

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 089 OF 2020

STATE

v

MAILE FINAU LATAMAI

Counsel : Ms. S. Swastika with Mohammed I. Rafiq for Prosecution
Mr. P. Gade for Defence

Dates of Hearing : 24-25 May 2023

Date of Judgment: 26 May 2023

(The name of the complainant is suppressed. She is referred to as LR)

JUDGMENT

1. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. The information is read as follows:

Count One
Statement of Offence

RAPE: Contrary to section 210 (1) and (2)(a) of the Crimes Act, 2009.

Particulars of Offence

MAILE FINAU LATAMAI between the 1st day of October 2018 and the 31st day of October 2018 at Sigatoka in the Western Division penetrated the vagina of LR with his penis, without her consent.

2. The matter proceeded to trial when the accused pleaded not guilty to the charge. At the ensuing trial, Prosecution presented the evidence only of the Complainant and closed its case. The accused was put to his defence when the Court found a prima facie case against the accused. The accused and two other witnesses presented evidence for the Defence. The counsel from both sides tendered written submissions. Having carefully considered the evidence presented at the trial and the submissions made by the counsel, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence and that proof must be discharged beyond reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt. The accused is under no obligation to prove his innocence or prove anything at all.
4. The Defence took up an *alibi* as a defence. But he is under no obligation to prove his *alibi*. It is for the Prosecution to disprove the *alibi* and prove beyond reasonable doubt that it was the accused Maile and not anyone else that had penetrated the vagina of the complainant with his penis.
5. The accused is charged with Rape. Section 207(2)(a) of the Crimes Act defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slightest penetration is sufficient to prove the element of penetration.

6. 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 give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.
7. I shall now summarise the salient parts of evidence led in this trial.

LR (The Complainant)

8. LR is still a student of Year 13. Since her childhood, LR had been residing at Nawamagi Village, Sigatoka with her parents, five siblings and one of her cousin's children.
9. In October 2018, she was residing in Nawamagi with her elder sister Mele Latamai, her grandmother, two younger siblings and her cousin Maile alias Yaca. She knew Maile from her childhood.
10. In October 2018, she was 13 years old. One day in October 2018, both of her parents had gone to attend a funeral in Namuka with her elder brother, leaving her grandmother, two small siblings and her elder sister at home. Her cousin Maile was also around at home. Her elder sister was in the kitchen and her grandmother was lying down in the living room. Her younger siblings had gone somewhere around in the village.
11. When LR was sitting in the only bedroom in her house, folding clothes, Maile suddenly entered the bedroom. He walked towards the bed and called her. He was only wearing shorts at that time. She walked towards where he was. When she went to him, Maile started touching her body on top of her clothes. She was wearing a round-neck T-Shirt and a wrap-around *sulu*. He then put his hand underneath her clothes. When he started touching, she did nothing. However, she did not want him to touch her body.
12. Maile is a well -built tall man. He pushed her down for her to lie on the bed. He just opened the *sulu* and continued touching her, this time, by putting his hand under her clothes. He went

down and pulled down her panty up to her knee and started touching her vagina. She did not want him to do this to her. She did not like what he was doing so she tried to sit up. He pushed her back down and came on top of her. He was not wearing anything at that time. He continued touching her vagina till the time he tried to insert his penis in her vagina. He then put his penis into her vagina and moved back and forth for few minutes. She felt pain in her vagina. She felt sad. She did not want him to do this to her. When he had inserted his penis, she was twisting and turning but he was still doing it.

13. When he started touching her vagina, he told her not to tell anyone. She was troubled that if she told anyone he would do something to her. When he was moving back and forth she pushed him back. When she pushed him, he moved away from her. After that he pulled up her panty and went away. When she sat up, she saw the blood stains in the bed sheet.
14. She took the bed sheet and went past the sitting room to the bathroom where she had a shower and washed the bed sheet. She saw her grandmother still lying down in the sitting room. Her sister was in the kitchen. She didn't show the blood stains to her sister because, at the time Maile was doing the act, he had told her not to tell anyone. She was scared of him. This incident took place during day time.
15. The day after, she told her eldest sister Mele Latamai (Mele) about the incident. She told only when Mele asked. Mele had seen Maile lying in the living room between her and her youngest sibling while they were sleeping the night before. That's what had prompted Mele to inquire about the incident. But she didn't tell the whole story to her sister. She only told Mele that Maile had harassed her by touching. She did not tell all the details because she was still thinking about what Maile had told her- do not tell anyone. She saw Maile at her house two days after the incident. She did not want to see him anymore.
16. Nothing happened when she told her sister about the harassment. She went missing from home because she did not like to face Maile anymore. His visits home kept reminding her of the incident. So she ran away from home and was staying at a friend's place. Her brother located her and took her to Sigatoka Police Station. The police referred her to the Social Welfare Office because she was underage. When the Social Welfare officers asked her the reason of her leaving the house, she told them in detail everything Maile had done to her. When her

family went to the Social Welfare Office, they got to know what had happened. The relationship between the family members got sour.

