

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE No: HAC 108/ 2022

THE STATE

vs.

VILIAME VUNISINA

Counsel : Mr. J. Singh for State
Mr. A. Waqanivalagi & Ms. S. Daunivesi.

Dates of Hearing: 28, 29 September, 2022

Date of Judgment : 3 October 2022

(Name of the Complainant is suppressed. She is referred to as LQ)

JUDGMENT

1. The accused was charged with two counts of Rape on the following information:

COUNT ONE

Statement of Offence

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

Particular of Offence

WILIAME VUNISINE on an unknown date between 1st Day of August 2016 and 31st day of August 2016 at Rewa Street, in Suva, in the Central Division, had carnal knowledge of LQ without her consent.

COUNT TWO

Statement of Offence

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

Particular of Offence

WILIAME VUNISINE on an unknown date between 1st Day of September 2017 and 30th day of September 2017 at Ocean View Hotel, in Suva, in the Central Division, had carnal knowledge of LQ without her consent.

2. The accused pleaded not guilty to both counts. At the trial which lasted for two days, the Prosecution presented the evidence only of the complainant. At the end of the Prosecution case, the accused was put to his defence. Upon his rights being explained, the accused elected to give evidence under oath. He also called his wife. At the end of the Defence case, the Court heard oral submissions from both the counsel. Having carefully considered the evidence presented and the respective submissions, I now proceed to pronounce my judgment as follows.
3. The Prosecution must prove all the elements of each count beyond a reasonable doubt. That burden never shifts to the accused at any stage of the trial. The accused is presumed innocent until he is proven guilty.
4. The Prosecution must prove the following elements on Counts 1 and 2:
 - (i). The accused, WILIAME VUNISINE
 - (ii). Penetrated of the vagina of the complainant LQ, with his penis,
 - (iii). Without her consent and that
 - (iv). The accused knew or had reasons to believe that the complainant was not consenting or he was reckless as to whether she was consenting or not.
5. A slightest penetration is sufficient to prove the element of penetration.

6. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Consent obtained by force, threat or intimidation is not voluntary. Different people react differently to situations. It is not necessary violence, kicking, and shouting etc. to take place to show that one is not consenting.

7. I would now summarise the salient parts of the evidence led in the trial:

Case for Prosecution

LQ (The Complainant)

8. LQ was born on 6 July 2000. In the year 2016, she was 16 years old. She is currently living in Saweni with her husband and three children. Before the marriage, she was with her mother Titilia and her stepfather Jone.
9. Her biological father Viliame Vunisina is not part of her life any longer. Viliame was living in Waimanu Road Suva. He was in contact with her over the phone. He would call her and ask her to come and visit him in Suva. She would go and visit his father during school holidays, three times a year. Viliame was living with her step mother, Mere Rabeta. Viliame did night duty for Signal Night Club. Mere worked for Central Finance during day time.
10. She used to come from Lautoka to Suva by van and spend time with his father. Viliame pays the van fare. Sometimes she had to go back home because Viliame gets quiet abusive and angry towards the wife.
11. In August 2016, during second school holidays, she visited his father when he was alone at home. When she was lying down on the bed and watching movies during daytime, Viliame all of a sudden came on top of her. He pulled up her top and bra. Then pulled

down her long jeans and panty. He pulled his pants down and then he put his penis in her vagina for 30 minutes. She asked Viliame to stop but he would not stop. She did nothing because she was scared and was feeling the pain. He threatened to punch her if she made any noise. After that he told her not to tell anyone and went off to sleep.

