

IN THE HIGH COURT OF FIJI

AT LABASA

C RIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 22 OF 2021

BETWEEN: STATE

AND: JACK CAMBELL BALEIVERATA

Counsels : Ms. E. Thaggard for the State
Ms. E. Radrole for the Accused

Date of Trial: 23rd May 2023

Closing Submissions: 23rd May 2023

Date of Judgment: 25th May 2023

JUDGMENT

(The name of the victim is suppressed she will be referred to as "P.D")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 10th May 2021.

COUNT ONE

Statement of Offence

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

Particulars of Offence

JACK CAMBELL BALEIVERATA, between the 1st of October 2019 and the 31st of October 2019 at Vunivacea Settlement, Labasa, in the Northern Division, had carnal knowledge of **P.D**, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

JACK CAMBELL BALEIVERATA, between the 1st of October 2019 and the 31st of October 2019 at Vunivacea Settlement, Labasa, in the Northern Division, on an occasion other than **COUNT 1**, had carnal knowledge of **P.D**, without her consent.

2. On the 22nd of November 2022 the accused person was present and represented and upon the charges being read and explained he pleaded not guilty to both charges. On the 4th April 2023, the accused was present and agreed facts were tendered then the trial date was set for the 22nd of May to 26th of May 2023. The accused was on bail. On the 22nd of May 2023, when the matter was taken up for trial the accused was absent and the learned defence counsel Ms. Radrole informed that the accused has mistakenly believed that day to be a public holiday. It was also informed that he had undertaken to be present in Court on the 23rd Tuesday and moved that the trial be postponed for the 23rd of May. The application was allowed subject to the warning that the trial would proceed in his absence. The learned defence counsel also undertook to inform the accused of the same and also to be present on Tuesday the 23rd of May.
3. On the 23rd of May 2023, the accused was once again not present. Ms. Radrole informed that she was in contact with the accused and that he was on his way to court this morning. The matter was thus adjourned and resumed later that day. The accused was not present and Ms. Radrole informed that the accused was not responding to her calls and is not communicating with her.

4. The State moved that a bench warrant be issued on the accused and the trial be postponed. However, the State Counsel also informed that all the witnesses were present and the State is ready to commence the trial.
5. The Accused was present in court when the trial date was set and the Defence Counsel was in communication with him and has informed of the trial date. The accused was granted time to be present on the following day but he failed to come to court. Then he ceases all communication with the Defence Counsel and maintains a stark silence. The accused clearly did have sufficient notice of the trial date. I am inclined to believe and it's apparent from his conduct that he absconded and deliberately avoided being present in court on Monday the 22nd.
6. The Accused's so-called belief that *Monday was a public holiday* in the context is suspect and appearance to false. His undertaking to be present on the 23rd too appears to be a further extension of his pretence of coming to court. This is confirmed by his sudden cessation of communication and maintaining a stark silence and not responding to the Defence Counsel's telephone calls.
7. In these circumstances this court being satisfied that the accused with sufficient information and knowledge of the trial date, had himself chosen not to attend court and that he is absconding. Accordingly, an order was made permitting the State to proceed with the trial in the absence of the accused under and by virtue of Section 14 (2) (h) (i) of the Constitution. The trial proceeded in-absentia. However, as the Defence Counsel Ms. Radrole informed that she was instructed and has instructions, she was permitted to continue to appear and defend the accused.
8. The cases of the prosecution and the defence were closed and judgement was set for the 25th of May 2023 but the defence was informed that if the Accused appears any time before that he is free to give evidence if he so desires. Accused continued to abscond despite the Defence Counsel informing of the same.

Elements of the charges

9. For the Accused to be found guilty of the counts of Rape in the present case based on sub sections 1 and 2(b) of Section 207 of the Crimes Act, in addition to the date and place

stated in the respective counts the prosecution must prove beyond reasonable doubt, the following elements, that;

- i) The Accused,
- ii) Penetrated the vagina with his penis,
- iii) The Complainant did not consent to the Accused to the said penetration,
- iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.

The slightest penetration of the complainant's vagina by the Accused's penis is sufficient to satisfy penetration.

10. If I may elaborate counts No.1 and 2 that of rape are based on sub sections 2(a) of Section 207 of the Crimes Act. Under these sections, the offence of Rape is constituted when a person penetrates the vagina without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to so 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.

Presumption of innocence

11. The accused is presumed to be innocent until he is proved 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 is not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence led by of the prosecution the Accused must be found not guilty of the charges and accordingly acquitted. No adverse inference may be drawn from the absence of the accused and it will be considered as being akin to the exercise of the right to silence by the Accused.

The Trial

12. The prosecution led in evidence two witnesses and closed its case. As there was prima evidence of the charges the defence was called for. The Defence Counsel informed that they do not wish to call any evidence or witnesses. Accordingly, both parties closed their respective cases and the counsel were heard in their closing submissions and the Defence filed written submissions too. Now I will endeavour to pronounce the judgment upon considering the evidence and their submissions.

The Prosecution Case

13. PW1 **P.D.**, the victim is now 19 years and a student in Form 4. Her date of birth is 20th of October 2003 and in proof of which her birth certificate was produced as exhibit PE1. In 2019 she was living with her parents and younger brother in their house at Vunivacea where her father has a large sugar-cane plantation. During October 2019, a group of about 15 labourers have been engaged by her father to harvest and cut cane. They have been resident in a partitioned area of their house for 3 to 4 weeks for this purpose.
14. On a Saturday morning around 10am during October she had taken *salty water* to be given to the goats about 200 metres away from the house within their plantation. As she was bending down and feeding the goats she felt someone approach from her rear, put his arms around her neck and had one hand on her mouth whilst holding a cane knife in the other. She said that the knife was held somewhat close to her neck. Then she had been taken forcibly may be about 30 metres into the bush. She then was pushed down on to the grass and her dress lifted and her panty was removed by this person. She was on her back facing up. At this point the person was right above her and she was face to face with him. She had recognized him to be Jack, one of the labourers. She had seen him with the labourers and heard he been called Jack by others.
15. She had made an attempt to shout and get up but was not possible as he was holding her down and was on her. Then Jack had lowered his tights and then inserted his penis into her vagina and had forcible sexual intercourse which she say lasted for about 25 to 30 minutes after which Jack had dressed up and then threatened her that he would chop her neck with the cane knife if she told anybody of this. He had then left. P.D. had returned home.

16. She had not told anybody and remained silent as her parents were very strict and she was scared. Looking after the goats being her duty in the household, she was required to go back to the same place late that afternoon once again. She had been reluctant and told her mother that she does not want to go to get the goats. However, her mother had wanted to know why and insisted that she attends to the same. She had thus around 4pm gone back to get the goats. This time around once again Jack had come there and taken her to the same spot and in a similar manner removed her panty and inserted his penis and had sexual intercourse without her consent and forcibly for 10 to 15 minutes as done before he had finished what he had to do and then threatened her once again that he would chop her neck off if she would tell anybody and then left.
17. This time around she had been crying and returned home but as she came close to her house she had contained herself and concealed her emotions and remained without telling anybody. She said that these labourers were there may be for another 2 weeks and they left. After some time she had realised that she was pregnant but continued to remain silent. In May 2020 she happened to visit her elder sister in Suva on which occasion her sister had seen her stomach looking large and asked her if she was pregnant. She had not said anything and the following day her sister has called and informed their father and then taken P.D to a doctor. The doctor had then scanned her and confirmed that she was 7 months pregnant.
18. Both of them have returned to the sister's house and the sister had inquired and P.D has told the sister that it was a hired labourer an i-Taukei man, whereupon she had been immediately taken to the police where P.D for the first time has narrated details of this entire episode and incident.
19. She said that the person who had forcible intercourse was "Jack" and that she clearly identified him and he was one of the labourers who spent 3 to 4 weeks in their house at the plantation. She said he was a kind of a muscular man who was somewhat dark in complexion and taller than her. She was confident that she could identify him if seen again. As the accused was absconding the witness was shown the accused identification details filed in the Magistrates Court original record and she identified the colour

photograph as being that of Jack she referred to. The said photograph was marked as Exhibit PE2.

