

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 13 of 2023**

**STATE**

vs.

**MATAI WAQABACA**

**Counsel:** Ms. L. Latu for the State  
Ms. A. Bilivalu with Ms. S. Ratu for Accused

**Dates of Hearing:** 05<sup>th</sup> and 06<sup>th</sup> February 2024

**Date of Closing Submission:** 08<sup>th</sup> February 2024

**Date of Judgment:** 28<sup>th</sup> March 2024

---

**JUDGMENT**

---

**Introduction**

1. The Director of Public Prosecution, on the 2nd of February 2023, filed this Information, charging the Accused, Mr. Matai Waqabaca, with one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are:

***COUNT 1***

*Statement of Offence*

**SEXUAL ASSAULT:** *Contrary to Section 210 (1) (a) of the Crimes Act 2009.*

*Particulars of Offence*

**MATAI WAQABACA** on the 29<sup>th</sup> October 2022 at Tamavua in the Central Division unlawfully and indecently assaulted **JANET WAQALIVA RAICEBE** by kissing her lips.

**COUNT 2**

*Statement of Offence*

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

*Particulars of Offence*

**MATAI WAQABACA** on the 29<sup>th</sup> October 2022 at Tamavua in the Central Division had carnal knowledge of **JANET WAQALIVA RAICEBE** without her consent.

2. The Accused pleaded not guilty to these two offences; hence, the matter proceeded to the hearing. The hearing commenced on the 5th of February 2024 and concluded on the 6th of February 2024. The Prosecution presented the evidence of two witnesses, including the Complainant, while the Accused gave evidence for the Defence. Subsequently, the Court heard the closing submissions of the learned Counsels for the Prosecution and the Defence. Besides their respective oral submissions, both the learned Counsel filed written submissions. Having carefully considered the evidence presented and the respective oral and written submissions, I shall now pronounce the judgment on this matter.

**Burden and Standard of Proof**

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is 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 he is 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 Offence

4. The main elements of the Sexual Offence are that:
  - i) The Accused,
  - ii) Unlawfully and indecently,
  - iii) Assaulted the Complainant by kissing her lips.
  
5. The main elements of Rape under Section 207 (1) (2) (a) of the Crimes Act are:
  - 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.
  
6. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences 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 never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator.
  
7. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration. In this matter, the Accused admitted that he penetrated the vagina of the Complainant with his penis on the night of 29th October 2022. He contends that the Complainant consented for him to penetrate his penis in that manner which the Complainant denies.

8. Section 206 (1) of the Crimes Act defines the consent as:

*"The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent."*

9. Accordingly, 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 consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent. Accordingly, the "capacity" is essential in making free and voluntary choices about consent.

10. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his fingers/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 differs from the hope or expectation that the Complainant was consenting.

### **Admitted Facts**

(1) The Defence tendered the following admitted facts under Section 135 of the Criminal Procedure Act,

1. Matai Waqabaca is the person charged in this case matter. [hereinafter referred to as "Matai"].
2. Matai was 19 years old at the time of the alleged offending.
3. The Complainant in this case matter is Janet Waqaliya Ruicebe. [hereinafter referred to as "Janet"].

4. *Matai and Janet are known to each other as they are both students at the Fiji School of Nursing in Tamavua in the Central Division.*
5. *There is no dispute in relation to the identification of the accused person in this case matter.*
6. *On the 29<sup>th</sup> October 2022, Matai and Janet consumed alcohol with other students at the Fiji School of Nursing Hostel.*
7. *Matai penetrated the vagina of Janet with his penis on the 29<sup>th</sup> October 2022.*
8. *Janet was medically examined at the Medical Services Pacific on the 7<sup>th</sup> December 2022.*
9. *The following documents are tendered by consent by the State and Defence counsel:*
  - a) *The Photographic Booklet of the Alleged Crime Scene dated on the 8<sup>th</sup> December 2022 and*
  - b) *The Rough and Fair Sketch Plans of the Alleged Crime Scene dated on the 8<sup>th</sup> December 2022.*

### **Prosecution's Case**

12. The Complainant and the Accused were both students studying at the Fiji School of Nursing in 2022. The Complainant was a first-year student, while the Accused was a second-year student. They got to know each other when they met at the Campus and played volleyball together. On the 29<sup>th</sup> of October 2022, the Accused invited the Complainant to attend his birthday celebration, which he planned to have at the Campus with his friends on the evening of that day. The Complainant was staying with one of her friends at the Campus's girls' hostel while attending her practical training.
13. As per the invitation, the Complainant attended the birthday celebration of the Accused. The celebration went on well over the midnight. The Accused had offered to accompany the Complainant back to her friend's room. She had consumed alcohol and was drunk at that time. However, the Complainant knew her surroundings and what was happening around her. They had to walk past the room of the Accused on their way to the

Complainant's friend's room. Instead of going straight to her friend's room, the Accused went to his room. The Complainant thought he wanted to get something from his room, so he went to his room. She was leaning against the wall while the Accused opened the room door. He pulled the Complainant to the room by her hand when he opened the door. She went and laid down on the bed of the Accused's roommate. The Accused then came to her and started to kiss her lips. According to the testimony of the Complainant, she could not recall whether the Accused was lying beside her when he kissed her, and also, she was not aware of how her clothes were removed. She then found the Accused was penetrating her vagina with his penis and engaged in sexual intercourse with her.

14. Once the Accused ejaculated and finished the sexual intercourse, he stood up and helped her to dress up her clothes. They both then came out of the room. The Complainant then went to the room of one of her friends by herself, and the Accused stayed near his room. The following morning, as per the Complainant, she received a message on her messenger from the Accused asking forgiveness for what had happened the previous night.
15. In December 2022, the Complainant found that she was pregnant. She messaged the Accused, informing him about it, and claimed that her parents would disown her now. The Accused responded, denying his responsibility and also suggested she take some pills. The Complainant then told her mother about this incident. Subsequently, the matter was reported to the Police.

#### **The Accused's Case**

16. The Accused vehemently denied this allegation, claiming that he had consensual sexual intercourse on the night of the 29th of October 2022 in his room with the Complainant. It was alleged by the Accused that the Complainant made up this allegation because she was angry with him as his response to her messages informing him about her pregnancy was unhelpful.

## Evaluation of Evidence

17. According to the evidence adduced by the Prosecution and the Defence, the Accused admitted that he penetrated the vagina of the Complainant with his penis but denied the allegation that he did it without her consent. Hence, the main issue that the Court has to determine is whether the Complainant consented to the Accused to penetrate her vagina with his penis.
18. Under such circumstances, the Court must consider all of 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 committed this crime. In doing that, the Court must evaluate the evidence presented in the Court. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to provide evidence. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case.
19. Lord Reading CJ in Abramovitch (1914) 84 L.J.K.B 397 held that;

*"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases: it always remains on the prosecution."*<sup>11</sup>

20. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. If the Court rejects the Accused's version, that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established,



on its evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the Information.

21. In evaluating the evidence, the Court must determine the testimonial trustworthiness of the evidence given by the witnesses based on the credibility and reliability of their 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 Solomone Qurai (HC Criminal - HAC 14 of 2022).*)

#### Self - Induced Intoxication and Consent

22. The Complainant claimed that she was drunk, and hence, she was not aware of certain things happening inside the room. The Court heard her evidence saying that she was leaning against the wall when the Accused opened the door as she was drunk. She further said that she could not recall whether the Accused lay beside her when he kissed her. She was unaware of how her clothes were removed. Therefore, it is prudent to consider the law related to self-induced intoxication and the issue of consent.
23. In *R v Bree [2007] EWCA Crim. 804*, England and Wales Court of Appeal (Criminal Division) outlined the scope of the drunken consent, where the Court held that:

*“26. In cases which are said to arise after voluntary consumption of alcohol the question is not whether the alcohol made either or both less inhibited than they would have been if sober, nor whether either or both might afterwards have regretted what had happened, and indeed wished that it had not. If the complainant consents, her consent cannot be revoked. Moreover it is not a question whether either or both may have had very poor recollection of precisely what had happened. That may be relevant the reliability of their evidence. Finally, and certainly, it is not a question*



*whether either or both was behaving irresponsibly. As they were both autonomous adults, the essential question for decision is, as it always is, whether the evidence proved that the appellant had sexual intercourse with the complainant without her consent.”*

24. The definition of consent stipulated under Section 75 of the Sexual Offence Act of the UK is fundamentally similar to that under Section 206 of the Crimes Act of Fiji. Hence, the above view expressed in **R v Bree (supra)** could be a persuasive guideline for approaching drunken consent.
25. Sharma J in **State v Suguturaga [2019] FJHC 1070; HAC117.2016 (8 November 2019)** observed that drunken consent is still consent if the Complainant had the capacity to make a choice freely and voluntarily. Such drunken consent is still consent, though the consumption of alcohol has caused her to consent to an activity to which she would ordinarily not have consented. Sharma J quoting a passage from Blackstone’s Criminal Practice 2018, held in **State v Suguturaga (supra)**, that:

*46. In a situation where the capacity of the complainant to consent due to self-induced intoxication through drink and drugs is in issue the following points may be considered by the court (Blackstone’s Criminal Practice 2018 [B3.30]).*

*Consumption of alcohol or drugs may cause someone to become disinhibited and behave differently. If she is aware of what is happening, but the consumption of alcohol or drugs has caused her to consent to activity which she would ordinarily refuse, then she has consented no matter how much she may regret it later. The fact that a person makes an unwise choice does not mean that she lacked the capacity to make it. A drunken consent is still a consent if a person has the capacity to make the decision whether to agree by choice.*

*However, if a complainant becomes so intoxicated that she no longer has the capacity to agree, there will be no consent. Clearly she will not have the capacity to agree by choice where she was so intoxicated through drink or drugs, and her understanding and knowledge are so limited that she was not in a position to decide whether or not to agree. (This relates to understanding and knowledge of what is going on, as opposed to the quality of the decision-making.)*

*A person may reach such a state without losing consciousness. For instance, she may be in a state where she knows that she does not want to take part in any sexual activity with someone, but she is incapable of saying so. Alternatively, she may have been affected to such a degree, that, whilst having some limited awareness of what is happening, she is incapable of making any decision at all.*

*If a person is asleep or has lost consciousness through drink or drugs, she cannot consent, and that is so even though her body responds to the accused's advances. the paragraph in*

26. There is no specific rule to self-induced intoxication and consent. The issue is whether the Complainant understood her situation and could make up her mind. (**vide: R v Lang [1976] 62 CAR 50**).
27. The Complainant never claimed that she was unconscious; hence, she was completely unaware of what was happening to her. The Complainant admitted during the cross-examination that she inquired from the Accused whether he ejaculated outside or inside her vagina when he finished the sexual intercourse, indicating that she was perfectly aware of what the Accused was doing at that time. Moreover, during the cross-examination, she further admitted that she was aware of her surrounding and the situation when the Accused penetrated her vagina with his penis. Accordingly, I am convinced that the Complainant was aware of her surroundings, the situation, and what the Accused was doing with her.

28. Based on the above conclusion, I find it a non sequitur to claim that she was unaware of how her clothes were removed before the Accused penetrated her vagina with his penis, thus creating reasonable doubt about the credibility of her evidence in this regard.

### Delay and Motive

29. The Defence urged that the Complainant made this false allegation nearly two months after the alleged incident because of the lackluster response of the Accused about her pregnancy. Therefore, the Defence contended that she had a *mala-fide* motive for making up this false allegation of Rape.
30. The learned Counsel for the Defence submitted in her written submission quoting an observation made by the Supreme Court of Canada in **R v Gerrard ( SCC 13 (19/04/2022)** that the existence of the Complainant's motive to lie is relevant in determining the credibility of the Complainant's evidence, especially where the Defence raised such a suggestion. The Supreme Court of Canada in **R v Gerrard (supra)** said that:

*"[4]Two of these factors warrant a few additional comments. Lack of evidence of a complainant's motive to lie may be relevant in assessing credibility, particularly where the suggestion is raised by the defence (R. v. Stirling, 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 10-11; R. v. Ignacio, 2021 ONCA 69, 400 C.C.C. (3d) 343, at paras. 38 and 52). Absence of evidence of motive to lie, or the existence of evidence disproving a particular motive to lie, is a common sense factor that suggests a witness may be more truthful because they do not have a reason to lie. That said, when considering this factor, trial judges must be alive to two risks: (1) the absence of evidence that a complainant has a motive to lie (i.e. there is no evidence either way) cannot be equated with evidence disproving a particular motive to lie (i.e. evidence establishing that the motive does not exist), as the latter requires evidence and is therefore a stronger indication of credibility – neither is conclusive in a credibility analysis; and (2) the*

*burden of proof cannot be reversed by requiring the accused to demonstrate that the complainant has a motive to lie or explain why a complainant has made the allegations (R. v. Swain, 2021 BCCA 207, 406 C.C.C. (3d) 29, at paras. 31-33)."*

31. The Fiji Court of Appeal in **Rokocika v The State [2023] FJCA 251; AAU0040.2019 (29 November 2023)** observed, referring to the NSW Criminal Trial Court Book, that the motive to lie if it is established would substantially affect the assessment of the credibility of the witness. The Fiji Court of Appeal in **Rokocika (supra)** said that:

*[32] The appellant argues that the trial judge had failed to give to the assessors what has come to be known as the Jovanovic direction that reminds the jury that an accused has no burden to prove a motive or reason for complainant to lie. In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:*

*"It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about".*

*[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:*

*"If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence*

*of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521-522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth. Jovanovic v R at 523.*

[34] *NSW Criminal Trial Courts Bench Book also states that:*

*'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].' (emphasis added)*


32. Accordingly, if Defence raised and established the existence of a *malu-fide* motive to lie, it could be considered in determining the credibility and reliability of the Complainant's evidence. In this case, it was submitted by the learned Counsel for the Defence that the Complainant made up this false allegation after she found that the Accused was not assisting her with her pregnancy; thus, that was the main reason for delaying in reporting this matter.
33. The Complainant accepted that she communicated with the Accused through the messenger when she found out she was pregnant and accepted the contents of those messages during the cross-examination. These messages confirmed that she initially informed the Accused that she was pregnant and her family would disown her if they found out. The Accused showed no interest in it and suggested she take pills. He further told her that her boyfriend would be the child's father. The Complainant then only brought up the issue of non-consent, stating that since she did not say "yes" to the sexual intercourse, she would go and report it.

34. Moreover, the Complainant said that she felt disconcerted to accept the role given to her by the youth group of her church as she was pregnant, which she had not disclosed to anyone yet. During the discussion that ensued after her refusal with a lady from a church and her mother, she said yes when her mother asked her whether she was pregnant. She then revealed to her mother about this incident that occurred at the FNU Nursing School.
35. Taking into consideration the conversation she had with the Accused when she found out that she was pregnant and her feeling of disconcerted when she was offered a leadership role at her church youth group due to her conduct and pregnancy, it appears to the Court that there is a reasonable doubt whether she consented to have sexual intercourse with the Accused, though she was drunk, and then started to regret about it when she found out that she was pregnant and her religious beliefs. This conclusion leads to another reasonable doubt as to whether she made up this allegation due to her regret, thus creating a reasonable doubt whether the Complainant's evidence is credible and reliable.
36. The Court is acutely conscious that the fact the Complainant and the Accused previously had consensual sexual intercourse does not automatically suggest that the Complainant gave consent to have sexual intercourse at this particular instance. Hence, I do not find any persuasive probative value in the evidence that they previously had consensual sexual intercourse.
37. However, I am persuaded to scrutinize the evidence given by the Complainant explaining the incident that occurred inside the room of the Accused on the night of 29th of October 2022 with careful attention. It was observed that her evidence was not consistent in explaining how she walked to the accused's room. She initially stated that she followed the Accused as she walked behind the Accused. Yet, she admitted during the cross-examination that they held hands and walked together. Though she was consistent in stating that she was leaning against the wall when he opened and pulled her inside, she admitted that she did not resist or try to shout, alarming others. The Complainant voluntarily went in and laid on the bed.



38. As discussed above, the Court is convinced that she was completely aware of her surroundings and the situation, though she had consumed alcohol. The Complainant knew that the Accused penetrated her vagina with his penis as she inquired the Accused after he finished whether he ejaculated inside or not. Hence, her claim that she was unaware of how her clothes were removed creates a reasonable doubt about the credibility of that claim.
39. Considering all the reasons discussed, I am content to accept that there is a reasonable doubt whether the Complainant made up this allegation after she found out that she was pregnant and the Accused was not assisting her during her pregnancy. Therefore, I find there is a reasonable doubt whether the Complainant's evidence is credible and reliable. Accordingly, it is my conclusion that the Prosecution failed to prove beyond reasonable doubt that the Accused committed these two offences as charged in the Information.
40. In conclusion, I find the Accused not guilty of one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act as charged in the Information and acquitted of the same accordingly.
41. Thirty (30) days to appeal to the Fiji Court of Appeal.



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

**At Suva**

28<sup>th</sup> March 2024

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.