12. Mere come home from work in the afternoon. Her relationship with Mere was not that good. They did not communicate each other much. Sometimes she's against her. She would make up stories to her father that she was roaming around with boys and that she was pregnant. Viliame would get really angry and he starts to get abusive asking questions. She did not tell anyone about the incident because he had threatened her. The next day, she went back to Lautoka.
13. In September 2017, during the sugar festival in Lautoka, she was with her mother, Titilia. Titilia was having drinks with her friends. All of a sudden, Titilia wanted to come up to Suva to meet Viliame. She told Titilia that she did not want to come to see Viliame. But Titilia was forcing her to come to Suva. Then they came to Suva that Saturday and surprised Mere and Viliame. They stayed the night at Mere's place. On Sunday morning, when they were getting ready to get back to Lautoka, Viliame wanted them to have some family time with him and he told Titilia that he had booked a family room in Ocean View Hotel. Titilia agreed to the idea and they all went to Ocean View.
14. At Ocen View, Viliame and Titilia were having drinks in the room. Viliame wanted Titilia to go and buy some food from the hotel restaurant and he gave money. Instead of buying food, she went to the bar downstairs. As Titilia was leaving the room she also tried to follow her mother, but Viliame stopped her. When she was sitting in the room, Viliame closed the door and came towards her. He pulled her from her legs to the bed. Then he pulled her long jeans down up to the knee. He pulled his ¾ pants down. He took out his penis and came on top of her face to face. Then he put his penis in her vagina forcefully for 20 minutes. She felt pain due to the marbles on his penis. She saw the marbles when he took his penis out. She did not do anything because she was scared of him and of the threats that came to her at the first time when he raped her saying that he would punch her if she made any noise or told someone about what he's doing to her. She was helpless.

15. Once he was done, he opened the door and went for a bluff like sleep. Her mother came to the room with beer and then they two had an argument. When the argument heated up, they went away from the hotel and started walking down to go to the Viti Mini Stand. After the argument they patched up again and they were smoking at the sea wall before leaving for Lautoka.
16. Immediately after the incident, she did not tell anyone about what Viliame did to her. She was trying to tell her mother, but she just ignored her. Mother was drunk at that time. When they went to Lautoka, she tried to tell her mother again. When they arrived home, her stepfather and the three kids were there. After a while her uncle Epeli Tawake also came and stayed with them.
17. Explaining the nature of the relationship she had with other family members, LQ said that her mother didn't communicate much with her even though they were living together. Titilia would ignore her whenever she wanted to bring up some issues. She and her step father did not communicate at all. It was her uncle Epeli that was close to her. She felt safe around him and that's why she shared with him what happened to her about Viliame having sex with her. When she told Epeli about what Viliame did to her, Epeli tried to convince her mother what happened but her mother did want not listen to him. Her mother chased Epeli away from the house. She tried her best to talk with Titilia, but she didn't believe her. She made up a false accusation that she was having an affair with Epeli. After that Titilia chased her also out of the house. She stood on her own and started taking care of her own self going and living in the streets. The day she was chased away, she went to meet Epeli at his work place but he had been transferred. She went back to Saweni and stayed around in the beach and the forest.
18. She called the helpline from Epeli's house at Vuda. The helpline told her to report the matter to the police. She wanted to complain to police but the threats kept on coming to her phone from Viliame and he was watching her whereabouts. She was imagining what would happen if the matter was reported. She finally lodged the complaint in 2018.
19. Under cross-examination, LQ admitted that she continuously kept on coming to Suva during the school holidays because she enjoyed the satay with her father. She admitted that before Viliame was in a relationship with Mere, he was also in a relationship in

2016 with another woman by the name of Fiona. She admitted having visited Viliame and Fiona when they were residing together at Norotan Hotel at Waimanu Road.

20. She denied that when Viliame's relationship with Fiona ended only he started his relationship with Mere in 2017. Her evidence was that Viliame was in relationship with both Mere and Fiona at the same time on and off. She denied Mere being introduced to her in 2017 at her work place at Central Finance. Her evidence was that Mere was residing at Nippons Building in Waimanu Road in 2016 also. She denied visiting his father in weekends. She agreed that she would meet up with the boy named Sam but not at Waimanu Road. She denied that, in September 2017, she and her mother had contacted Viliame asking for bus fare down to Lautoka and came to Nippons Building and spent about 2 hours. She admitted that when they returned to Lautoka, after the alleged incident in 2017, uncle Epeli was staying at her place. She agreed that she would trust Epeli more than she trusted her own mother and father. She was comfortable with Epeli. She agreed that the first person she spoke to about the alleged incident was her uncle Epeli in 2017.
21. Epeli was staying with them for two months in 2017. She denied that sometime in 2017, she was in a romantic relationship with Epeli and that her step father Jone had contacted Viliame to inform him of the same. She did not remember Viliame ever speaking to her about this relationship and advising when she came to Waimanu Road. She admitted that her mother and step father were suspecting that she was in a romantic relationship with uncle Epeli.
22. She denied that the reason why she had told Epeli of the alleged incident was because she and uncle Epeli were in a romantic relationship. She denied having made up this allegation about Viliame because her entire family were disappointed to know that she was in a romantic relationship with uncle Epeli.
23. Under re-examination LQ said she was not sure where Nippons was located. He admitted Sam was her boyfriend. Viliame and Mere knew that she had a boyfriend but they had no complaints.

