

IN THE HIGH COURT OF FIJI AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 396 of 2022

State –v- Josua Dovia Kilawekana

For the State: Mr. Zunaid
For the Accused: Mr. Varinava

Date of Trial: 29th and 30th April 2024
Date of Judgment: 8th July 2024

JUDGMENT

1. The Accused is charged with the following offences on the Information filed on the 6th of January 2023

INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTIONS

JOSUA DOVIA KILAWEKANA is charged with the following offences:

COUNT 1

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009

Particulars of Offence

JOSUA DOVIA KILAWEKANA on the 12th day of November 2022, at Ratu Kadavulevu School in the Eastern Division, unlawfully and indecently assaulted **E.L.** by touching his chest and nipples along with kissing his face and lips.

COUNT 2

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009

Particulars of Offence

JOSUA DOVIA KILAWEKANA on the 12th day of November 2022, at Ratu Kadavulevu School in the Eastern Division, unlawfully and indecently assaulted **E.L.** by procuring the said **E.L.** to hold **JOSUA DOVIA KILAWEKANA**'s erect penis.

COUNT 3

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009

Particulars of Offence

JOSUA DOVIA KILAWEKANA on the same occasion as in Counts 1 and 2, had carnal knowledge of **E.L.** by penetrating his penis into the anus of **E.L.** without his consent.

2. The Accused was first produced in the Nausori Magistrate's Court on the 18th of November 2022. The case was transferred to the High Court and he was remanded in custody.
3. The Accused was first arraigned on the 30th November 2022 and directions were made for the filing of Information and disclosures.
4. On the 31st of January 2023, the Accused entered the plea on not guilty to all three counts. Directions were then given for pretrial conferences and agreed facts.
5. The parties filed the following Agreed Facts pursuant to section 135 of the Criminal Procedure Act 2003 on the 4th of May 2023.

Agreed Facts

- i. Josua Dovia Kilawekana was 18 years, 18 days old at the time of the alleged offence.
- ii. Josua Dovia Kilawekana was a vocational student at Ratu Kadavulevu School, RKS.

- iii. Josua Dovia Kilawekana was a rugby player for RKS.
 - iv. Josua Dovia Kilawekana is also known as “Nemo.”
 - v. Etuate Lolohea is also known as “Eddie.”
 - vi. Etuate Lolohea and Josua Dovia Kilawekana “Nemo” are known to each other.
 - vii. Etuate Lolohea was a junior in school whilst Josua Dovia Kilawekana was a senior.
 - viii. Both Etuate Lolohea and Josua Dovia Kilawekana “Nemo” are in the same school house/bure/dormitory known as “Sukuna.”
 - ix. Both Etuate Lolohea and Josua Dovia Kilawekana “Nemo” were boarding students at RKS.
 - x. On the 12th of November 2022, at 1am, Josua Dovia Kilawekana “Nemo had laid down beside Etuate Lolohea.
 - xi. In November 2022, Ulaiasi Lawe was a school teacher at RKS.
 - xii. Ulaiasi Lawe being a school teacher at RKS knew Etuate Lolohea and Josua Dovia Kilawekana “Nemo” as students in RKS.
 - xiii. There is a toilet within the RKS student dormitory and it is commonly known to students as “Cube 11.”
 - xiv. The walkway in the RKS students’ dormitories have lights.
 - xv. There are lights outside “Cube 11” windows.
 - xvi. On the 12th of November 2022, at around 1am, these lights were switched on.
 - xvii. On the 12th of November 2022, at 1am, Josua Kilawekana “Nemo” was present with Etuate Lolohea in “Cube 11” toilet.
 - xviii. On the 14th of November 2022, Etuate Lolohea was medically examined by Dr. Inikasio Sokini Vakadrano at the Korovou Hospital.
 - xix. On the 12th of November 2022, at around after 1 am, some sexual acts had occurred between Josua Dovia Kilawekana “Nemo” and Etuate Lolohea. The nature of these sexual acts and whether there was consent or not, is a trial issue.
6. The matter was then fixed for Trial from the 29th of April to 3rd May 2024.

