

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 19 of 2022

BETWEEN: THE STATE

AND: BUDDY JAMES WHIPPY

Counsel: Ms. M. Lomaloma for the State
Ms. R. Raj and Mr. V. Savou for the Accused

Date of Trial: 26th April 2024

Date of Judgment: 7th June 2024

JUDGMENT

1. The Accused Buddy James Whippy is charged on the following Information: -

CONSOLIDATED INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTION

BUDDY JAMES WHIPPY is charged with the following offences:

[COUNT 1]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of January 2014 to the 31st day of December 2014, at Drekeniwai village, Savusavu, in the Northern Division, penetrated the vagina of **ASINATE SENIKAUCAVA**, with his finger without her consent.

[COUNT 2]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of February 2021 to the 28th February 2021, at Labasa, in the Northern Division, had unlawful carnal knowledge of **ASINATE SENIKAUCAVA**, without her consent.

[COUNT 3]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of January 2019 to the 31st of December 2021, at Savusavu, in the Northern Division, had unlawful carnal knowledge of **SERA ALEMER**, without her consent.

[COUNT 4]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of January 2020 to the 31st of December 2020, on occasions other than Count 3 at Wainunu, Bua, in the Northern Division, had unlawful carnal knowledge of **SERA ALEMER**, without her consent.

[COUNT 5]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of January 2020 to the 31st of December 2020, at Vakasigani, Labasa, in the Northern Division, had unlawful carnal knowledge of **SERA ALEMER**, without her consent.

[COUNT 6]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of January 2020 to the 31st of December 2020, at Vakasigani, Labasa, in the Northern Division, had unlawful carnal knowledge of **SERA ALEMER**, without her consent.

[COUNT 7]

Statement of Offence

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

Particulars of Offence

BUDDY JAMES WHIPPY on an unknown date between the 1st day of February 2022 to the 28th of February 2022, at Vakasigani, Labasa, in the Northern Division, had unlawful carnal knowledge of **SERA ALEMER**, without her consent.

2. The Accused was first produced in the Labasa Magistrate's Court on 28th of February 2022 and the case was then transferred to the High Court and he was arraigned on the 21st of March 2022.
3. The Accused pleaded Not Guilty to the Information on the 1st of September 2022.
4. The matter was adjourned for pretrial conference and the parties also filed the following Agreed Facts: -
 - (a) **THAT** the person charged in this matter is **BUDDY JAMES WHIPPY** born on 26th January 1973.
 - (b) **THAT** the first complainant in this matter is **ASINATE SENIKAUCAVA**
 - (c) **THAT** the second complainant is **SERA ALEMER**.
 - (d) **THAT** the first complainant and second complainant are sisters.
 - (e) **THAT** Buddy James Whippy is married to the mother of the first and second complainant since 2008.
 - (f) **THAT** Buddy James Whippy is the step father of the first and second complainants and is known to the complainants.
 - (g) **THAT** Buddy James Whippy was arrested by the Police on the 25th of February 2022.
5. The parties also filed the Pretrial Checklist, and the matter was fixed for Trial on the 25th of April 2024.

The Trial

6. On the first day of the Trial, on the 25th of April 2024, the State advised the Court that the two complainants were not present even though they had been subpoenaed to give evidence. Counsel sought time to have the two complainants brought to Court and asked that the Trial be deferred to the 26th of April 2024.

7. On the 26th April 2024, the State advised that the first complainant could not be located and only the second complainant was available to give evidence.

The evidence for the State

8. The State called the complainant Sera Alemer as its only witness, and she gave testified under oath.
9. She confirmed that she is currently 20 years of age, and her date of birth is 6th July 2004. She confirmed that she is present in Court to testify as to what her father did to her.
10. She clarified that Buddy James Whippy is her stepfather and he is married to her mother Unaisi Lelevi. She testified that he raped her and he began doing this in 2019 (initially she had said 2014 however she later corrected it) when she was 15 years of age and she was in Form 4.
11. She testified that in 2019 when she was in Form 4, she went with the Accused to Savusavu for shopping. At that time they lived in Wainunu and when they finished shopping, it was already in the afternoon so he called home and stated that they would return in the morning. They then went to a hotel to spend the night.
12. That night while they were at the hotel, Buddy James Whippy came to her and asked her to have sex with her. When he asked her, she said no and she was scared. Despite her saying no, the Accused removed her pants and her panty and put his penis into her vagina. She felt him putting his penis in her vagina and she could not do anything. This happened on the bed.
13. She had been lying on her back in the bed and Buddy James came on top of her and after he had sex with her he stood up and went to the other bed in the room. They were the only ones there and her mother was in Wainunu.

14. At the time in question she was attending Labasa Sangam College and they were living in Namara, Labasa however, every school holiday they would go to Wainunu and his incident happened during a two weeks holiday.
15. When they arrived home in Wainunu, she told her mother what her stepfather did to her and when she told her mother what had happened, her parents got into a fight and ultimately she did not do anything after that.
16. In that same year she testified that her stepfather did the same thing to her again in Wainunu.
17. On that second occasion, they were at home in Wainunu and her brother and mother had left for the farm while her stepfather left later. At that time she was cooking lunch and as she did this, her stepfather came into the kitchen and asked her to have sex with him and she refused so he pushed her chest and spoke to her harshly so she lay down and he pulled her pants and panties and then he put his penis into her vagina.
18. When she lay on the floor he came on top of her and when he was doing this she did not scream out or struggle because she was afraid that he would do something to her.
19. After this second incident she did not tell anyone what happened because no one trusted her.
20. She testified of another incident in 2020 when she was in Form 5. At that time she was in Form 5 and they were staying at Vakasigani. On the day in question she was at her home with her little brother, Alfred, 2 years old. They were in the sitting room, her stepfather then approached and asked her to have sex and she replied no. He told her to go into the room and she complied and he pushed her down, took off her put his penis inside her vagina.
21. She complied because she thought he was going to hurt her or do something bad with her. She again did not tell anyone about what had happened as she was ashamed and afraid.
22. She also testified that another incident happened in 2022 when she was in Form 6 still at Labasa Sangam College. At that time they were staying at Vakasigani in a house that her

parents had bought. On that day she and her stepfather had come from Wainunu to Vakasigani in a twin cab.

23. When they arrived home, the driver left, and her stepfather asked her to have sex with her. She refused but he kept on insisting and he took a broom and hit her. She ran outside and went to the house where the driver had gone to however her father came and pulled her hand forcefully.
24. He pulled her home, took her to the room and he told her to lay down and he then removed her pants and panties and he put his penis into her vagina. She felt scared at that time and just complied with what he wanted. She again did not say anything.
25. She could not recall any other incidents, even though she was asked by State counsel about an incident in 2022.
26. The matter was reported to the Police by her uncle Masi Leiloma. She had called him however she did not get through to him. She then met him in town, so he asked her why she had called him. She remained silent and he could see from her face that something was wrong, and he asked her again whether anything was wrong. She finally told him everything that her stepfather did to her and he then took her to the Police Station.
27. She confirmed that her mother married her stepfather when she was one year old and they have stayed together from that date till when this matter was brought to Court. She identified the Accused as the person who committed these acts on him and currently, she has no trust in him at all.
28. Under cross examination, counsel put the Defence case.
29. The complainant confirmed that her mother was previously married to the victim's biological father and her mother then married the accused in 2008.
30. The victim also confirmed when her mother remarried the Accused, she lived with him in Wainunu while the victim remained in Lajonia with her grandmother.

31. She also confirmed that she first went to Wainunu in 2015 and she attended Wainunu and she attended school with Shirley and Jane, her step sisters.
32. She confirmed that she was always accompanied by Shirley and Jane and she was never left on her own. Later she confirmed that they both came to Labasa for secondary school and she attended Labasa Sangam with Shirley.
33. She maintained that she did go alone with her stepfather to Savusavu in 2019 and he committed the first act of rape there. She did concede that her father would mostly stay at the farm, and he would only visit them in Labasa for a short time and return to Wainunu.
34. She conceded that at the farm there were a lot of them all living together and there would be very few instances of anyone being alone.
35. It was also put to her that none of these alleged incidents happened however she maintained her evidence in cross examination. It was further put to her that she fabricated these allegations as she wanted her mother to return to her biological father. She denied this.
36. That was the evidence for the State.
37. At the close of the State's case the Court found that the State had failed to provide any evidence in support of the 1st 2nd and 7th Count therefore he had no case to answer on those 3 counts.
38. He advised the Court that he wished to give evidence and call witnesses in answer to Counts 3, 4, 5 and 6.

The evidence for the Accused

39. The Accused gave evidence on his own behalf, and he also called witnesses.
40. Buddy James Whippy testified that he is married to Unaisi Lelei, the mother of the victim, Sera Alemer. They have been living together since 2008 and Sera first came to live with them when she was young, and she had not attended school yet.

41. When she started schooling, she returned to Labasa and stayed with her grandmother in Lajonia, Labasa.
42. With respect to the first allegation, he denied ever going to Savusavu with the victim at any time in 2019. He testified that most of the time he stayed on the farm in Wainunu while his wife and his children stayed in Labasa during the school term. He stayed on the farm with his son Barry Whippy. He denied the allegations that he took her to Savusavu for shopping as he always came to Labasa for any shopping.
43. With respect to the 4th count, he denied this allegation as the family would only be staying together during the holidays and on those occasions, she was never alone with him as she would be always accompanied by his daughters, and they all took turns in doing the chores including cooking and cleaning. Apart from the family, people would always be popping in and the house was never unoccupied at any time.
44. He further denied the two remaining counts which allegedly happened in Labasa. His testimony is that he mainly remained in the farm at Wainunu and would only come to visit his wife and children at Labasa on weekends and would spend three days at the most before leaving again for Wainunu. He mostly stayed at the farm with his son Barry and maintained that he was never ever alone with the victim at any time when he came to Labasa.
45. He maintained this evidence under extensive cross examination.
46. The second witness was Barry Whippy, the son of the Accused. He confirms that he is a yaqona farmer and he usually stays in Wainunu with his father. He confirmed that his father would leave Wainunu to visit his siblings and stepmother in Labasa. In a month he would travel 2 or 3 times to visit them in Labasa and he would sometimes stay up to one week then he would return to Wainunu to the farm.
47. He also confirmed that they would all return to Wainunu in the school holidays but most of the time they would be in Labasa for school. He maintained his evidence under cross examination.

48. The next two witnesses were Jane Whippy and Shirley Whippy, the daughters of the Accused and stepsisters of the victim. Jane confirmed that she attended Labasa Sangam College with the victim, and they all stayed together in Labasa during the school term and in the holidays, they would return to Wainunu to the farm. They confirmed that their father would visit them in Labasa and come for two and three days and then leave. During the holidays they would all go together to Wainunu, and they would all stay together, especially Jane and the victim would go together to the farm and also do the cooking together.
49. They also maintained their evidence under cross examination.
50. The final witness was Unaisi Lelei, the wife of the Accused and the mother of the victim. She testified that in 2019 she stayed with her children in Labasa during the school term and they would all return to Wainunu. She denied that her husband ever went to Savusavu at any time that year as they always did their shopping in Labasa. She also denied that her daughter told her that the Accused raped her in Savusavu.
51. While in Wainunu her three daughters would do the chores and they were always doing chores together because at that time her youngest son, Alfred was 2 years old and his older sisters, including the victim Sera, would take turns looking after him.
52. She testified that her relations with her daughter was okay until after the Christmas of 2020 or 2021 when the victim and her sister went to spend the holiday with their biological father in Vuya. When she went to collect the girls from the village, she missed the bus and spent the night there. That night the victim's biological father approached her to reconcile but she turned him down as she was married to the Accused and did not want to break up her marriage. She states that from then on their relationship suffered as the girls hated her for not returning to their biological father.
53. Under cross examination she maintained her evidence and she also maintained that if her daughter had informed her that anything was happening to her, she would have taken it seriously even though the allegation was against her husband.

54. That was the evidence for the Defence.

Analysis

55. The Accused is charged with the offence of Rape contrary to section 207 of the Crimes Act 2009, which provides: -

“The offence of rape

207.-(1) Any person who rapes another person commits an indictable offence.

Penalty– Imprisonment for life.

(2) A person rapes another person if-

1. (a) the person has carnal knowledge with or of the other person without the other person’s consent; or
2. (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or
3. (c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s consent.

(3) For this section, a child under the age of 13 years is incapable of giving consent.”

56. The State alleges that on the dates and times in question, the Accused Buddy James Whippy had sexual intercourse with Sea Alemer on the 4 separate occasions as set out in the Information before the Court. On each occasion Buddy James Whippy knew that Sera Alemer was not consenting to the sexual intercourse, or he was reckless as to whether or not she was consenting to the act of sexual intercourse.

57. The burden is on the State to prove each count beyond a reasonable doubt. The Accused elected to give evidence although he does not have to prove or disprove anything.
58. To prove the offence of Rape, the State has to establish the following elements of the offence: -
- That on the 4 occasions and in the various locations as set out in the Information, Buddy James Whippy had sexual intercourse with Sera Alemer on 4 separate occasions.
 - Sera Alemer did not consent to the sexual intercourse on each occasion.
 - Buddy James Whippy knew that Sera Alemer was not consenting to the sexual intercourse each time.
59. Consent is defined in law at section 206 (1), (2) of the Crimes Act 2009 as follows: -
- “(1) 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.
- (2) Without limiting sub-section (1), a person’s consent to an act is not freely and voluntarily given if it is obtained–
- (a)* by force; or
 - (b)* by threat or intimidation; or
 - (c)* by fear of bodily harm; or
 - (d)* by exercise of authority; or
 - (e)* by false and fraudulent representations about the nature or purpose of the act; or
 - (f)* by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.”
60. The main evidence relied on by the State is the testimony of the victim. At the time of the first alleged act she was 15 and by the last alleged act she was 16.

61. The Children's Bench Book has some important guidelines in terms of the development of a child and also their testimony and what to expect as follows: -

“Stage 5 Adolescence: 13 to 18 years

Adolescence is the period of transition from childhood to adulthood and covers the time between 13 to about 18 or 21 years of age. It is characterized by dramatic changes in all aspects of development (discussed further in Part C).

However, adolescents generally have better developed communication skills as compared to younger children:

Most are able to give detailed, descriptive accounts of an event.

Understand more complex sentences, but may still be confused by compound or negatively termed questions.

Generally able to comprehend hypothetical questions, but may sometimes be confused by them;

Able to estimate times, tell time and provide reasonably accurate measurements.

May be embarrassed to acknowledge that they do not understand a question and are thus reluctant to seek clarification;

Beginning to develop the capacity for “adult-like” reasoning and planning, but they do not use adult-like reasoning consistently and are not always able to foresee the consequences of their actions;

May begin to exercise advanced moral reasoning, i.e. shift from reasoning in terms of social approval to reasoning in terms of principles such as justice and fairness (many adults never reach this stage of moral development).

It is important to remember that these age categories are generalisations only, and individual children may develop at very different rates. There is significant variation in the rate (how fast change takes place) and pattern (in what order changes take place) of development be slower. Children also develop at different rates in different areas – cognitive, social, moral, and physical development – and may mature in some areas before others. For example, a child may develop physically at an early age and appear mature, but his/her cognitive or moral development may.

62. As a witness the victim was vague about even the most mundane details, she could not recall the exact date or even the day of the week when each alleged event happened or the time of the year or the time – either the first, second or third term holiday. Her testimony had gaps and she was not an impressive witness.
63. From the evidence that is before the Court, I find reasonable doubt on each count.
64. That being the case, the State has failed to establish beyond a reasonable doubt that Buddy James Whippy had sexual intercourse with Sera Alemer on each of the 4 instances as alleged in the remaining counts before the Court – Counts 3, 4, 5 and 6 of the Information.

This is the Court's judgment in this matter: -

- 1. Buddy James Whippy for Counts 1, 2 and 7 on the charge of Rape – you have no case to answer and you are acquitted.**
- 2. Buddy James Whippy on the remaining counts of 3, 4, 5 and 6 on the charge of Rape – you are acquitted.**
- 3. All bail conditions are revoked, you are free to go.**

30 days to appeal



A handwritten signature in black ink, consisting of a stylized 'U' and 'R'.

Mr. Justice U. Ratuveli
Puisne Judge

Solicitors:

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