20. She was cross examined by the Defence Counsel extensively. It was suggested that the labourers were there on the 24th of September 2019. The witness said they were there during October. The following omissions were elicited during her evidence. Though she said in evidence that it was a Saturday she had not specifically stated so in her statement. However, the defence admitted that she had stated that it was during a weekend. The failure to mention in the statement that it was her duty to look after the goats was the next omission. Though she in evidence said she was trying to push the accused and get rid of him the failure to mention the same in the statement was the third mission.
21. The following contradictions were marked during the cross examination. In evidence P.D said that the knife was put against her neck, however, in her statement she had said that he showed the knife to her. Then in evidence she had said the panty was removed of one leg and was hanging on the other, however, in her statement she had said the panty was pulled down below the knee. These were the noticeable omissions and contradictions.
22. P.D said that she was taken about 30 metres towards the river by the accused. She also said that she was raped twice for 25 minutes and 15 minutes respectively. It was suggested to her if she was so dragged and raped in this manner she ought to have sustained serious injuries. P.D said that she did have some minor scratches and injuries and it was extremely painful in her vagina and there was a cut in her vagina. It was suggested to her that if she was forced in that manner she would have been emotionally disturbed and traumatized that others at home ought to have noticed. She said that she was afraid of her parent and due to the threat made by the accused, she tried to look normal when she returned. It was suggested that she could not possibly have looked normal if she was so raped. She said that she looked normal from outside but from inside she had been in fear and pain and she was afraid of her parents.
23. The defence suggested that she did not complain because nothing happened. It was also suggested that the allegation against Jack is made up and false. It was also suggested that Jack did not do anything in the morning or at 4pm and he never raped her or threatened

her with the knife on that day. The complainant has denied all these suggestions. She admitted not telling her sister when she asked if she was pregnant and even denying that she was pregnant. However, she admitted that once she returned from the doctor's, she narrated the incident to her sister. Finally, it was suggested that she was ashamed and she is lying to safeguard herself and to push the blame to Jack. She denied these suggestions too.

24. PW2 P. D she's the elder sister of P.D and said that P.D visited her in May and when P.D was changing her clothes she observed her stomach was big and asked her if she was pregnant. P.D had denied but Priya had realised that she looked pregnant and given her time till the following day to tell what happen. The following morning, as she told nothing, Priya had called their father and as instructed has taken P.D to the doctor. Doctor after a scan has confirmed that she was 7 months pregnant. Then she confirmed that after returning home when she asked P.D she was uncontrollably emotional and crying a said that an i-Taukei labourer who was at their house had raped her. Then without further probing she had immediately taken her to the Valelevu Police Station. At the police station they have spoken to her, calmed her down and then P.D has come out with the entire story and also divulged the name Jack when she made the police statement.
25. In cross examination she admitted that her father is in overall charge of the livestock in their farm but looking after the goats was always done by her mother then by this witness when she was at home and once she left it was by P.D. She also said that her parents were very strict but admitted they were loving. She also admitted that when she asked P.D she only mentioned that it was an i-Taukei man. With this evidence, the prosecution closed its case.

Admitted facts

26. The following facts are agreed and admitted; that the complainant is P.D; the accused is Jack Cambell Baleiverata; and that he worked as a labourer in the sugar cane farm at Vunivacea belonging to the complainant's father. To that extent the identity and the name of the accused are admitted and not in dispute.

Evaluation

27. Though the accused absconded and was not present at the trial no adverse inference can be and will be made on his absconding. The accused was not there but he was represented by counsel with full instructions who cross examined and put the accused's position and the defence to the witnesses. The absence of the accused will be deemed and be considered as he exercising his right to remain silent. I once again reiterate that the burden of proof is fairly and squarely, right to the end remains with the prosecution even when the accused is absconding. Having said so, I will now endeavour to evaluate the credibility and reliability of the prosecution witnesses and their evidence.

Delay

28. The starting point is that this is a belated complaint almost after 7 months after the alleged act. Prompt complaint certainly supports consistency and belated complaint if there is a reasonable and acceptable explanation may be considered as evidence. Prosecution intendeds to prove the main elements of this offending with the evidence of P.D alone. In a case of this nature since no corroboration is necessary, it is possible to prove all the ingredients and elements with only that of the victim's evidence. There is a delay of about 7 months in disclosing this incident. The delay by itself in the circumstances of this case will not affect her credibility if such delay is explained.
29. The complainant in this was almost 16 years when this offending took place in 2019. She gives two reasons for not disclosing. The primary reason is that her parents were strict and that she was afraid to tell them. Secondly, that the accused had threatened to chop her neck off if she disclosed. Are these rational and acceptable excuses for not disclosing promptly? Naturally a girl of almost 16 years will be embarrassed, ashamed and shy to disclose that she had been subjected to sexual intercourse by another, particularly when it was a labourer of her father. It is settled and well accepted that girls especially of immature age are prone to conceal due to shyness and threats even sometimes due to self-blame. Justice Anthony Fernando (President of the Court of Appeal of Seychelles) in **Jean-Luc Louise v State** [2021] SCCA 72 in considering a similar case of delay of a child victim opined thus;

“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint....” and that, *“...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame,*

embarrassment, powerlessness and overt and covert threats by offenders”.

30. As to the manner of assessing a belated complaint was considered in *State v Serelevu* [2018] FJCA 163; AAU141.2014 (4 October 2018) at paragraph 24 – 27; and it was held that;

[24] In law the test to be applied on the issue of the delay in making a complaint is described as “the totality of circumstances test”. In the case in the United States, in Tuyford 186, N.W. 2d at 548 it was decided that:-

“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

31. In the above circumstances let me now consider if the delay is so explained. P.D was living in her house in a large sugar cane plantation in an isolated setting. The closest neighbour was a few kilometres away. She had only her parents and the younger brother around. With her parents being unusually strict especially her father it is probable and possible that she opted to conceal this incident. Further the accused himself was living in the same premises for 2 weeks after the incident. The accused had threatened her with death so to say. Thus faced with strict parents, and the abuser who threatened to chop her neck being in the vicinity she not immediately telling and concealing this and suffering in silence is probable.
32. That being so, at least when she realised that she was pregnant one would expect her to tell and disclosed this to someone she had being going to school. She had the opportunity to tell someone at school. However, between 2019 and 2020 there had been a disruption of school due to covid-19 and the lockdown so she may not have had the opportunity to do so. Then she had the opportunity to tell her sister in May 2020 when she asked her. She does not divulge but remained silent until the medical test confirmed her pregnancy. It is thereafter, that she tells her sister for the first time of being raped.
33. The sister confirms that P.D was continuously crying and emotional at that point. It is only when she was questioned at the police station after being calmed down that a full

disclosure is made. As observed above the circumstances had initially compelled P.D to conceal and then the concealment has continued for a long period and it is possible that she would have a mental block to disclose voluntarily even when asked due to the prolonged self-denied and fear. In these circumstances a girl in that condition of mind and body would require great persuasion and assurance to confidently disclose what she had been concealing for a long period of time.

34. According to PW 2 it is only upon the police officers re-assuring and talking to her and calming down that P.D had disclosed that, it was Jack who raped her. Was the victim prompted and induced or coached to make an allegation of rape? It is true that a child, owing to immature age and understanding, is prone to manipulation and tutoring. But there is a vast difference between tutoring and counselling. Tutoring, in common parlance, means inducing a person to say something which is untrue or about which the person tutored has got no personal knowledge, whereas, counselling means encouraging a person to come out with the truth. Even in an adult, sexual abuse will cause intense feeling of embarrassment, fear and humiliation. A survivor of sexual abuse may even be afraid that she would not be believed by her family members. This fear can keep the victim under silence without disclosing the abuse to anybody. At times, the survivor may allow her to be exploited repeatedly under threat by the abuser that he would expose her. Thus, there are so many reasons for even adult survivors of sexual abuse to keep silent without disclosing about the harm caused to her. This is in effect, a psychological and emotional phenomenon. In order to relieve such survivors from the said trauma, the survivor may need intensive encouragement and counselling by experts and the family members or the persons in whom the survivor reposes confidence.
35. Similarly, in the case of a child victim, it is quite common for the child survivor of sexual abuse to keep silent either due to fear for the abuser or the fear of the parents as in this case. In such cases, the child victim may not disclose the occurrence to anyone or may even go to the extent of saying that nothing had happened to her. If such earliest statements of the victims are given weightage, then, one more real victim shall be the truth. Therefore, in order to bring out the truth, the child needs to be counselled intensively either by the parents or by their family members, teachers or the others with whom the child is very affectionate and also with a skilled professional counsellor. If the child as a result of such counselling, comes out with the truth by making a disclosure

statement after being relieved from the above inhibition, the evidence of the said child cannot be discarded.[**Ganesan vs. The state** (The High Court of Judicature at Madras (Criminal Appeal No.401 of 2015 (27.04.2017))].

36. Time and again studies have shown, and common sense dictates, that victims, especially young children differ in their responses to traumatic events, and are inclined to display individualised emotional responses to such situations. This is particularly so when the experience is an embarrassing and shameful one which involves the bodily invasion and assault on the integrity of the victim. In such circumstances when she is faced with strict parents may not be unusual for a victim to put up a front of normality.
37. In this circumstances I am satisfied that the delay is satisfactorily explained and it is not unsafe to act on this belated evidence.

Demeanour and deportment

38. As to the demeanour and deportment of P.D: she had no doubt matured to some extent when she gave evidence several years after and she was around 19 years. Yet, I observed that when she was narrating being dragged and subjected to intercourse she was visibly emotional and exhibited a degree of tension and fear. This emanated quite naturally and effortlessly. In my experience, it is not possible to artificially and falsely to play act in this manner. She however, appeared to have some kind of strong ability to respond to cross examination and withstand even when harsh suggestion were made. She did not at any stage get into a condition of uncontrollable emotional outburst. She was quite in control to that extent. Her responses were prompt and deliberate. Thus, her demeanour was extremely consistent with that of a truthful witness.

Probability

39. Let me consider the probability of her evidence. She claims to have been forcibly been abused the morning and then she returns once again to the same place that afternoon very well knowing that Jack was around. In the normal course of events is this probable? When questioned she said that she was reluctant to go back and told her mother but her mother spontaneously began to question her as to why, she was by this time concealing and incident and when her mother was so questioned, it is quite natural for her to get into a quandary and the state of helplessness in which circumstance she would rather go back

to attend to the goats rather than risk disclosing what she was trying to conceal. That being so she faces the same ordeal for the second time. Then she continues to remain silent. Is that probable? In the circumstances of this case she has once before concealed an incident from her parents and then is faced with the same once again. Thus second time round she will suffer from the guilt of not disclosing the first incident as well as the fear and shame of having to disclose the second incident which would compound and further confuse the situation she had put herself into. The compounded guilt, confusion and the helplessness will certainly prevent her from disclosing and seeking help. Therefore it is quite probable and possible for a girl of this age in this predicament to conceal in this manner and also to have gone to the same place for the second time.

40. The defence suggested that if she was dragged 30 metres and raped for 25-30 minutes, one would expect her to sustain serious injuries which she did not have. P.D said that she sustained some minor abrasions and scratch marks externally on her body and she had severe pain and a cut in her vagina. The question is the external injuries; if she was dragged twice over 30 metres one would certainly expect drag marks at least on her feet as she was taken held by her neck area. However, P.D in her evidence said that she was wearing boots when she went to feed the goats. This certainly would have prevented any injuries from being caused to the legs and feet if she was dragged along.
41. Then it was also in evidence that there was grass in this area. This would have prevented causing serious injuries to the back of her body. P.D in her evidence described and demonstrated how the accused came from her behind and put his arms around her and grabbed her. As I observed in court, P.D is a person of a small structure. A few years ago when she was 16 it is highly possible that she may have been even smaller. She described the accused to be a person of about 30 years, taller than her and a person with a well-built structure with a muscular bodily. Considering the description and the demonstration as to how she was taken, to my mind it is certainly possible to have taken her in that manner and the chances of she sustaining any serious injuries would certainly have been extremely remote.
42. Further thereto the accused had a knife in his hand which he held close to her neck in a threatening manner. In these circumstances it is very unlikely for her to have resisted in

that sense and its more probable she would have succumb and surrendered with very little resistance. Therefore, the absence of serious physical injuries is probable and possible.

43. However, she did clearly and consistently say that there was extreme pain in her vagina and there was a tear or a cut in her vagina. This is extremely possible and probable when a person is forced into penial penetration in this circumstances for 20-30 minutes and twice over. Accordingly the evidence of the victim to my mind is extremely probable and credible, thus I see no appreciable improbability.

Consistency

44. Now I will consider the consistency of her evidence. No doubt her statement is belated and has been made in 2020. She testified in May 2023. During the course of which several omissions and contradiction were elicited. Let me consider the effect of these contradiction and omissions. She in her statement had not specifically stated that it was on a Saturday but she had clearly said that it was during a weekend. To that extent there is no omission but she had said the same thing in a different form. I don't consider this as an omission. She not telling the police that it was her responsibility to look after the goat was also another omission raised by the defence. The fact that she had gone to tend and look after the goats is not an omission. The fact that she was entrusted with this responsibility arose in cross examination as a further explanation of a connected matter. It is quite natural and probable that these additional details may not be stated in the police statement. Then in evidence she said the knife was held against her neck whereas to the police she had said the knife was shown. The fact that the knife was used is not contradicted. It is only how it was used and she had elaborated this when giving evidence. I don't see any contradiction in this instance.

45. Then she said that the panty was removed off one leg and was still hanging on the other, whereas to the police she says that it was removed down below the knee. When she said that the panty was still hanging on the leg that shows it still remained along her leg below the knee on one leg. It is this difference that has been elicited as a contradiction. She had not told the police it was on both the legs. I do not consider this as a significant contradiction. These were the inconsistencies that were elicited which I don't consider having any bearing or effect on the credibility or reliability of her evidence. Her evidence is thus consistent I hold.

The defence suggestions

46. The position suggested by the defence is that this is a false allegation and something that did not happen. In effect it was a denial. There was no suggestion of consent. The defence did suggest that this did not happen on a Saturday and also did suggest that the accused did not threaten and no incident took place in the location as stated by the victim. The defence is that of a fabrication and a total denial. It was also suggested that she is fabricating and making a false allegation due to shame and to save herself.
47. On a consideration of the totality of these suggestions it is a denial that has been suggested, and it is also a false fabrication. That being so let me consider the defence position vis-à-vis the prosecution position. P.D or her family did not have any reason to make a false allegation of this nature against the accused. Neither was there any reason suggested in cross examination. He was a labourer who worked for a few weeks and left 7 months before they complaint to the police was made. In these circumstances it is extremely unrealistic and highly improbable that an allegation of this nature will be randomly fabricated against the accused. The victim for the first time disclosures Jack's name to the police. That too was after the police calmed her down and inquired from her.
48. The initial inquiry may have most certainly been as to who was responsible for the pregnancy. It is that she had disclosed as being Jack. That being so now it is incumbent and necessary to consider if the sexual intercourse may have been consensual. The defence no doubt takes up a total denial. I have not accepted and have rejected the denial as being improbable. Even though the defence denies it is the duty of this court to consider the issue of consent independently. As said above, though the defence denies P.D says otherwise. This issue is sorely dependent on the credibility and the reliability of P.D's evidence.
49. As evaluated above, the evidence of P.D is credible and reliable. That being so, she says that she did not consent and the sexual intercourse was committed on both occasion forcibly and without her consent and against her will. That is the position and to that extent this had been consistent. As evaluated above, even without consent she could have been subjected two acts forcible penetration in these circumstances without causing serious external physical injuries. But she said that there was a vaginal injury and serious

pain in her vagina. This remain uncontracted and consistent. When she said under cross examination she spontaneously explained the vaginal pain and injury.

50. If she had suffered such injuries and it was against her consent why would she remain silent without immediately disclosing? As explained above, it is due to the fear she had of her parents. I have held that to be possible and probable. As such I accept her evidence as being true and reliable As such, the evidence of the victim on the issue of consent that it was without her consent is probable and reliable. She was resisting and saying no. Thus the Accused certainly knew that she was not consenting on both these occasions.

Date of offending


51. The labourers were there during the month of October. According to the victim this had happened a week after they came and the labourers have remained for a further 2 weeks thereafter. Thus if they came during the first week of October this act of rape had taken place on the Saturday of the following week if so the Saturday of the 2nd week. The defence suggestion was that they came on 24th September. If that be so yet the rape would have taken place the following week that will be the first week of October. Thus it is proved that the two acts of rape have been committed during the first two weeks of October 2019.

Conclusion

52. The defence is a denial, they even alleged this to be a false fabrication. As opposed to that P.D says that the accused penetrated her vagina without her consent and that it was rape. As evaluated above, there is no logical or rational reason as to why P.D or her family should make a false allegation against the accused. Therefore, the defence suggestions are highly improbable and are rejected. Now I'm left with the evidence of P.D. She says that the accused had intercourse on two occasions on a Saturday in October 2019 Which I accept. I have held that the, suggestions of the defence are not able to create any doubt on the prosecution version. This means that the prosecution has successfully proved beyond reasonable doubt that the accused Jack did have sexual intercourse or carnal knowledge of the victim on the two occasions as alleged in the two counts and that was without her consent and the accused knew that she was not consenting on both occasions.

53. On the totality of I am satisfied that the prosecution has proved beyond reasonable doubt that that on a day within the month of October 2019 at Vunivacea Settlement Labasa, the Accused Jack Cambell Baleiverata did on two occasions insert his penis into the vagina of P.D without her consent and he knew that she was not consenting, which proves the allegations of rape made by Counts 1 and 2. Thus I hold that the prosecution has proved beyond reasonable doubt Counts 1 and 2 of rape as charged. I accordingly find the accused guilty of the said counts separately and convict him for the same separately.




Gihan Kulatunga
Judge

At Labasa

25th May, 2023

Solicitors

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused