

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 97 of 2020

STATE

vs.

VILIVO NAMOCEICA LUVUBULA

Counsel: Ms. S. Bibi for the State
Ms. P. Mataika for Accused

Date of Hearing: 7th and 8th February 2023

Date of Closing Submission: 09th February 2023

Date of Judgment: 03rd March 2023

JUDGMENT

1. The Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are that:

COUNT 1

Statement of Offence

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

Particulars of Offence

VILIVO NAMOCEICA LUVUBULA on the 1st day of October 2018 at Cunningham in the Central Division had carnal knowledge of VASEMACA RAVATUKAWA TUVOU without her consent.

2. The Accused pleaded not guilty to the offence; hence the matter proceeded to the hearing. The hearing commenced on 7th February 2023 and concluded on 08th February 2023. The Prosecution presented the evidence of two witnesses, including the Complainant. The Accused gave evidence for the Defence. Afterwards, the Court heard the submissions of the Counsel for the Prosecution and the Defence. In addition to their oral submissions, the learned Counsel for the Prosecution and the Defence filed their written submissions. Having carefully considered the evidence adduced before the Court and the respective oral and written submissions of the parties, I now pronounce the Judgment of this case.

Burden and Standard of Proof

3. The Accused is presumed to be innocent until proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offences

4. The main elements of the offence of Rape as charged are that:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
5. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed this offence against the Complainant. There is no dispute about the correctness of the identification. The Accused

and the Complainant are known to each other. The Accused admitted that he penetrated the vagina of the Complainant with his penis. Therefore, the Defence admitted the identity of the Accused and penetration of the Complainant's vagina with his penis. Hence, the main dispute in this matter is whether the Complainant consented for the Accused to penetrate her vagina with his penis.

6. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered as consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
7. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent is not the same as the hope or expectation that the Complainant was consenting.

Admitted Facts

8. The Prosecution and the Defence tendered the following Admitted Facts pursuant to Section 135 of the Criminal Procedure Act; they are that:
 - a) *The Complainant's name is Vasemaca Ravatukawa Tivou ["Vasemaca"], currently 22 years old, but was 17 years old at the time of the alleged incident.*
 - b) *The name of the person charged is Vilivo Namoceica Luvubula ["Vilivo"], also known as "Bill", currently 23 years old, but was 18 years old at the time of the alleged offending.*

- c) *The Complainant and the Accused do not share a domestic relationship, but had met each other on 1st October, 2018 through their friends namely, Ruci Koroi ["Koroī"] and Jacob Fox ["Jacob"].*
- d) *The Accused, the Complainant, Koroi and Jacob went to a bush located at Delainabuki settlement, Cunningham Stage 1.*
- e) *The Accused, Complainant, Koroi and Jacob were sitting and smoking cigarettes together, before the Accused and the Complainant went a bit further away, from where Koroi and Jacob were seated.*
- f) *The Accused and the Complainant had sexual intercourse on 1st October, 2018 into a bush located at Delainabuki settlement, Cunningham Stage 1, where the Accused had penetrated the Complainant's vagina with his penis.*
- g) *After the sexual intercourse, the Complainant and the Accused returned to where Jacob and Koroi were and headed back to their respective homes.*
- h) *The matter was reported to the police and the Accused was arrested, interviewed under caution and formally charged for one Count of Rape contrary to Section 207 (1) and (2) (a) of the Crime Act 2009.*
- i) *There is no dispute as to the identification of the Accused person in this matter, the Complainant and the Accused are known to each other.*
- j) *There is no dispute as to the penetration of the Complainant's vagina with the Accused's penis.*
- k) *The Litigation Trial issue is that of CONSENT.*

- 1) *It is agreed that the admissibility of the following documents are not in dispute and the same is tendered by consent and annexed as follows.*

Prosecution's Case

9. The Complainant, the Accused and two other friends (Koroi and Jacob) had gone to the bush near Cunningham Stage 1 on the afternoon of the 1st of October 2018. They sat together and started to converse while smoking cigarettes. The Complainant and the Accused attended the same school and knew each other though they were not friends. After a while, the Accused and the Complainant moved to another place, which was not far and about two to three meters away from where the two friends were sitting. They moved, leaving the two friends to have some private time for themselves.
10. The Accused and the Complainant started conversing while sitting at the new location. After a while, the Accused began to touch her, which she initially found funny. He softly pinned her down with his chest and came on top of her. While doing that, the Accused removed her shorts and undergarment. The Complainant tried to push him away, but he continued. He then penetrated her vagina with his penis. She tried to move and stop. She then made sounds. Initially, the Complainant said that her friend Koroi came to her when she started to scream, but she then changed her version, testifying that no one had come.
11. After having sexual intercourse, they went back to their friends. They then went home. The Complainant explained in her evidence that she did not tell her two friends about this incident because she was scared and shocked. However, when they came to the road, she told Koroi about the incident that happened to her. Koroi had told her to go to the Police. Apart from Koroi, the Complainant had told her uncle about this incident.
12. Eventually, the Complainant reported this incident when she attended her counselling session in 2020. She had tried jumping out of the school building and was referred to counselling. While attending the counselling, she reported this incident.

Accused's Case

13. The Accused denies this allegation, claiming that it was a consensual act. He did not deny being at the location with the Complainant and two other friends on the 1st of October 2018. He further admitted that he moved a bit away from the two friends with the Complainant, and then he had consensual sexual intercourse with her.