7. At the trial the State called two witnesses, the complainant Etuate Lolohea and Dr. Inikasio Sokini Vakadranu.
8. The Accused testified and called no other witness.

The evidence for the State

9. The first witness Etuate Lolohea is currently a student at Mahatma Gandhi Memorial School, and he is also known as Eddie.
10. He testified that in 2022 he attended Ratu Kadavulevu School or RKS and he was in Form 5. He was a boarder in Sukuna House and in 2022 he had been attending RKS for 2 years.
11. He confirmed that the Accused Josua Dovia Kilawekana or Nemo, and he had known him for 2 years although he did not know his real name.
12. He confirmed that he considered Nemo as a friend and Nemo would talk with him daily and ask for toiletries and other supplies. Nemo was also a member of Sukuna House, and he was a senior.
13. In the culture of boarding life, seniors were respected and if they directed juniors to do something, then the juniors were expected to comply, and if they refused then they could expect to be punished.
14. He testified that on the night of the 12th of November 2022 he was asleep in the Junior Dorm of Ratu Sukuna House, RKS. He was sleeping with 3 other students inside a cubicle, and he was asleep on the mat on the floor. The Junior Dorm was on the top floor of Sukuna House and Etuate was the most senior of the 4 students asleep in that cubicle.
15. Etuate was wearing a white vest and sulu and as he slept, he was sleeping on his side, and he was awakened by someone pinching his chest and his left nipple. This person was at his back and when he tried to pull away in fright, the person got hold of his waist and pulled him tight. He was frightened and he was shaking, and he did not consent to this person touching his left nipple.

16. This person then came on top of Etuate, and he started kissing his face and licking his face. He could smell alcohol on this person and at that point he could not see his face as it was dark. He did not consent for this person to kiss and lick his face.
17. This person then lay down beside Etuate and told him in iTaukei “Eddie vadinataka mai” or “Eddie let’s make it happen or Eddie let’s make it happen.”
18. When he heard this, Etuate recognised the voice as that of the Accused, Nemo. After he said that, Nemo then took Etuate’s left hand and put it inside his pants, feeling his erected penis. Etuate again did not consent to putting his hand inside Nemo’s pants nor to touching his erect penis.
19. At that point someone walked on the walkway and Nemo told him to be quiet then he told him in iTaukei “let’s go to Cube 11.” Cube 11 was the toilet block at the end of the top floor. Nemo then got up to go to the toilet and when he looked back and saw that Etuate still sat there he returned and forcefully took his hand and pulled him behind him.
20. They went into the toilet cubicle and as they went into the walkway, he clearly saw his face and he saw that it was Josua Kilawekana also known as Nemo. At the time that he saw his face he was about 1 meter away from him so he could identify him properly and he saw that Nemo was wearing a basketball vest and basketball shorts.
21. Inside the Cubicle 11, it was not completely dark as there was enough light from the walkway lights outside. Nemo commanded him to go into a washroom and he stood at the door of a washroom and called him to enter it.
22. Inside the washroom, Nemo told him to take off his underwear, he said this forcefully and Etuate did so. Nemo then lay down on the floor and he told Etuate to come on top of him (Etuate then demonstrated that he sat astride Nemo who was lying on the floor, and he faced him).
23. As he sat astride Nemo, Etuate felt his penis penetrate his anus and he felt a pain in his stomach. Nemo then commanded him to go up and down and he could still feel his erected penis in his anus. He did not consent to Nemo penetrating his anus.
24. Etuate felt so much pain and he told Nemo that he wanted to drink water, but Nemo was angry and said no. Etuate then pushed him off using his elbows and he ran outside.

25. He ran away to the drying shelter, where they dried their clothes and stood there looking out whether Nemo was looking for him as he had hit him with his elbows. He then returned to Cubicle 11, retrieved his underwear, and went and sat on a chair and waited there until morning.
26. Later on, that same day at around 5:30 pm he went to the house of the Senior House Master for Sukuna House, Mr. Lawe. When he talked to Mr. Lawe, he was crying, and he asked the Master if he could call his mother. Master Lawe asked him what was wrong. Etuate told him that he had been molested by Nemo, Josua.
27. Master Lawe told him to go to the Office and the Assistant Principal would be waiting for him there. He informed the Assistant Principal what had happened to him that night, so he was allowed to go straight home.
28. At home Etuate's mother was surprised to see him and she asked him what he was doing home as she was not expecting him at home. He informed her that he was raped in school, and he returned to school on the 14th of November 2022.
29. When he arrived at school, he was sent to the Welfare Officer and from there he was directed to Korovou Police Station where he lodged his report. He was then taken for medical examination at the Korovou Hospital where he was accompanied by his mother and the police officer. His mother signed the report as he was then 16 years of age.
30. He also gave evidence that Nemo's parents attempted to reconcile in the traditional manner to his family on the 18th of November, 6 days after the incident. Later, on the 12th of December Nemo's parents again approached Etuate's mother to write a letter confirming that they have reconciled. On both occasions their approach was rejected.
31. He identified the Accused in the dock, Josua Dovia Kilawekana as the person who committed these acts on him that night and he was also known to him as Nemo.
32. The complainant maintained his evidence under robust cross examination. He denied that he had returned Josua's kiss and that he had willingly accompanied him to Cubicle 11, and he had sucked his penis inside the toilet cubicle. He maintained that he never consented to anything that happened that night. He maintained that he reported this matter to the Police because he was raped, not because of the mocking by fellow students.
33. The next witness was Dr. Inikasio Sokini Vakadrano, Senior Medical Officer, Korovou Hospital. He confirmed that in 2022 he was based in Korovou Hospital, and he has

been serving as a doctor since 2016. He has qualifications of MBBS and Post Graduate Diploma in Obstetrics and Gynaecology.

34. On the 14th of November 2022 he examined a patient named Etuate Lolohea and he filled in the Police Medical Examination Form however he neglected to sign the report. He was shown the Medical Form and he confirmed that this was the same form that he filled that day after examining Etuate Lolohea.
35. He commenced the examination at 6:13pm and he completed the examination at 6:30 pm. The patient was brought in by his mother Esiteri Somumu and WPC Mere.
36. In his medical findings he found 2 bruises (1 x1 cm) at the 12'o clock and 6 o'clock area of the anal area. His opinion was that the bruises could have been caused by blunt trauma resulting in bleeding under the skin, and this causes discoloration of the skin. He found no laceration or active bleeding. He also found that the injury was recent, and together with the history related by the patient, that the incident happened on the 12th of November, then the injuries were recent, and the signs of trauma was still there.
37. His professional opinion was that the bruising was caused by blunt trauma by an object, not strong enough to cause laceration or active bleeding to those areas. This could have been caused by a finger or a penis, especially where there is no lubrication, causing friction against the skin, which resulted in those blood vessels rupturing and causing bruising.
38. Under cross examination he maintained his opinion and stated the injuries could not have been caused by scratching as these would caused lacerations. He conceded that the injuries could have been self-induced.
39. The State then closed the prosecution case. At the close of the case for the prosecution, the Court found that there is a case to answer, and the Accused was put to his defence.
40. The Accused elected to give evidence and he would have also called his mother however she could not now give evidence as she had been present in Court throughout despite the Court's warning for any witnesses to leave the Court while the evidence was being heard.