Case for Defence

Viliame Vunisina (the Accused)

24. Viliame testified that in 2016, he was residing at Noroton Hotel in Waimanu Road with Fiona, his de-facto partner. He denied that he was living with Mere Rabeta at Waimanu Road in August 2016. He denied that he had had sex with LQ in 2016.
25. In 2017, LQ always came and visited him at Nippons Building in Suva during weekends. She visited him when she came to meet up with her boyfriend Sam. He was residing with Mere Rabeta and his three sons at that time. One Sunday during that period, LQ and her mother did come to Nippons Building asking for bus fare for them to return down to Lautoka. He gave them the bus fare and they went back after spending two hours.
26. She denied meeting LQ and Titilia at Ocean View Hotel in September 2017 and having had sex with LQ. LQ is making up this allegation because it came to light that she was in an intimate relationship with her uncle Epeli Tawake. LQ's step father Jone informed him about this relationship in December 2016. When he asked LQ about this relationship, she denied.
27. She started the relationship with Mere Rabeta in 2017. LQ met Mere for the first time in 2017 when he took LQ to Mere's office.
28. Under cross-examination Viliame said that he married Mere in 2017 and has 3 children by that marriage. Eldest is 5 years old. LQ visited him during nearly every weekend at Nippons. He gave her the bus fare. He did not love spending time with LQ. She did not listen to him.
29. In August 2016, LQ did not visit him during her school holidays. She only came in 2017. She always came to Suva during the weekends to meet her boyfriend Sam. LQ did not inform him of that relationship. He came to know in 2017 from his wife Mere. When they were staying in Nippons, Sam always came in his car to see LQ. He was not happy with that relationship. When he found about Sam's relationship, he became very

angry. But he has never met Sam. Three guys always came to see LQ at his place. He came to know about the allegation only when he was arrested in 2022. He was not working at Signals Night Club in 2016.

Meresiana Sawaqa Rabeta (Mere)

30. Mere testified that Viliame has been her partner for more than 5 years now. She met him around December 2015. The relationship lasted only for 2-3 months and then it had stopped when she found out that Viliame was still in a relationship with another woman by the name of Fiona. From March 2016, he continued his relationship with Fiona. From 2016 March- March 2017 Viliame was staying at Noroton Motel with Fione.
31. She saw Viliame again towards the beginning of 2017 when she was living at Nippons Building. She resumed the relationship and she moved in with him in early 2017 at Nippons. Her children used to come to her during weekends and holidays. She met LQ at her office when they started the relationship again in 2017. LQ used to come to Nippons Building during the weekends. She was very close to LQ. She treated her like her daughter.
32. LQ's relationship with Viliame was very close. She started coming to Suva because she wanted to spend time with her father and also at times she was having problems at home with the mother. She found out that LQ was having a boyfriend by the name of Sam based in Lautoka to whom she used to call him on the phone. She has never seen Sam. When she told Viliame about this relationship, he was not happy.
33. In September 2017, on a Sunday, Viliame's phone received a call from LQ and she asked if he could give bus fare for her and the mother to go back to Lautoka. Upon receiving the call, they invited them to come and visit them. Viliame gave \$50.00 when they arrived. After spending about 2 hours with them, they were dropped off at the gate.
34. Under cross examination, Mere said that LQ visited only once in school holidays in 2017. She agreed that she would not want to see the father of her children go behind bars. She will try to protect him whatever way she could.

35. That's the case for Defence

Analysis

36. Prosecution solely relies on the evidence of the complainant. Prosecution says that the complainant is credible and reliable. The case for the Defence is one of complete denial. The accused says that he was never present at the venues and on the dates of the alleged offences as mentioned in the information so that those offences never took place. It was his position that the complainant made up these allegation when the relationship she had with her uncle Epeli came to light.
37. Let me now turn to the complainant's evidence. The first alleged incident occurred in 2016 when she was 16 years old and the second incident in 2017. She had not complained to her mother or anyone immediately after those incidents. She relayed the incidents to her uncle Epeli in 2017. The matter has been reported to police in 2018 and the accused has been charged in 2022. The position of the Defence is that she did not make a prompt complaint because these incidents never occurred.
38. I find in evidence a lot of reasons why she acted the way she acted after the alleged rape incidents. The accused is complainant's biological father. He was living with her wife Mere, the complainant's step-mother. The complainant in numerous occasions had witnessed how bad her step mother Mere was being treated by the accused when she had visited him in Suva. In some instances, she had even cut short her visits when such bitter disputes became unbearable. Such were the memories that must have informed the complainant in making her decisions on how she should react.
39. During the first rape incident in 2016, the accused had threatened to punch her if she made any noise. He threatened her not to tell anyone. She said she did nothing because she was scared and was feeling the pain. She did nothing in protest. Those were the things she vividly recollected when she encountered the second incident in 2017. The threat was ongoing. The accused contacted her over the phone and renewed the threats continuously. He maintained surveillance over her through her aunties.

40. Her relationship with Mere was not that good. They did not communicate each other much. Sometimes she's against her. She would make up stories to her father that she was roaming around with boys and that she was pregnant. Her relationship with her mother Titilia was not good at all. She found Titilia drunk soon after the second incident. Still she made several attempts to relay the incident to Titilia when she got back home. Titilia just ignored her. Titilia had never given her an opportunity to tell what had happened. She even thought Titilia would never believe the story. The next person in her immediate family was her step-father. She hardly spoke to him. The only person she trusted was her uncle, Epeli, with whom the Defence says the complainant had had a romantic relationship. She finally found solace in Epeli in sharing the story. She felt safe around him and that's why she shared with him what happened to her. Upon the complaint being received, Epeli passed it on to Titilia and tried to convince her. Titilia did not believe the story. The end result was that, Epeli was chased away from home and then the complainant.
41. Epeli encouraged the complainant to report the matter to police. The help line she contacted gave the same advice- report the matter to police. However, she was still imagining what the outcome would be if she reported. She wanted to complain to police but the threats kept on coming to her phone and he was watching her whereabouts. The report was finally lodged in 2018. The delayed reporting is reasonably justified.
42. The Defence argues that the complainant said she did nothing in protest when the accused was doing all those things because they never occurred. This argument should also be dismissed on the strength of the same justifications- the threats she had received.
43. The Defence appears to suggest that the manner the complainant reacted would have made the accused believe that she was consenting to sexual intercourse. However, this line of contention is completely inconsistent with the defence they have taken in this case, namely, the alleged rapes never occurred.
44. The complainant was confused as to the exact address where her father was residing in 2016 /in which the 1st alleged rape incident occurred. Whether it was in Waimanu Road or Rewa Street, she was sure she was raped in the house her father was residing at that time in Suva. The complainant was based in Lautoka and, therefore, would not have

been familiar with the names of the roads in Suva. This inconsistency in my opinion does not affect the credibility of the version of the complainant.

45. In his closing, Mr. Waqanivalagi submitted that the complainant willfully continued to travel to Suva to visit the Accused in 2017 during the school holidays, despite the alleged incident in 2016 and that she confirmed that she would come by herself. However, she never said that she came to Suva on her own to see her father after the 1st incident. Instead, she was reluctant to go with her mother to see her father. She had no option but to accompany her mother when she was forced in September 2017 after the sugar festival.
46. The complainant maintained her consistency throughout her evidence. She was straightforward in her answers. Her demeanour is completely consistent with that of an honest witness. The fact that the Prosecution had no other witness to support complainant's evidence did not affect the credibility of her evidence. I accept that the complainant told the truth in court.
47. The accused completely denies the allegations. In his evidence, he was trying to convince the Court that he was never at the locations and the dates of the alleged offences. He called his wife to support his version.
48. Evidence of the accused was that the complainant used to visit him almost every weekend because she wanted to see her boyfriend Sam. However, he had never seen this Sam. Even his wife Mere had never seen this man. Mere's evidence is that the complainant's boyfriend was based in Lautoka and that she came to know about this relationship when the complainant was making phone calls. What's the point in complainant coming all the way to Suva to see her boyfriend if he was based in Lautoka? According to Mere, the only purpose of complainant's visits to Suva was to spend time with her father.
49. Having said that the complainant visited him almost every weekend, the accused tried to make the year 2016 an exception, obviously to convince the Court that the 1st alleged rape could never have happened during the second school holidays in that year. The evidence that the relationship with Mere had temporarily come to an end towards the

beginning of 2016 and that the first meeting between the complainant and Mere took place at her office in 2017 was also intended to bolster this same version. The complainant did not deny that the accused was carrying on with another woman by the name of Fione on and off at the same time in 2016. In that context, the effort of the Defence at challenging complainant's evidence that the day the first rape occurred, Mere was still living with the accused would seem futile.

50. It came as no surprise that the accused having been charged and placed under a 'Sword of Damocles' was expected to come up with an innocent version to exonerate himself. His wife's interest in the Defence case was amply manifested when she said that she would try to protect the accused whatever way she could and see the father of her children does not go behind bars.
51. The theory that the complainant made up these allegations when the 'romantic relationship' she had with uncle Epeli came to light is not convincing. The evidence relating to this alleged intimate relationship with her uncle was allowed to be adduced when it appeared to Court that the purpose of which was not to show the sexual behaviour or the history of the complainant but to discredit her version on the alleged premise that she had an ulterior motive to fabricate evidence against the accused. However, that allowance did not help the Defence theory.
52. According to accused's own evidence, this so called relationship had first come to light in 2016 upon which he had registered his strong protest and come down hard on her. If her real intention was to teach her father a lesson, she would have lodged a complaint then and there. But the complaint with police had been lodged in 2018 after much deliberation.
53. In any event, it is hard to believe that the coming to light a romantic relationship between the complainant and her uncle and a strong opposition to it from the family prompted the complainant to fabricate such a serious allegation against her father. Even if the accused's evidence that she had an intimate relationship with her uncle were to be believed, it would not in my opinion damage the credibility of the case for Prosecution.

54. The version of the Defence is not appealing to me. It is not consistent and credible. No reasonable doubt is created in my mind as to the credibility of the version of events of Prosecution case. I reject the version of the Defence.
55. A rejection of the Defence version does not automatically prove the charges against the accused. The burden to prove the charges beyond reasonable doubt squarely rests on the Prosecution. Prosecution discharged that burden in this case.
56. Having accepted the version of the Prosecution, I now turn to see if the Prosecution has proved all the elements of Rape on each count. The identity of the accused is not in dispute. The accused is the biological father of the complainant. Evidence is overwhelming to find that the complainant did not consent to sexual intercourse on each occasion. The fact that the complainant did not resist physically does not mean she was consenting. Consent obtained by force, threat or intimidation is not consent.
57. In relation to the first incident, the accused all of a sudden came on top of the complainant. He pulled up her top and bra. Then pulled down her long jeans and panty. He put his penis in her vagina. She must have been shocked to find her father doing all these things. All these acts were unilateral on the part of the accused. She asked the accused to stop but he did not. He threatened to punch her if she made any noise. She did nothing because she was scared and was feeling the pain. Lack of consent is clearly established.
58. At the second incident, the accused pulled her from her legs to the bed. Then he pulled her long jeans down up to the knee. He pulled his $\frac{3}{4}$ pants down. He took out his penis and came on top of her. Then he put his penis in her vagina forcefully. She did not do anything because she was scared of him. She recollected the threats that were held out to her at the first incident where he had said that he would punch her if she made any noise or told someone about what he's doing. She said she was helpless. Again, lack of consent is clearly established.
59. Even though she did nothing in protest on both occasions, during the first incident, she had told him to stop. He threatened to punch her if she made any noise. That threat was on going and was lingering in her memory. The accused must have been well aware that

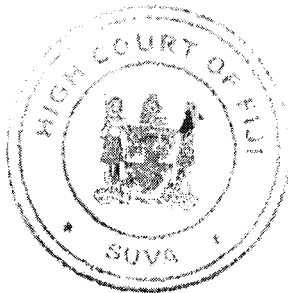
she was not resisting only because of the threats he had held out to her during the first incident. Being the father of the complainant, there was ample reason for the accused to believe that her daughter was not consenting to a sexual intercourse. The fourth element of rape is also established in relation to each count.

60. Prosecution proved all the elements of Rape as charged beyond reasonable doubt. I find the accused guilty on each count.
61. The accused is convicted on each count accordingly.



Aruna Aluthge

Judge



03 October 2022

At Suva

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence