Fiji Women's Crisis Centre (FWCC) was present as a support person during the recording of the complainant's evidence.*
- (ii) *The complainant testified that she is currently residing at Vavinaqiri Settlement in Sigatoka, with her father and her mother. She has three siblings. She has been residing at Vavinaqiri Settlement since birth.*
- (iii) *She is currently a Form 7 student at Nadroga Arya College.*
- (iv) *She is now 19 years of age. Her date of birth is 3 October 2002. A copy of her birth certificate has been tendered to Court as Prosecution Exhibit PE1.*
- (v) *It is an admitted fact that the accused and the complainant reside with their respective families at Vavinaqiri Settlement, Emuri Village in Sigatoka. It is also an admitted fact that the accused and the complainant are cousins.*
- (vi) *The complainant testified to the events which took place on a day in the month of October 2017. She said that between 5.00 and 6.00 in the afternoon she was walking up to her uncle's place. Her uncle's name is Sabola Waqavou. He is her dad's younger brother. They were staying at a settlement closer to the village. Her uncle's place is at the upper end of the village and they were staying at the lower end of the village.*
- (vii) *The witness said: "I was walking up and Vili was walking down. And I stepped aside to make way for Vili but then he kept on walking towards me. As soon as he reached me, he covered my mouth with his hands. As he covered my mouth, he pulled me towards the guava tree on the roadside." The complainant said that Vili is her cousin and his full name is Viliame Ereinadi.*
- (viii) *The following questions were then asked from the witness and she answered as follows:*
 - Q. *What happened after that?*
 - A. *He pulled me inside, covered my mouth and told me not to say anything or shout.*

 - Q. *Then what happened?*
 - A. *He told me to keep quiet or else he will do something to me. He laid me on the ground and pulled down my shorts.*

- Q. *What were you wearing on that day?*
A. *I was wearing a shorts and a t-shirt*
- Q. *What was Viliame Ereinadi wearing?*
A. *He was wearing a t-shirt and shorts.*
- Q. *After he laid you on the ground and pulled down your shorts, what happened?*
A. *Afterwards he also pulled down his shorts. He laid on top of me, covered my mouth and told me not to say anything or shout or else he will do something to me.*
- Q. *How did you feel (at the time)?*
A. *I was afraid because there were trees around me and it was a bit dark.*
- Q. *What did you do in response to this?*
A. *I was just lying down because I was really afraid.*
- Q. *What happened next?*
A. *He laid on top of me, covered my mouth, took out his private part and put it in my private part. [For private part, the witness used the iTaukei term yago tabu].*
- Q. *What did he use to cover your mouth?*
A. *He used his hand to cover my mouth.*
- Q. *Do you remember what hand?*
A. *I can't remember.*
- Q. *When you say his private part, what do you mean?*
A. *His chuna (his penis).*
- Q. *When you say your private part, what are you referring to?*
A. *My vagina.*
- Q. *When he put his penis into your vagina, what was your reaction?*
A. *When that happened, I was again frighten and again shocked at the same time.*
- Q. *What happened next?*
A. *I pushed him away and he covered my mouth.*
- Q. *How long did he put his penis in your vagina?*

A. *It was quiet long – for about 3 minutes.*

Q. *When you pushed him away, what did Viliame do?*

A. *He covered my mouth and told me not to say anything or else he will do something to me.*

Q. *What came to your mind when he said this?*

A. *I was afraid because of the bushes and the trees around me.*

Q. *Again when you pushed him and he covered your mouth, what did he use to cover your mouth?*

A. *He used his hand.*

Q. *When you tried to push him away, was Viliame still on top of you?*

A. *Yes.*

Q. *In the process you were doing this, did you see his face clearly?*

A. *I could not see his face because it was a bit dark.*

.....

Q. *When you were lying on the ground, who was the person that was on top of you?*

A. *Vili.*

Q. *What happened after you tried to push him away?*

A. *He kept covering my mouth. And there was only one thing he kept telling me ‘not to say anything or else he will do something to me’.*

Q. *Then what happened?*

A. *He laid on top of me, pulled out his chuna and put it in my chuna.*

Q. *After that what happened?*

A. *He kept doing that for quite some time and afterwards he just left me there and went away.*

.....

Q. *How did Viliame pull you towards the guava tree?*

A. *As I explained, he looked around, did not see anyone, at the same time covered my mouth and pulled me towards the guava tree.*

Q. *What did he used to pull you towards the guava tree?*

- A. *He used his hands to pull me towards the guava tree.*
- Q. *Did he used one hand or both hands to pull you?*
- A. *He used one hand to cover my mouth and the other to pull me towards the guava tree.*
- Q. *Do you remember which hand he used to cover your mouth and which hand he used to pull you?*
- A. *I don't recall.*
- Q. *You said Viliame left you there and went. Prior to leaving, did Viliame say anything?*
- A. *He was only saying one thing to me – not to say anything or else he would do something to me.*
- Q. *When he left, what did you do?*
- A. *After what happened, I was so weak, it took me some time to recover. Then I got up, put on my clothes and went home.*
- (ix) *The complainant said that she had walked back home. The place where the incident took place was not far from her home. It would take 2 minutes to walk from her home to the place where the incident happened.*
- (x) *The witness testified that when she returned home, her parents and siblings were there. She was very weak. So she went to sleep. At the time she got home, it was dark. She did not tell her parents or her siblings as to what happened. She did not do so because she was so frightened of what Viliame had told her – not to say anything or else he will do something to her.*
- (xi) *The witness said that she knows the accused Viliame for quiet sometime. Before the incident happened, she had known him for over 10 years. After the incident in October 2017, she has seen Viliame around in the village.*
- (xii) *The complainant identified the accused in the dock as Viliame Ereinadi.*
- (xiii) *The complainant said that she did not agree to what happened at the guava tree.*
- (xiv) *The witness next testified to the events which took place on 9 June 2018. She said on that day, she was so weak and could not remember anything. When she became conscious again, she was at the Lautoka Hospital and her mother had explained everything to her. She was informed that she had given birth through a caesarean operation. "My mum explained that I had to learn how to walk again because I was in shock about what had happened".*
- (xv) *The matter had then been reported to the Police and her statement was recorded.*
- (xvi) *When asked as to why it took so long for her to complain to the Police as to what the accused Viliame had done to her and why she did not do so*

immediately, the witness said: "I was still afraid of what Viliame had told me – for me not to say anything or else he would do something to me. And I was always afraid of them as they are always drinking in the village and I was afraid of the fact that he will do something to me."

(xvii) The complainant said that she had given birth to twins (daughters) and that she is now taking care of them.

(xviii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with the defence case.

(xix) The complainant agreed that neither her mother nor anyone in her family knew that she was pregnant until 9 June 2018. She also agreed that on the 9 June 2018 her mother had been insistent to know about who had impregnated her.

(xx) It was suggested to the witness that that was the only time and only reason why she came up with Viliame's name. She agreed to this suggestion.

(xxi) The complainant clarified that Vavinaqiri is a settlement and not a village. Emuri is the village close to the Vavinaqiri settlement.

(xxii) When asked whether the alleged place of incident was close to the main road, the witness said, the place where the incident took place is a bit far and inside from the main road. When asked whether vehicles and villagers pass by that road all the time, the witness said: "Yes. But it doesn't happen often".

(xxiii) The following questions were inter-alia asked from the witness and she answered as follows:

Q. In your evidence yesterday you stated that you could not see the face of the person because it was dark?

A. When he pulled me from the road I recognized him very well. But when he was on top of me, it was a bit dark. That is why I did not see his face properly.

Q. Your family, especially your mother, was surprised that you had given birth on 9 June 2018?

A. Yes.

Q. You would agree with me that it would have caused embarrassment or shame to the family?

A. Yes.

Q. And this was when you told your mother that you were raped by Viliame?

A. Yes. After I had given birth then I informed my mother of what had happened.

Q. You were never in any boyfriend/girlfriend relationship with Viliame?

A. No. At that time Viliame was married with one child.

.....

- Q. *I put it to you that Viliame never met you any time in October 2017?*
- A. *I met Viliame in 2017 – because I can still recall that it was my birthday on the same month that I met Viliame.*
- Q. *I put it to you that Viliame never did anything to you in October 2017 as you two had never met?*
- A. *As I have stated before, that my birthday falls on 3 October, and ever since birth and while growing up that was the first time that this has happened to me. And I will never forget it.*
- Q. *I put it to you that Viliame had not put his private part on your private part?*
- A. *Viliame did that to me. He put it.*
- Q. *I put it to you that you had only made up this allegation against Viliame because you were embarrassed that you had given birth?*
- A. *No. Because of what Viliame had told me, while covering my mouth not to say anything or else he will do something to me.*
- Q. *My simple question is that you had made up this allegation against Viliame because you were embarrassed?*
- A. *No. I did not make up that allegation and even though I was embarrassed after giving birth, I just had to share or tell of what happened so that I can be free as well.*

[23] 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.

[24] The accused decided to testify on his own behalf. A copy of his Certificate of Marriage was tendered to Court as Defence Exhibit **DE1**.

Case for the Defence

[25] Evidence of Viliame Ereinadi

- (i) *The witness testified that he is 27 years old and currently residing at Korovou, Tavua. He is employed at the Vatukoula Gold Mine. He is working at the Engineering Department as a Pump Man.*
- (ii) *He is staying in Tavua with his aunty, his father in law, two brothers in law, his wife and 6 month old son.*
- (iii) *He testified that he got married in 2020 and has got 3 kids. His 6 month old son is residing with him in Tavua. His other two children (his 4 year old son and 1 year old son) are currently residing at his mother's place in Sigatoka. A copy of his Certificate of Marriage was tendered to Court as Defence Exhibit **DE1**. As per his Certificate of Marriage, the date of his marriage is 24 December 2020.*
- (iv) *The witness testified that in October 2017 he was residing at the Vavinaqiri Village, with his father, mother, two sisters and brother.*
- (v) *When asked what he was doing in October 2017, the witness said: "I was staying home. Sometimes I go to work. Sometimes I used to go to work to Pacific Pine Chemical and other job if they call me they call me then I go." At the time he was working as a Driver.*
- (vi) *As to the alleged incident of rape, the witness said that he did not meet the complainant in the month of October 2017 and did not do anything to her. He explained further: "I meant that I haven't even met her or done anything to her, because during that time, sometimes I go to work and sometimes I stay at home."*
- (vii) *The witness also completely denied that he had threatened the complainant in the month of October 2017.*
- (viii) *He also confirmed that he was not in any boyfriend or girlfriend relationship with the complainant.*
- (ix) *The witness was cross examined by the State Counsel. The prosecution's version of the events were put to the witness during his cross-examination.*
- (x) *He agreed that the complainant had been to his house sometimes. She used to come to watch TV and to play with his sister. The witness confirmed that he was very familiar with the complainant's family since they were cousins and that her family and his family were always on good terms before he was taken in for questioning for this case.*
- (xi) *The witness agreed that he used to go and play with the boys at the Vavinaqiri settlement playgrounds and during this time he could also see the complainant playing at the playground.*
- (xii) *The accused completely denied the allegation of rape made against him by the complainant.*

Analysis

- [26] The prosecution in support of their case, called the complainant, KN. The accused testified on his own behalf.
- [27] The burden of proving each ingredient of the charge 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 charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 10 of this judgment.
- [28] As I have 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.
- [29] Based on the said admitted facts it is admitted that the accused is 27 years of age. It is also admitted that the accused and the complainant reside with their respective families at Vavinaqiri Settlement, Emuri Village in Sigatoka and that the accused and the complainant are cousins.
- [30] I have summarized the evidence of the two witnesses led during the trial-namely the complainant and the accused.
- [31] At the time of the incident the complainant was only 15 years of age and as such a child. At the time she testified in Court she had turned 19. The complainant testified as to how the accused, between 5.00 and 6.00 in the afternoon, on a day in the month of October 2017, while she was walking to her uncle's house, had approached her, covered her mouth and pulled her towards the guava tree, which was further away from the main road. He had told her not to say anything or shout and to keep quiet or else he will do something to her. He had then laid her on the ground, taken off her clothes and forcibly inserted his penis into her vagina. She has testified that she did not agree or consent to the accused inserting his penis into her vagina.

- [32] She testified that although she did not remember the specific day the incident happened, that she was certain it was in the month of October 2017, because her birthday is on the 3 October.
- [33] The complainant had not reported this incident to her mother or any family member soon after it happened. She says she did not do so as the accused had threatened her not to tell anyone about it. She said: *“I was still afraid of what Viliame had told me – for me not to say anything or else he would do something to me....”*
- [34] The matter only came to light on 9 June 2018, when the complainant had been taken to the Lautoka Hospital, where it was revealed that she was pregnant. She had been subject to a caesarean operation and given birth to twins. When asked as to who had impregnated her the complainant had said it was the accused.
- [35] The accused totally denies the incident. He even denies meeting the complainant in the month of October 2017.
- [36] The Defence attempted to impeach the complainant’s credibility during her cross examination by stating that the complainant did not complain of the incident immediately as it happened and that she only implicated the accused after she had given birth, as much embarrassment and shame had been caused to her family as a result of her becoming pregnant at her age (due to her teenage pregnancy).
- [37] This Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.
- [38] In any event, the complainant has clearly testified as why she did not complain about the incident promptly. She said that she did not do so as the accused had repeatedly threatened her not to tell anyone about it or else he will do something to her. I am satisfied with the complainant’s explanation for the delay in reporting the matter.
- [39] Furthermore, I see no reason why the complainant should falsely implicate the accused, who is her own cousin, and as admitted by the accused, with whom her family and his family were always on good terms, before he was taken in for questioning for this case. It is my opinion that the only reason why the complainant

implicated the accused was because the incident had actually taken place and because the accused had inserted his penis into her vagina, without her consent, on a day in the month of October 2017.

[40] For the aforesaid reasons, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.

[41] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.

[42] It must also be mentioned that in terms of the provisions of Section 129 of the Criminal Procedure Act, "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".

[43] 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 has been charged.

[44] In the circumstances, I find the accused guilty of the charge of Rape.

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



AT LAUTOKA

Dated this 27th Day of July 2022

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused:

Office of the Legal Aid Commission, Lautoka.