Evaluation of the Evidence

14. In view of the evidence presented by the Accused and the Complainant, it appears that the different versions of evidence presented by the Complainant and the Accused. In such circumstances, the Court must consider the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed this crime. The task of the Court is not to decide who is credible between the Complainant and the Accused. (*vide; Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) R v Li (2003) 140 A Crim R 288, at 301, Goundar v State [2015] FJCA 1; AAU0077.2011 (the 2nd of January 2015).*
15. I shall first endeavour to evaluate the evidence presented by the Prosecution. In doing that, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (*vide Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomon Qurai (HC Criminal - HAC 14 of 2022).*
16. According to the Complainant, she informed her friend Koroi about this incident soon after they came to the road. The Complainant did not elaborate further, explaining what she had informed her friend. She only said that she had told Koroi what had happened to her at the bush.

17. Koroj, in her evidence, explained what happened that afternoon on the 1st of October 2018. Her evidence encompasses two components. One is evidence of facts, and the second is evidence of the recent complaint.
18. Gates CJ in Raj v State [2014] FJSC 12; CAV0003.2014 (the 20th of August 2014) has defined the evidence of recent complaint outlining its scope and the application. Accordingly, the evidence of the recent complaint is not evidence of facts complained of but evidence that connects to the issue of consistency or inconstancy of the evidence given by the Complainant. Hence, the evidence of the recent complaint could enhance the credibility and reliability of the evidence presented by the Complainant. The evidence of the recent complaint does not establish the facts of which the Complainant testified or disprove those facts. It only establishes the consistency of the Complainant, establishing that she has stated the similar version of events she alleges in her evidence to the recent complaint witness. The Complainant is not required to disclose the details of the offence, covering all the ingredients. It is sufficient to explain the material and relevant alleged sexual conduct allegedly committed by the perpetrator.
19. According to Koroj, she found the Complainant was upset when she came back from the bush with the Accused. Her eyes were teary. When they went to the road, Koroj had asked her what had happened, to which the Complainant replied that she would tell her later. The Accused and Jacob were still walking beside them. When they went to the Wishbone washroom, the Complainant told her what had happened and showed her the blood on her undergarment. The Complainant told her that Bill touched her even after she said no to that.
20. The Complainant, in her evidence, said that she found blood after the Accused penetrated her vagina with his penis. She then went back to the place where Koroj and Jacob were. She was shocked and scared and did not tell anyone about this incident. She only told Koroj what had happened to her when she got to the road. Unfortunately, the Prosecution led no further evidence to elaborate on what she told Koroj and where the Accused and Jacob were at that time.

21. As Gates CJ outlined in **Raj v State (supra)**, there is no requirement for the Complainant to disclose the details of the offence, covering all the ingredients. It is sufficient to explain the material and relevant alleged sexual conduct allegedly committed by the perpetrator. According to Koroï, the Complainant had told her that the Accused touched her when she said no. He then forced into her without her consent. She had shown Koroï the blood in her undergarment. However, the Complainant did not explain what she told Koroï about this incident in her evidence. According to the Complainant, she told Koroï what had happened to her on the road and not in the bathroom of the wishbone. Therefore, I find this inconsistent nature of the evidence between the Complainant and Koroï affects the reliability of the evidence given by the Complainant.
22. Koroï further testified that she heard the screaming sound of the Complainant, but she did not go and check it. According to the Complainant and the Accused, they moved away from Koroï and Jacob, leaving them to have their private space. The distance between them was just 2 to 3 meters. Koroï said she was scared when she heard the sounds, but Jacob prevented her from going and checking it. During the cross-examination, Koroï said that the scream came only briefly. She cannot precisely tell whether the sound of the scream was for fear or passion.
23. Koroï and Jacob apparently went for a romantic rendezvous with two other friends. (The Complainant and the Accused). The two friends moved away, leaving Koroï and Jacob some space in private. It is impossible that Koroï ignored the scream coming from her friend, who moved 2 to 3 meters away if that scream was for help. The evidence of Koroï needs to be considered with the evidence given by the Complainant, where she initially said that her friend came to her when she screamed. However, she immediately changed her position and said no one came to her when she screamed. The Prosecution did not provide any explanation for this inconsistency. Hence, there is a reasonable doubt whether the Complainant actually screamed for help as she claimed.
24. According to the Complainant's evidence, the Accused initially touched her body, which she found funny. She explained that when he started to touch her, they had not even started any

conversation, asking their names *etc.* He then began to pull down her shorts. The Complainant asked him what he was doing, to which the Accused replied, saying the same things Koroï and Jacob were doing. She pushed him away, but he pinned her down with his chest. She said that it was soft and not a hard push. While softly pinning her down with his chest, he removed her shorts and undergarment and then put his penis out. When the evidence of this alleged incident is considered together with the above-discussed reasons, I find a reasonable doubt whether the Complainant did not consent or gave her consent reluctantly to this sexual intercourse. Moreover, there is a reasonable doubt whether the Accused believed that the Complainant was consenting though she was initially reluctant.

25. In view of these reasons, there is reasonable doubt about the reliability of the evidence given by the Complainant. Therefore, the Prosecution has failed to prove the charge against the Accused beyond a reasonable doubt.

Conclusion

26. In conclusion, I find the Accused is not guilty of this offence as charged and acquitted accordingly.
27. Thirty (30) days to appeal to the Fiji Court of Appeal.



Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

03rd March 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.