

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 161 of 2018

STATE

V

KAVEKINI ERENAVULA

Counsel : Mr. T. Tuenuku for the State.
: Ms. N. Sharma and Mr. A. Sami for the Accused.

Dates of Hearing : 19, 20 October, 2022
Closing Speeches : 27 October, 2022
Date of Judgment : 27 October, 2022

JUDGMENT

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

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

Statement of Offence

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

Particulars of Offence

KAVEKINI ERENAVULA between the 1st day of February, 2018 to the 28th day of February, 2018 at Lautoka in the Western Division, inserted his penis into the vagina of "L.L", 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 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. In respect of the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (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 offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina 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 this offence. This element of the offence is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the penis. This element of the offence 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 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 without her consent 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 offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I have to 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.

ADMITTED FACTS

15. In this trial, the prosecution and the defence have agreed to certain facts titled as amended admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
16. 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

17. The complainant informed the court that she knows the accused who is her cousin. In 2018 the complainant was 17 years of age and was residing at Korobebe village.
18. One late night in February 2018 between 12 midnight and 1 am the accused came to the house of the complainant and called her through the bedroom window to come outside and for them to go to Eroni's house to talk. At this time the complainant's mother and brothers were sleeping.
19. The complainant and the accused went to Eroni's house where the accused was staying which was about two minutes walk away from her house. Eroni's house was empty and as soon as both entered the house the accused punched the complainant's right backside to force her to have sexual intercourse with him. When she was punched she felt pain and became afraid.
20. The complainant refused by saying that she was a school student, however, the accused kept forcing her. He also said if they didn't have sexual intercourse he will again punch her, the accused told the complainant to lie down. The complainant was afraid so she removed her sarong, panty and t-shirt whilst lying on the floor.
21. After this they had sexual intercourse the accused was on top of her and he penetrated his penis into her vagina. This was the first time she was having sex according to the complainant it was painful and she told the accused about this pain but he did not stop. The complainant tried to push the accused with her hands but she could not. She did not agree to have sex with the accused which lasted for 10 minutes.
22. After having sexual intercourse the complainant wore her clothes and went home alone because the accused was at Eroni's house. By this time it was 4 am in the morning the accused told her not to tell anyone about what he

had done to her. The complainant did not tell anyone at home about what had happened to her because she was afraid. The complainant reported the matter to the police after she got pregnant.

23. In cross examination, the complainant agreed that she has been in a relationship with the accused since 2017 and because the accused was her cousin she had to keep the relationship a secret. The complainant denied having sexual intercourse with the accused secretly.
24. Furthermore, on the night in question she had not planned to have sex with the accused she also denied the suggestion that planning was obvious from the fact that when the accused had called her she accompanied him to Eroni's house. At Eroni's house the complainant agreed that both had chatted for a while but they did not touch or kiss each other. She denied that they made love to each other.
25. The complainant did not shout but had pushed the accused she could have kicked him but she did not. She maintained that the accused had punched her that night.
26. Upon further questioning the complainant stated that she did not seek any assistance from the villagers when returning home that early morning because she was afraid and this also included not informing her mother or brothers. The complainant agreed after this incident the accused continued to come to her bedroom window to call her and she would go with him to Eroni's house and the accused used to force her to have sexual intercourse.
27. When the complainant was asked why she had continued to accompany the accused if she was raped on the first occasion the complainant replied "*to have sex again*". The complainant agreed she did not complain about the rape to anybody until signs of her pregnancy started showing. Her aunt noticed her pregnancy when she went to her aunt's house. The

complainant agreed she could not tell her aunt that she was in a relationship with the accused so she told her aunt that the accused had raped her to protect herself from shame.