17. Then her uncle (mother's elder brother) brought yaqona to ask for forgiveness from her parents. Maile's father is his uncle's brother. Maile asked for forgiveness from her father. Her father forgave Maile. When they sought forgiveness, she felt a little better so she stayed home.
18. Talks about the incident had spread in the village. She was taken to Suva. The matter was reported to police in 2019, during the school break when she started attending school in Suva from her aunt's place. One of aunt's children who is a police officer had informed the police. She went to give a statement to the Police.
19. Under cross-examination, LR said that the uncle who came to seek forgiveness was Semisi Qaranivalu. She admitted that there was a property dispute between her mother and her two brothers- Maile's father and Semisi Qaranivalu. She agreed that in the year 2018 there had been constant arguments with regards to the ownership of the house in which they were staying in Nawamagi village. He admitted that when her grandmother got a mild stroke, her mother and her family had moved to Nawamagi. She denied that Maile was not residing in Nawamagi in October 2018. She agreed that the allegation arose when she had moved to Suva in 2019. She denied that between 1 October and 31 October 2018, Maile did not come to the house at Nawamagi Village. She gave her statement to the Police on 2 December 2019 in the presence of her mother. She denied that she was influenced by anyone to come up with this allegations because of the arguments regarding the ownership of the house in Sigatoka.

Defence Case

Maile Finau Latamaiurukalala

20. Maile said that, between 1 October and 31 October 2018, he was residing at Raiwaqa Village about 12 km away from Nawamagi Village. He was residing there with his grandfather Tawake, his family and Uraia Mudreilagi who is one of Tawake's children. The house in Nawamagi in which LR's family was residing was owned by his grandfather and passed down to his father. Since his grandmother was sick she wanted her daughter Masina Draunidalo

who is LR's mother to be with her. Masina is his father's youngest sister. He denied that he was at LR's house when her parents had gone to attend a funeral in October 2018. He was in Raiwaqa village from September to November 2018. He went for a family function. He did not return back to Nawamagi in October 2018. He denied going with his uncle to ask for forgiveness after this alleged offence came to light.

21. Maile assumes that LR and her parents made up this allegation because they wanted to get him out from the house which passed down from his grandfather to his father.
22. Under cross-examination, Maile admitted that he occasionally used to stay in their family house in Nawamagi. He agreed that he went to attend a family function when he was staying at the family house in Nawamagi in 2018. The function Tevutevu was for 100th night remembrance of one of his grandfathers who had passed away. The function lasted only for 2 days.

Uraia Masivou

23. In the year 2018, Uraia was residing in Raiwaqa. In September 2018 Maile came home, for the function that celebrated his grandfather's birthday. The visitors went back but Maile stayed back on his dad's invitation and was staying with them till December, when he left home for Levuka.
24. Under cross- examination Uraia said he came to give evidence on Maile's request.

Semisi Qaranivalu

25. In 2018, Semisi was residing in Nawamagi. LR is the daughter of her younger sister. Maile is the son of his elder brother. Maile called him to come and give evidence because LR had given a statement that he facilitated a reconciliation process. However, he never conducted a reconciliation process. He knew about this case only when Maile was being arrested. He is aware of a property dispute over the sister's house that LR was living in.
26. Under cross-examination, Semisi agreed that on some occasions, Maile used to come and live with him in Nawamagi. He admitted that being the eldest in the family he is responsible for

counselling the younger members of the family in the village setting, if he is told. He would attend to reconciliations of family disputes. His house and LR's mother's house are situated adjacent to each other.

27. That's the case for Defence.

Analysis

28. Prosecution case is that the accused Maile penetrated the vagina of the complainant without her consent. Prosecution relies solely on the evidence of the complainant and they want the Court to believe her evidence which they say is the truth. The Defence case is one of complete denial. They say that the complainant did not tell the truth so that her evidence should be rejected. They take up an *alibi* and place the accused in Raiwaqa, about 12 km away from the alleged crime scene, at the time of the alleged offence. They further claim that the complainant and her family made up this allegation because of the land dispute over the ancestral house.

