

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 9 OF 2020

STATE

Vs.

WAISAKE CEACEA

Counsel : **Ms. L. Latu for the State**
Ms. R. Raj for the Accused

Date of Hearings : **30 - 31 August 2022**

Date of Judgment : **01 September 2022**

JUDGMENT

(The name of the victim is suppressed he will be referred to as “.M.B.”)

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 20th of May 2020.

COUNT ONE

Statement of Offence

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

Particulars of Offence

Waisaki Ceacea between the 1st day of December 2019 and the 31st day of December 2019, at Navere Settlement, in Bua, in the Northern Division, penetrated the vagina of **M.B.** with his penis without her consent.

2. The trial commenced on 29th of August 2022 upon reading and explaining the charges the accused pleaded not guilty to the count of Rape.
3. This is an allegation of rape of a 13-year-old girl by her step brother. The prosecution led the evidence of M.B and her brother Tomasi Nabogi and closed its case. As there was prima facie evidence, the defence was called for and the rights of the accused were explained. The accused opted to give evidence and called an expert witness and led in evidence a DNA report. This court heard the closing submissions and I will now endeavor to pronounce the judgment.
4. For the accused to be found guilty of the rape counts based on sub sections 2(a) of Section 207 of the Crimes Act 2009 in addition to the date and place stated in the count the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused Waisaki Ceacea
 - (ii) has carnal knowledge with or of M.B., and
 - (iii) complainant did not consent.

If I may further elaborate, under Section 207 (2) (a) of the Crimes Act 2009, the offence of Rape is defined as follows: a person rapes another person if the person has carnal knowledge with or of the other person, without the other person's consent. In the context of this case, 'carnal knowledge' is an act of penetration of the female genitalia of a victim with the penis of the accused. The slightest penetration of the female genitalia or the anus is sufficient to prove the element of penetration [vide- Section 206(4) of the Crimes Act].

5. According to Section 206(1) of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

6. The accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt so that the court was not sure of the accused's guilt or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

Admitted Facts

7. The following facts are admitted;

- 1] **THAT** the Accused in this case, **Waisake Ceacea** (hereinafter referred to as "Waisake", also known as "Tukai") is related to the complainant in this case, **M.B.**, (hereinafter referred to as "M"), as her biological brother, through only one parent, their mother, Paulini Lupe.
- 2] **THAT** M.B was a class 8 primary school student in 2019 and was born on the 2nd of June 2006.
- 3] **THAT** sometime between the 1st day of December 2019 and the 31st day of December 2019, **Waisake Ceacea** went to Navere Settlement to stay for a while with his mother's family that consists of Makereta, her siblings, their mother, Paulini Lupe and Makereta's father [Waisake's step-father]
- 4] **THAT** sometime during the above period, before Christmas, when Waisake was living with Makereta's family, he had gone to the farm in the morning, with Makereta's brother Nabogi and later returned home.
- 5] **THAT** when Waisake returned home that day from the farm, his mother, Paulini Lupe and his step father not at home.

The Prosecution Case

8. Prosecution led the evidence of the victim M.B and her brother Tomasi Nabogi and close its case. According to M.B the accused is her step brother. Their mother Paulini Lupe is common and of different fathers. The accused is from the mother's previous partner and M.B along with three other younger siblings are from the mother's present partner Suliasi Vata.
9. She is born on the 2nd of July 2006 and had been living Navere in Bua. In January 2020 she had gone to a relative's house at Nasawana to attend Bau College and as she was not well and was vomiting she had been taken to the hospital and was examined by doctors and nurses. Due to the said medical check it was found that she was pregnant. The nurse in attendance had inquired as to how she became pregnant. She said that she narrated the same story that she told this court.
10. The story she narrated is as follows. In December 2019 M.B had been living in their Navere house and her step brother the accused too had been living with them during Christmas 2019 and New Year 2020. On a particular day in December 2019, her step brother Waisake who is also known as Tukai and her own brother Tomasi have gone to the farm around 6.00 a.m. Her mother Paulini and father Suliasi too have left the house shortly thereafter for certain matters. She had been alone in the house with her two younger siblings Rosemary and Sereima. She had attended to the preparation of the breakfast and around 9 o'clock in the morning, when the accused and Tomasi returned. After having breakfast Tomasi had left to check on his pig traps. A neighbor Laisa also had been in the house when the two brothers returned. However, according to M.B, Laisa had left shortly thereafter. She with her younger siblings had attended to some household chores and then the younger siblings had gone to the nearby Bu Eta's house to watch a movie. M.B had been folding some clothes and she was intending to join the young siblings thereafter. The accused at this time approached her and told her some stories about how he was drinking with some others on a previous day. He had then told her he wanted to do something to her. She had understood what she was actually telling her but she has refused because they are brother and sister.
11. She says that the accused then came and forcefully put her on the mattress held her down and removed her skirt and panty and inserted his penis into her vagina and had sexual intercourse with her. She had not liked what he did because she knew they were

brother and sister and tried to stand up to go out but was unsuccessful. After the said act the accused had got off and told her that she should not tell this to anyone. She had then gone to Bu Eta's house and joined her siblings. She had not told this to anybody for the reason that she was that she was afraid that some harm may come to her by the accused and also that she was afraid of her father and mother.

12. This had been during the month of December and the following January she had gone to the relation's house to attend school as aforesaid when she was found to be pregnant. In cross examination it was suggested that she is lying and that the accused did not have sexual intercourse with her. She admitted that when the doctors and nurses pressured and asked her, she narrated the same story she had told in court which means the incident where the accused is alleged to have raped her. The defence questioned about how she got pregnant. She admitted that she told the doctors of this incident and told that it was a i-Taukei boy. The defence did make several attempts to question her as to who the father of the child born to her is. The prosecution objected on the basis that it violates section 130 of the CPA. The basis being past sexual history would come in to evidence. At this stage the court did uphold this objections but subsequently as it appeared necessary to determine the fact in issue of consent as well as to decide if the accused was the person who committed the act, certain questions were put to by court. The court asked her if she knew who the biological father of her child is. She answered in affirmative then she was asked if the accused in court is the biological father, she with a clear 'no'. With these answers the defence concluded their cross examination and she was re-examined by the prosecution. However, the prosecution did not clarify any matter arising out of these said answers.
13. Then the prosecution called the brother of M.B, Tomasi Nabogi. He had been at home living with victim and others and on that particular day in December he confirmed that he went to the plantation with the accused and they returned around 9.00 a.m. He confirmed that when he returned Laisa, M.B and the two younger siblings were there. Then he had set off to check on his traps. When he left he says, all the others were at home and has returned between 11.00 and 12.00 mid-day. When he so returned the victim and the siblings with the accused were at home. He had been unaware if the victim and her siblings had gone to Bu Eta's house or not.

The Defence Evidence

14. The accused opted to give evidence and according to him he admits being at home with M.B and her siblings after returning from the farm. He totally denies any act of sexual intercourse. According to him M.B and her younger siblings did not go to Bu Eta's house that morning. He was never alone with M.B that morning. He takes up the position that this is a false allegation planned by his step father and M.B. His step father Suliasi had not liked him and he also says that M.B was also indifferent and did not like him. Therefore the defence position is that when she got pregnant they planned and made this false allegation against him because of this dislike. This was the main line of defence. The accused had not told this in his caution interview. It is an omission. The accused explains this omission by saying that the police was rude and he was not able to say this. The caution interview was not led or used by the prosecution. It shows that there have not been any admissions. If the police was rude and acted otherwise one would expect in to have admitted certain facts absence of which shows it had been fairly recorded by the police. Therefore this explanation is unacceptable. The accused had failed to mention the most important defence in his caution interview. Therefore it is an afterthought and a false defence taken up by him at this trial.
15. Further analysis shows that the accused has lost his job as a carpenter somewhere around the 14th of December. Upon losing his job he has come to Navere and has lived there in the step father's house until this incident was revealed in January 2020. He admitted cultivating a land belonging his step father. This clearly shows that there could not have been any ill will or displeasure between his step father and himself until this incident was revealed by M.B. The position taken up by the accused is highly improbable and in all probabilities is false. Accordingly I reject the defence position and hold that the accused is lying on this issue of a plan between the step father and M.B.

I do not believe Mr Waisake's evidence, but this by itself does not lead to a finding of guilt, because to do so would be to forget who has to prove the case. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused's guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat

the Accused as innocent until the State has proved his guilt. The presumption of innocence means that Mr Waisake does not have to establish his innocence. The State must prove that Accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused is probably guilty or even that he is very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused is guilty is when I can find him guilty. On the other hand, if I am not sure that he is guilty, I cannot find him guilty. Now let's evaluate the prosecution evidence.

Evaluation of the Prosecution's Evidence

16. Prosecution intended to prove the main elements of this offending with the evidence of M.B alone. In a case of this nature since no corroboration is necessary, it is possible to prove all the ingredients with only that of the victim's evidence. There is a short delay of about a month in disclosing this event. The delay by itself in the circumstances of this case will not affect her credibility if such delay is explained. M.B says that she was afraid of her brother as well as her parents and was under threat. When a young girl is faced with the situation of this nature by her own step brother she not reporting it from police is nothing unusual. She may blamed herself and due to fear conceal this. Therefore delay *per se* will not affect M.B's credibility.
17. This charge against the Accused was the final result of MB getting pregnant. If not for which there would not have been any complaint or investigation against the accused. She admits that she did not tell anybody of this incident. The detection of the pregnancy forced her to reveal how she got pregnant. MB admits having disclosed the act which her step brother is alleged to have committed. This revelation led to the police investigation. The accused had been arrested and was been charged for this act of rape.
18. M.B admits that after the child birth in March 2021 that she made a further statement to the police. In that she admitted having stated that the accused did ejaculate in her. It was a part of the defence evidence that samples were taken and a DNA profiles obtained from the Accused, M.B and the child were analysed. The The DNA analysis Report

was tendered as defence Exhibit No.1. However, the DNA report has specifically excluded the accused from being the biological father of the child born to M.B. M.B in her evidence does state that the accused is not the father of her child and she had told the doctors and nurses that it was an i-Taukei boy was the father of her child. To that extent, she does not directly implicate or allege that the accused is the father of her child.

19. However, when she was asked as to how she became pregnant she had narrated the incident alleged to have been committed by the Accused. According to the totality of her evidence she does not appear to have revealed any other incident. The aforesaid circumstances lead to the inference that an insinuation was made that the pregnancy was caused by the act of the Accused. Further there is no evidence to show that M.B did divulge the identity of any other as being the father of the child at any time before DNA report came to light.
20. It is probable for certain other acts of sexual abuse other than the impregnating act to come to light in the course of an inquiry in to a pregnancy. So in the present case, the pregnancy of M.B did result in she being questioned and it is possible for her to have come out with a past event or the act committed by the Accused. But in this case according to the evidence it appears that the only matter revealed is the act of sexual intercourse committed by the accused. The victim in cross examination admits that this is the story she told the doctors and nurses when she was questioned about the pregnancy.
21. That being so, it leads to the inference that M.B had tried to explain the cause of her pregnancy by the alleged act of the accused. The the only incident she appears to have put forward to explain her pregnancy is the alleged act by the accused. Did she deliberately conceal the sexual act that impregnated her? Why did she do so? Did she so conceal that to protect that other person? This gives rise to a very strong inference that she may have implicated the step brother as an alternative to revealing the other person. If so, could this be a false implication to protect the other as well as to save herself from the wrath and fury of her parents? These are inferences that necessarily emanate from the present circumstances. It is also possible that she may have been sexually abused by the accused as well.

22. In a criminal matter when more than one inference is possible from the proved circumstances what is in favour of the accused should be preferred. One of the inference is that this may be a false implications to save some other and also herself. When the court questioned M.B said that the accused is not the biological father of the child. The prosecution did not clarify anything on this in re-examination. It was necessary to have clarified if a person other than the accused was known to be the father why she did not bring that incident or the act of sexual intercourse to the notice of the doctors and nurses or the police at the outset and as to how and when she came to know this fact. This remains unexplained. This is not an issue of previous sexual conduct of M.B but a necessary explanation required to clarify a fact in issue. The prosecution did not produce the medical examination form or the DNA report. These were not required as corroboration but to explain as to why a particular act of intercourse during the relevant period was not disclosed.
23. The end result is that there is a reasonable doubt as to whether the allegation made against the accused was true or otherwise. Firstly the question arises as to why she concealed the other act of intercourse. Secondly if the implication of the accused was false. Whatever may be the reason the M.B's evidence thus becomes unreliable and unsafe to act upon in a criminal case such as this.
24. During the cross examination she admitted that the fact of she being forcibly being pinned down and held had not been told in the police statement. Her evidence that she was held by the hand and forcibly pinned down and she struggled to get up but was not able to. In her statement she does not specifically state that. This omission has a direct bearing on the issue of consent. What she said in evidence is that she did not consent as they were brother and sister. Then she also said that her father and mother would be angry. She admitted that the accused told her he wants to do something to her, which she understood. This shows that there had been some indication made by the accused that he wishes to have sexual intercourse with her. It has not been a surprise attack on the victim. Correspondingly, she had shown some reluctance due to their relationship. In these circumstances, the omission to state the acts of force has a direct bearing on her evidence as regards the lack of consent. In the absence of the forcible pinning down and holding the act appear to be consistent that of consent. To that extent I'm of the view that there is a reasonable doubt on the issue of consent.

Conclusion

25. The proof of the charge depends solely on the evidence of the M.B. For the reasons stated above, her evidence becomes unreliable and unsafe to act on because there appears to be a possible motive or reasons to falsely implicate the accused at least as a way out for the victim. This is further compounded by the fact that there is no explanation as to why the act of impregnation was not revealed and why was it concealed. The combined effect is that this gives rise to the inference that she may be not truthful and that she had deliberately concealed the actual reason for the pregnancy. It is unsafe to rely on this evidence.
26. It is possible that the accused himself may have committed the alleged act but simultaneously there is this inference that the said allegation may also be false. This is a classic instance of a reasonable doubt. This court does not even for a moment find that the accused did not commit the act as alleged, but it is just that there is a reasonable doubt as to whether he did actually do it. For these reasons I hold that the prosecution has failed to prove the charge beyond reasonable doubt. Accordingly the accused is hereby acquitted.




Gihan Kulatunga
Judge

At Labasa

1st September, 2022

Solicitors:

Director of Public Prosecutions, Labasa for the State

Legal Aid Commission, Labasa for the Respondent