28. She was also angry with the accused because he had denied her pregnancy. When it was suggested that this was the reason why she reported the matter to the police the complainant explained "*I went to the hospital to do my booking and the doctor advised me to treat this as rape.*" According to the complainant this was the reason why she had reported the matter to the police.
29. When the complainant was asked to explain why she had returned home at 4 am when she had left her home between midnight to 1am with two minutes walk to Eroni's house and 10 minutes of sexual intercourse the complainant replied that they were having sex.
30. Upon further questioning the complainant maintained that the accused had forced her on all occasions to have sex with him. The complainant was referred to her police statement dated 11th August 2018 from line 15 to line 44 as follows:

Three weeks later, this was in sometimes March, 2018. He came again to my window and called me, and I told him I will come later. I couldn't recall the date and day, but got out through the main door and went to the same house. As soon as I came in we talked and I had feelings for him too, so he told me to take off my clothes, and I took off his clothes and we started kissing and then he lay down and told me to sit on his penis and move forward and backward. Then he told me to lie on top of him whereby my vagina to his mouth and for me to suck him. Then we change again where I lay down and he kissed me and sucked my breast and his penis inside my private part, moving inside me until he finished himself. We lay there for a while and then he started licking my vagina again and we had sex again.

The next day in the night he came again called me from the window and we went again and had sex 2 times, and then the next day he came again we went back to that house and did the same thing all over again, having sex 3 times and I came home at 4am. He always come between 1 to 2am every night.

31. The complainant stated that the version she had given to the police was correct. She also agreed that she told the court that on the night of the alleged incident she went home and slept. Again the complainant was referred to her police statement line 9, page 2 which was read as follows:

"I then returned home, and went to the toilet to wash myself..."

32. The complainant stated that the correct version was in her police statement.

PREVIOUS INCONSISTENT STATEMENT

33. This court directs its mind to the fact that the defence counsel during cross examination of the complainant had questioned this witness about some inconsistencies in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.

34. This court is allowed to take into consideration the inconsistencies 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.

35. 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.

36. 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.
37. When it was put to the complainant that the accused had never raped her, the complainant said "*it's counted as rape what he did to me.*"
38. In re-examination the complainant stated that she did not agree to have sex with the accused the first time because she was still a student.
39. This was the prosecution case.

DEFENCE CASE

40. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
41. From the line of cross examination the defence took the position that the complainant did not tell the truth in court about what had happened. The accused did not at any time have forceful sexual intercourse with the complainant as alleged. The complainant was in a relationship with the accused from 2017 but the relationship was kept a secret by the complainant because the accused is her cousin.

42. The relationship only came to light after the complainant got pregnant and after the accused disassociated himself from her pregnancy. The complainant's aunt noticed the physical changes in the complainant and started questioning her. The complainant to avoid shame falsely alleged that she was raped by the accused.
43. The complainant went to do her pregnancy booking at the hospital and it was here she was told to treat her pregnancy as rape. This made the complainant lodge her police complaint. The complainant had been sneaking out of her house when her mother and brothers would be sleeping. She had consensual sex with the accused and then returned home at 4 am.
44. Finally, the defence is asking this court to consider the fact that the complainant did not tell anyone about what the accused had done to her or about any threats made to her by the accused which is very unusual since the complainant said she was assaulted by the accused before forceful sexual intercourse. The complainant was 17 years of age and she continued to have sexual intercourse with the accused without any complaints. The complainant did not raise any alarm or tell her mother or anyone about what had happened when she arrived home but washed herself and went to sleep.
45. The complainant was not restrained by the accused and there was nothing for the complainant to be afraid of. The defence is asking this court not to give any weight to the evidence of the complainant who did not tell the truth.
46. This was the defence case.

ANALYSIS

47. The prosecution states that the complainant and the accused are known to each other and are cousins.
48. In February, 2018 the accused had forceful sexual intercourse with the complainant at the house of Eroni. The accused misrepresented to the complainant that they will go and talk at Eroni's house. The house was empty and the accused assaulted the complainant and threatened her that he will assault her further. She submitted herself to the accused because she was afraid of him and to avoid further assaults. The complainant did not consent to have sexual intercourse with the accused.
49. The prosecution is asking this court to consider the fact that the allegation is about the first sexual encounter to which the complainant had not consented and not about what happened subsequently between the two.
50. The accused had threatened the complainant not to tell anyone about what he had done to her. She was so scared of the accused that she did not tell anyone about what the accused had done. The complainant had no motivation to falsely implicate the accused she told the court what had happened to her.
51. The prosecution further states that passage of time that is 4 years from 2018 also played a part in some inconsistencies between the complainant's evidence and her police statement which was not significant considering her age at the time of the alleged incident.
52. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. A close scrutiny of the evidence given by the complainant will show that whatever she told the court is

improbable and it does not make sense. There is a doubt on how the accused had assaulted the complainant in the manner described by her. If what the complainant told the court had happened there would have been strong resistance by her but she did not because nothing forceful had happened.

53. The defence is asking this court to consider the fact that she was a school student of a reasonable age who knew about right and wrong. Had anything untoward happened she would have most certainly raised an alarm or informed her mother at the very least? Most importantly, it is crucial to note that the complainant and the accused were in a relationship from 2017 and they had sex on many occasions. She only cried rape after becoming pregnant and to avoid shame she had no choice but to take the easy route and blame the accused.

54. Finally, the defence is asking this court not to give any weight to the evidence of the complainant in regards to the allegation raised.

DETERMINATION

55. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.

56. The only issue in this case is whether the complainant had consented to have sexual intercourse with the accused as alleged. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I do not accept the evidence of the complainant as truthful and reliable. From my observations, the

complainant was not forthright in her evidence especially in cross examination she would say one thing and after a few questions asked she would change her position.

57. I am also unable to accept that the complainant was raped as alleged. From the outset she willingly went with the accused in the middle of the night to the house where the accused was staying. From the complainant's evidence it is obvious that the complainant was waiting for the accused to call her from her bedroom window. She then left her house with the accused for Eroni's house which was about two minutes away. The complainant returned at 4 am in the morning and after washing herself went to sleep without raising any alarm. I reject the version of the complainant that she was called by the accused for them to talk at Eroni's house and that she was threatened by the accused not to tell anyone about what he had done to her.
58. I accept that the complainant only cried rape after her pregnancy was disowned by the accused. The complainant's aunt had confronted the complainant about her pregnancy and in order to save herself the complainant implicated the accused.
59. Furthermore, the demeanour of the complainant was not consistent with her honesty. I have taken note of the complainant's age at the time and passage of time, however, when the evidence of the complainant is looked at holistically I am unable to give any weight to the evidence of the complainant in respect of the allegation raised.
60. In my considered judgment the complainant did not give an honest narration in court. The evidence of the complainant has many doubts which makes her allegation against the accused not worthy of belief. The



complainant said one thing in her evidence in chief and another in cross examination.

61. I accept that the complainant was not restrained by circumstances beyond her control in failing to inform someone including her mother and/or report the matter to the police after the incident. I reject the evidence of the complainant that she was threatened by the accused at the house of Eroni not to tell anyone about what he had done to her.
62. The complainant did not tell the truth in court when she said that she did not ever consent to have sex with the accused whereas she told the police officer writing her police statement when facts were fresh in her mind that she had consensual sexual intercourse with the accused more than once. In my considered judgment the inconsistency between the evidence of the complainant and her police statement is significant which basically diminishes her credibility.
63. Another aspect of this matter is that the complainant was 17 years of age and a school student who knew what was right and what was wrong yet she continued to leave her house and have sexual intercourse with the accused not only on the date of the allegation but on many occasions thereafter reeks of consent and nothing else. The evidence of the complainant raises more questions than answers and it is therefore unsafe to convict the accused on such unreliable evidence.
64. Furthermore, if the accused had indeed raped the complainant as mentioned she would not have spent about three hours with the accused after the so called forceful sexual encounter by returning home at 4 am. Moreover, it is beyond my understanding as to how the complainant was able to have consensual sexual intercourse with the accused on many

occasions after the first incident of the alleged rape just does not make any sense.

65. This court is not satisfied beyond reasonable doubt that the accused had between 1st February, 2018 and 28th February, 2018 penetrated his penis into the vagina of the complainant without her consent. There is a reasonable doubt in the prosecution case and it is unsafe to find the accused guilty of the alleged offence. The accused is acquitted forthwith.

66. This is the judgment of the court.

Sunil Sharma
Judge

At Lautoka

27 October, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.