29. This case turns on who told the truth in Court. However, at the end of the day, even if the Court prefers the evidence of the complainant to that of the accused the Court must be satisfied that the Prosecution proved the charge beyond reasonable doubt.

30. The complainant was a child and had just turned 14 when the alleged offence occurred. She is still schooling. When I venture in to analyse her evidence, I would bear that in my mind.

31. It was contended that there had been no 'hue and cry' and that the complainant had made no complaint to anyone about a rape until the matter was reported to police, more than a year (14 months) after the alleged incident.

32. According to the complainant, she had told her eldest sister Mele the day after the alleged incident that Maile had 'harassed' her by 'touching'. But she had not told the whole story she told in Court to her sister for the reason she explained in her evidence.

33. In view of this evidence, Mr. Rafiq Mohammed, the Learned Prosecutor thought that the complainant's evidence is inadequate to call Mele, the recipient of the complaint, to support the version of the complainant on the basis of 'recent complaint'. So he decided against calling

her (Mele). I think the Learned Prosecutor missed an important piece of evidence. If Mr. Mohammed had carefully read Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) and series of other judgments that had dealt with ‘recent complaint’ evidence, he would have called Mele to the stand.

34. In Raj (supra), the Supreme Court at [39] & [40] observed:

The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant’s evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.

The Petitioner’s argument is that the complainant did not go so far as to complain to the witnesses about rape. The cousin sister said the complainant told her that the Petitioner was touching her body and breasts. The same story was related by the aunt, the mother of the cousin sister, and by the grandmother.

35. The complainant had told her eldest sister the day after the alleged incident that Maile ‘harassed’ her by ‘touching’. In the light of the paragraph quoted from Raj above, a complaint in the nature of the one made by the complainant should, in the circumstances of this case, be capable of supporting the version of the complainant if her eldest sister was called as a witness.

36. It is not my business to advise the Learned Prosecutor as to who he should have called as witnesses and not my intention to criticise the way the prosecutor conducted his case. But it is for me to emphasise the importance, in assessing the credibility of complainant’s evidence, of the fact that she had told her eldest sister the day after the alleged incident that Maile had harassed her by touching.

37. Perhaps, one could argue that even if Mele had been called as a witness, her evidence could have been of little help in terms of recent complaint as the complaint was in fact made upon her being questioned by way of a leading question -what happened? However it is significant that this particular inquiry was made by Mele when she had noticed Maile lying down next to the complainant in the sitting room in suspicious circumstances. Although the complainant’s evidence was not supported by calling her eldest sister, I still believe the complainant told the truth of what actually happened.

38. The complainant explained why she did not tell her eldest sister the full details of what had happened. She did not go into details because she was still thinking about what Maile had told her during the incident. When Maile started touching her vagina, he had told her not to tell anyone. The complainant expressed herself and said she was troubled that if she did tell anyone, Maile would do something to her.
39. He was an adult aged 37 whereas she was a child of 14. The difference between the two is not only that of the age but of their physique. He is fat, a well-built man. She is small and gracefully slim. They were residing in the same household in a closely knitted family setting. If she entertained any fear of him or expected bitter consequences or embarrassment by telling the full details, she is quite justified in her conduct in the circumstances of this case. That is my reasoning to the Defence argument that the complainant did not disclose full details of a rape incident to her eldest sister because no such thing ever happened.
40. The complainant expressed her dismay and disappointment at the response she had received to the complaint she made to her eldest sister about the harassment. It did nothing to protect her. Maile kept on coming to her house despite that bitter incident. She said she did not want to see him again and, whenever he visited her house, she avoided him and used to go away from home. Finally she decided to run away from home. She was caught by her brother at a friend's place. When her angry brother handed her over to the Sigatoka Police Station, she was referred to the Social Welfare Office because she was an underage girl. It was in that office that she had opened up with the full details, when she was questioned as to why she left home.
41. Her evidence would tell the predicament of a child victim in our society. When it was revealed at the Welfare Office that her cousin Maile had raped her, her mother's eldest brother, uncle Semisi, accompanied Maile to her place with Yaqona to seek forgiveness from her family. Her father was pleased to give forgiveness as requested. She said she was somewhat relieved at their gesture and decided to remain home. However, that did not prevent the allegation from being ended up in the police station. The matter had already been reported to police.
42. For the reasons given, I find that the delayed reporting is satisfactorily explained and quite justified in the circumstances of this case. It never discredits the version of the complainant that she was raped.

43. Uncle Semisi was called by the Defence to discredit the evidence of the complainant that a reconciliation process took place and that was in fact facilitated by him (Semisi). I do not believe Semisi told the truth in Court when he denied having participated in the reconciliation process. He in fact admitted that, being the eldest in the family, he would facilitate such a process, if a request was made. If he had once attempted to hide the truth from coming out by way of a reconciliation process, I would not expect Semisi to resile from his position and tell the truth in Court. He is indeed Semisi's uncle and had come to Court on Semisi's request. He also was party to the land dispute. In my view, he is not an independent witness. I would reject his evidence.
44. It was further argued that the complainant made up this allegation because of the dispute that existed between the complainant's mother on one part and Maile's father and his uncle the other part over the ancestral house in Nawamagi. The fact that there had been a property dispute was never denied by the complainant. According to Maile, the dispute was constant and ripe in 2018. Then why the complainant would wait 14 months to lodge a complaint with the police in December 2019 if she or her mother really wanted to teach a lesson to Maile and his family.
45. It was never put to the complainant that she made up this allegation because of the property dispute. Thereby, she was denied the opportunity to respond to this allegation of fabrication. I do not believe that the complainant of her age would fabricate such a serious allegation against her own cousin if it was not true or well founded. On the other hand, the circumstances under which the matter had been reported to police does not suggest that the allegation was made up. She or her parents never complained to police. It was police cousin in Suva that did.
46. Section 129 of the Criminal Procedure provides that where a person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted. In view of that, on the strength of the complainant's evidence, I do not need any corroboration to accept what she was telling the court to be the truth.
47. I closely observed the demeanour of the complainant. She was straightforward in her answers and was never evasive. Her conduct is consistent with that of an honest rape victim. I accept her evidence as the truth.

48. At the closing address, the Defence Counsel raised a point and argued that the Prosecution failed to establish the identity of the accused by not allowing the complainant to identify the accused in Court.
49. It was never in dispute that Maile Finau Latamai is the first cousin of the complainant. According to the complainant Maile had been residing with them in the same house as she was. They had inherited that same house from their grandfather. Maile himself admitted that he occasionally comes and stays in that house. Uncle Semisi also confirmed that. The alleged incident took place in broad day light. It was not a fleeting glance scenario. In these circumstance, I don't see the validity of the Defence argument that, without a dock identification, the Prosecution failed to establish the identity of the accused.
50. If the accused was exposed to a dock identification, he is the sitting duck in Court. A screen was set up and the Court house was cleared of the public, without any objection from the Defence to protect the interest of a vulnerable witness who had just turned 18. Even if the screen was removed only for the purpose of identification, the accused was the only person in the Court house with plain clothes to be identified. Therefore, there is no basis for the Defence argument. The complainant was so certain that it was his cousin Maile that penetrated her with his penis. It was not the position of the Defence that the complainant was never raped. Their position is that the accused was never present at the crime scene to commit the offence. It was never put to the complainant that she was mistaken as to the identity except for the suggestion that the accused was in Raiwaqa at the material time.
51. The Defence set up an *alibi* to dispute the identity of the accused. The accused denied the allegation and said that he was in Raiwaqa at the material time. It is natural for him to come up with such a Defence to save his skin.
52. The witness called to support accused's alibi, Uraia, contradicted the accused. According to the accused, he had been to Raiwaqa to attend a 100th day remembrance function in memory of his grandfather. The function had lasted only for two days. According to Uraia, Maile had come there for a birthday party. The Defence evidence and their *alibi* are not appealing to me. However, the rejection of the defence of *alibi* does not mean that the accused is guilty. It is

for the Prosecution to prove that it was the accused and no one else was the culprit. The Prosecution discharged that burden beyond reasonable doubt.

53. The version of the accused is not appealing to me. I reject the version of the Defence and accept the version of events of the Prosecution case. The rejection of the Defence version does not mean that the Prosecution has proved the case beyond reasonable doubt. I went further and considered totality of the evidence led in trial for me to be satisfied that there is no reasonable doubt created in my mind as to the guilt of the accused. I am satisfied that the accused penetrated the complainant's vagina without complainant's consent.

54. The Prosecution proved the offence of rape as charged beyond a reasonable doubt. I find the accused guilty. The accused is convicted accordingly.



Aruna Aluthge

Judge

26 May 2023

Solicitors:

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