The case for the Defence

41. Josua Dovia Kilawekana testified that on the 12th of September he came back from a talanoa session with his friends, and he went up to Cube 8 to look for his blanket.
42. When he reached Cube 8, he found students lying on the mattress on the floor. There were 8 students laying on the floor and he lay down beside them. He then saw Etuate with them, so he woke him up to get his blanket.
43. Etuate woke up, turned to him and they kissed and Etuate touched his penis. They then decided to go to Cube 11 to the toilet. He took the lead and Etuate followed.
44. Inside Cube 11 they kissed again and Etuate then sucked his penis. After that they both left.
45. He testified that what happened that night happened with their consent and Etuate only reported the matter to the Police after other students started spoiling him (mocking him) and he was ashamed.
46. Under cross examination he confirmed that he knew Etuate, and they were on good terms. He also confirmed that the culture in the dormitory was that the seniors were respected, and the juniors were obliged to obey them.
47. He also confirmed that lights out meant that everyone was to be sleeping and no one was to be walking around. He also confirmed that as a vocational student he slept on the ground floor while the upper floor was for forms 3 and 4 and prefects.
48. He denied drinking alcohol that night and maintained that he had only gone up to look for a blanket. He denied that he had specifically chosen to sleep beside Etuate because he wanted to have sex with him. He denied touching his chest and nipples although he admitted to kissing Etuate, but he maintained that they kissed each other.
49. He denied forcing Etuate to follow him to the toilet Cube and he also denied forcing Etuate to take off his underwear and to order him to sit on his erected penis. He denied penetrating Etuate's anus with his penis.
50. He also denied telling his parents that he had raped Etuate.
51. That was the Defence case, and the matter was then adjourned for submissions and oral arguments. Both parties have filed submissions, and the Court is grateful to counsel for their submissions.

Submissions for the State

52. In summary the State submits that the issue that the complainant did not scream, or shout is addressed in the case of State vs Kae [2023] FJHC 786; HAC 80 of 2019 (19th October 2023) where Justice Aluthge observed as follows: -

“Her explanation was that she did not push the Accused as she was scared. The complainant’s conduct is not inconsistent with that of a rape victim. Different people react differently. There is no stereotype conduct for rape victims.”

53. The State on the one hand argues that the recent development in the law is heading towards dispensing with the need for recent complaint evidence. On the other hand, in this case, the complaint was lodged within 48 hours of the incident.

54. The medical report is also important as the finding of bruising in the anal area of the complainant, located at 12 and 6 o’ clock of the anal area. The doctor opined that the bruising was caused by blunt trauma that caused bleeding under the skin resulting in the bruising. He also found that the injury was recent and fell within the time frame set out by the patient (48 hours).

55. The State maintains that the complainant was clear in his evidence and his testimony stood up under cross examination.

56. The State therefore submits that they have discharged their legal and evidential burden and established all three counts set out in the Information filed in Court.

Submissions for the Defence

57. In summary the Defendant denies the two counts of Sexual Assault and the one count of Rape.

58. Counsel submits that the medical report should be disregarded as the doctor has failed to sign the declaration that confirms that his findings are true and that he can be liable for any false statement.

59. Counsel submits that complainant was not credible, and he was argumentative during cross examination. Counsel submits that his version of events that night was implausible as it would have been very difficult to penetrate as he described it, without his active cooperation.

60. He submits that the version of events narrated by the Accused is far more plausible and in fact the complainant only reported the matter when the other students started to mock him.

61. Counsel therefore submits that the State has failed to establish all three counts in the Information therefore the Accused is entitled to be acquitted.

Analysis

62. For the first and second count the Accused is charged with Sexual Assault contrary to section 210 (1) (a) of the Crimes Act 2009.

63. The relevant section provides: -

“Sexual assaults

210.-(1) A person commits an indictable offence (which is triable summarily) if he or she—

1. (a) unlawfully and indecently assaults another person; or
2. (b) procures another person, without the person’s consent—
 1. (i) to commit an act of gross indecency; or
 2. (ii) to witness an act of gross indecency by the person or

any other person.

Penalty— Imprisonment for 10 years.”

64. For the third count, 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.”

65. The State alleges that on the date and time in question, the Accused sexually assaulted Etuate Lolohea by touching his chest and nipple and by procuring him to touch his erected penis.

66. The State further alleges that the Accused, penetrated the anus of Etuate Lolohea inside Cube 11, the toilet cubicle for Ratu Sukuna House.

67. 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.

68. The Accused, in his testimony, has denied the offence, instead he concedes that he kissed Etuate, with his consent and Etuate willingly went with him to the toilet (Cube 11) where he sucked the Accused's penis.

69. To prove the offence of Sexual Assault the State has to establish the following elements of the offence: -

- That between on the 12th of November 2022 inside Cube 8 (the Junior Dorm) of Ratu Sukuna House, RKS Josua Dovia Kilawekana assaulted Etuate Lolohea
- The assault was unlawful and indecent – touching his chest and nipples and kissing his face and lips; and procuring Etuate Lolohea to touch his erect penis.
- The assault was without the consent of the complainant Etuate Lolohea.
- Etuate Dovia Kilawekana knew that Etuate Lolohea was not consenting.

70. To prove the offence of Rape, the State has to establish the following elements of the offence: -

- That on the 12th of November 2022 at Cube 8 in the Junior Dorm of Ratu Sukuna House, Etuate Dovia Kilawekana penetrated the anus of Etuate Lolohea.

- Etuate Lolohea did not consent to the penetration of his anus.
- Etuate Dovia Kilawekana knew that Etuate Lolohea was not consenting to the penetration.

71. The slightest penetration is sufficient, there does not need to be ejaculation to prove the offence. There is no longer any requirement for any corroboration for sexual offences – section 129 of the Criminal Procedure Act 2009.

72. In State –v- Kanacuya Criminal Case No. HAC 169 of 2021, Justice Goundar, in ruling on an Information charging Sexual Assault and Rape made the following observations with respect to both offences: -

“[11] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act one that causes fear or pain.

[12] The word indecent means contrary to the ordinary standards of respectable behaviour. For an assault to be indecent it must have sexual connotations or overtones.”

73. The parties have filed Agreed Facts pursuant to section 135 of the Criminal Procedure Act 2009. Pursuant to the provisions of that section these agreed facts are taken to be established without the need for any evidence.

74. The following facts have been established: -

- Josua Dovia Kilawekana was 18 years, 18 days old at the time of the alleged offence.
- Josua Dovia Kilawekana was a vocational student at Ratu Kadavulevu School, RKS.
- Josua Dovia Kilawekana was a rugby player for RKS.
- Josua Dovia Kilawekana is also known as “Nemo.”
- Etuate Lolohea is also known as “Eddie.”
- Etuate Lolohea and Josua Dovia Kilawekana “Nemo” are known to each other.
- Etuate Lolohea was a junior in school whilst Josua Dovia Kilawekana was a senior.

- Both Etuate Lolohea and Josua Dovia Kilawekana “Nemo” are in the same schoolhouse/bure/dormitory known as “Sukuna.”
- Both Etuate Lolohea and Josua Dovia Kilawekana “Nemo” were boarding students at RKS.
- On the 12th of November 2022, at 1am, Josua Dovia Kilawekana “Nemo” had laid down beside Etuate Lolohea.
- In November 2022, Ulaiasi Lawe was a schoolteacher at RKS.
- Ulaiasi Lawe being a schoolteacher at RKS knew Etuate Lolohea and Josua Dovia Kilawekana “Nemo” as students in RKS.
- There is a toilet within the RKS student dormitory, and it is commonly known to students as “Cube 11.”
- The walkway in the RKS students’ dormitories have lights.
- There are lights outside “Cube 11” windows.
- On the 12th of November 2022, at around 1am, these lights were switched on.
- On the 12th of November 2022, at 1am, Josua Kilawekana “Nemo” was present with Etuate Lolohea in “Cube 11” toilet.
- On the 14th of November 2022, Etuate Lolohea was medically examined by Dr. Inikasio Sokini Vakadranu at the Korovou Hospital.
- On the 12th of November 2022, at around after 1 am, some sexual acts had occurred between Josua Dovia Kilawekana “Nemo” and Etuate Lolohea. The nature of these sexual acts and whether there was consent or not, is a trial issue.

75. Consent is defined in law, and this is at section 206 (1), (2) of the Crimes Act 2009 which provides: -

“(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."

76. I have considered the evidence led at the Trial and there is no dispute that at the time in question on the early morning of the 12th of November 2022 both the Accused Josua Dovia Kilawekana and the complainant Etuate Lolohea were together inside Cube 8, inside the Junior Dorm of Ratu Sukuna House, RKS.

77. There are two different versions of events that unfolded early that morning – the complainant's version as led by the State and the Accused's version as led in defence. This means that the Court will have to decide who is more credible and whose version of the evidence it will accept.

78. Before that, the Accused, through submissions suggested that the Court disregard the medical report as the doctor did not sign the medical report.

79. Section 133 of the Criminal Procedure Act provides for the admission of such reports. There is no question that the person who filled in the Police Medical Examination Form, and who examined Etuate Lolohea on the 14th of November 2022, was Dr. Inikasio Sokini Vakadrano.

80. He has given evidence under oath and has been subjected to cross examination therefore I find that the medical report may be considered in assessing the totality of the evidence in this case.

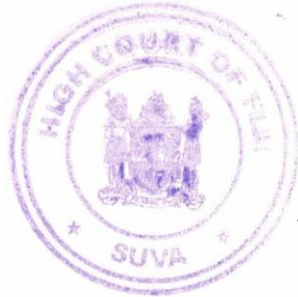
Court's findings


81. I have considered the evidence and I have examined both the complainant and the Accused person as they gave evidence.

82. I found the complainant's evidence to be compelling. He was forthright in his evidence and maintained his testimony even under grueling cross examination. He did not minimise anything nor did he evade any question put to him.
83. The Accused in his evidence was equally compelling he was also forthright in his version of what happened early that morning. He did concede that he was not where he was supposed to be – first he was walking about after lights out; he went to the Junior Dorm even though he was not supposed to be there at that time and place and then he specifically picked out where Etuate Lolohea was sleeping and went to sleep behind him.
84. The Accused maintains that he kissed the complainant with his consent, and they went together to the toilet cubicle where the complainant sucked his penis with consent.
85. The complainant has been very clear throughout that he did not consent to anything that happened that night. There is no evidence that there was any previous discussion or arrangement between the complainant and the Accused to meet later that night therefore there is no doubt that what happened to the complainant that night would have come as a shock to him.
86. The Accused was a senior and he had told Etuate what to do therefore he complied and gave consent under intimidation and duress and with the exercise of authority – section 207 (2) (b), (c), and (d) of the Crimes Act 2009. As consent was obtained in those circumstances, it is no consent at all.
87. With the allegation of Rape, the evidence of the complainant was bolstered by the findings of the medical report, which showed that there were two bruises of 1x1 cm at the 12 and 6'o clock position of the anal area, injuries which were recent and were caused by blunt trauma.
88. This places the time that these bruises were obtained as occurring within 48 hours, within the time set out by the complainant.
89. After considering all of the above, I prefer the evidence of the Complainant and find that the State has established the three counts in the information beyond a reasonable doubt.

Josua Dovia Kilawekana this is the judgment of the Court: -

1. Two Counts of Sexual Assault contrary to section 210 (1) (a) of the Crimes Act– convicted as charged.
2. One count of Rape contrary to section 207 (1) (2) (a) of the Crimes Act – convicted as charged.
3. The Court will hear from you in mitigation.





Mr. Justice U. Ratuveli
Puisne Judge

*cc: Office of the Director of Public Prosecutions
Office of Director, Legal Aid Commission*