

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

**Crim. Case No: HAC 48 of 2023**

**STATE**

vs.

**TEVITA DAUDRAVUNI**

**Counsel:** Ms. S. Bibi with Ms. P. Rice for the State  
Mr. T. Varinava for Accused

**Dates of Hearing:** 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> October 2023

**Date of Closing Submission:** 01<sup>st</sup> November 2023

**Date of Judgment:** 09<sup>th</sup> February 2024

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**JUDGMENT**

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**Introduction**

- 1, The Acting Director of Public Prosecution, on the 24th of October 2023, filed this Amended Information, charging the Accused, Mr. Tevita Daudravuni, with four counts of Rape, contrary to Section 207 (1) (2)(a) of the Crimes Act. The particulars of the offences are:

***COUNT 1***

***Representative Count***

***Statement of Offence***

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

*Particulars of Offence*

*TEVITA DAUDRAVUNI between the 1<sup>st</sup> day of January, 2014 and the 31<sup>st</sup> day of December, 2014, at Urban Nest Motel, in Suva, in the Central Division, on more than one occasion, had penetrated the vagina of TITILIA UAVEIRAKI, with his penis, without her consent.*

**COUNT 2**

***Representative Count***

*Statement of Offence*

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

*Particulars of Offence*

*TEVITA DAUDRAVUNI between the 1<sup>st</sup> day of January, 2015 and the 31<sup>st</sup> day of December, 2015, in a boat, in Suva, in the Central Division, on more than one occasion, had penetrated the vagina of TITILIA UAVEIRAKI, with his penis, without her consent.*

**COUNT 3**

***Representative Count***

*Statement of Offence*

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

*Particulars of Offence*

*TEVITA DAUDRAVUNI between the 1<sup>st</sup> day of January, 2016 and the 31<sup>st</sup> day of December, 2016, in a boat, in Suva, in the Central Division, on more than one occasion, had penetrated the vagina of TITILIA UAVEIRAKI, with his penis, without her consent.*

**COUNT 4**

***Representative Count***

*Statement of Offence*

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

*Particulars of Offence*

**TEVITA DAUDRAVUNI** *between the 1<sup>st</sup> day of January, 2017 and the 31<sup>st</sup> day of December 2017, at Urban Nest Motel, in Suva, in the Central Division, on more than one occasion, had penetrated the vagina of TITILIA UAVEIRAKI, with his penis, without her consent.*

2. The Accused pleaded not guilty to these offences; hence, the matter proceeded to the hearing. The hearing commenced on the 23rd of November, 2023, and concluded on the 25th of November, 2023. The Prosecution presented the evidence of the Complainant. At the end of the Prosecution's evidence, the learned Counsel for the Defence made an application under Section 231 (1) of the Criminal Procedure Act, submitting that the Prosecution failed to adduce evidence to establish that the Accused committed the first two counts of Rape as charged in the Information, hence, invited the Court to dismiss those two counts and acquit the Accused from the said two counts. The learned Counsel for the Prosecution conceded to this Application. I accordingly found that the Prosecution failed to present evidence to establish that the Accused committed the first two counts of Rape as charged in the Information, hence, acquitted the Accused of the same pursuant to Section 231 (1) of the Criminal Procedure Act. The matter then proceeded on to the Defence regarding the remaining two counts of Rape. The Accused did not give evidence but called three witnesses for his Defence.
  
3. Subsequently, the Court heard the closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, the learned Counsel for both parties filed written submissions. Having perused the evidence adduced during the hearing and the parties' respective oral and written submissions, I now pronounce the judgment on this matter.

4. 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.

### **Main Elements of the Offences**

5. The main elements of Rape are that:
  - 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. The dispute is whether this alleged incident happened involving the Accused.
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.
8. 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.

9. The Complainant must have the freedom to make a choice. She must not be pressured or forced to make that choice. Moreover, the Complainant must have the mental and physical capacity to choose freely. Consent can be withdrawn at any time. It is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. A person's consent should not be assumed.
10. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his 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**

11. The Prosecution and the Defence tendered the following Admitted Facts under Section 135 of the Criminal Procedure Act, they are:
  - i) *The name of the person charged is Tevita Daudravuni["Tevita"].*
  - ii) *Tevita was born on 15<sup>th</sup> July, 1957 and is currently 65 years old.*
  - iii) *Tevita shares a domestic relationship with Titilia Uaveiraki ["Titilia"].*
  - iv) *Titilia was born on 17<sup>th</sup> December, 1999 and is currently 23 years old.*
  - v) *Titilia's great grandfather and Tevita's father are brothers, which makes Tevita to be Titilia's grandfather.*
  - vi) *Titilia's biological mother's name is Unaisi Daulali ["Unaisi"].*

- vii) *It is agreed that the admissibility and the contents of the following document are not in dispute and the same is tendered by consent and annexed as follows:-*
- viii) *Birth Certificate of Titilia Uaveiraki.*

### **Prosecution's Case**

12. The Accused is related to the Complainant as her grandfather. In 2016 and 2017, the Complainant stayed at the Accused's place as his house was closer to her school. The Complainant had accompanied the Accused when he went to sell fish at Bayly Bridge. The Complainant alleged that when they were returning after selling fish in his boat, the Accused had penetrated her vagina with his penis without her consent. The Accused came close to her while she was in the boat. He started to kiss her lips and then her breasts. Afterwards, he removed her clothes and then penetrated her vagina with his penis. The Complainant had tried to push him away, but he continued and completed his sexual assault.
13. Moreover, the Complainant testified that the Accused took her to a motel near the Suva Hospital after they finished selling fish. He then took her to the room and had sexual intercourse with her, penetrating her vagina with his penis without her consent.

### **Defence's Case**

14. The Accused denies this allegation and calls three witnesses for the Defence. The first witness of the Defence is Acting Sergeant Livai, who was the initial Investigating Officer of this matter. He testified that he chatted with the motel owner and one female employee. They told him they never saw the Accused with a teenage girl at their motel. However, Sergeant Livai had not recorded any witness statement in this regard. The daughter and son of the Accused stated in their respective evidence that the accused always goes fishing with the son, and the daughter was the one who always sold fish. They both said that the Complainant stayed with them during the rainy days as it was easy for her to attend school.

According to the two Defence witnesses, the Complainant had never accompanied the Accused to go and sell fish.

### **Evaluation of Evidence**

15. According to the evidence the Prosecution and Defence adduced, the Accused denied the allegation and adduced evidence to establish that such incidents had never occurred. 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 had committed these crimes. In doing that, the Court must evaluate the evidence presented in the Court. The accused is not required to provide 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.
16. 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.
17. 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).**

18. I observed certain inconsistencies in the evidence given by the Complainant. The Defence urged that the Complainant made this false allegation to cover up the embarrassment of getting pregnant, which the Defence submitted was the reason for the delay in reporting this matter.
19. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014** (the 4th of October 2018) has extensively discussed the issue of delay in reporting. His Lordship found that "the totality of the circumstance test" is the correct approach to evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
20. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (*vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)*)
21. The Complainant did not promptly inform anyone about this incident. Her evidence regarding informing someone was not consistent and specific, as was her testimony regarding the incident that allegedly occurred in the boat. I shall first focus on her evidence regarding the incident in the boat.
22. The Complainant, in her evidence, initially stated that the Accused did the same things in 2016 when they were returning from selling fish in the boat. She was neither specific nor consistent in explaining the event in the boat. She said that the Accused tried to kiss her mouth and then went down to kiss her breast. He then attempted to remove her clothes, but she managed to push him away and went to the front side of the boat. The Accused then sailed the boat back home. Later part of her evidence in chief, she changed her version and



said that the Accused, irrespective of her resistance to pushing him away, managed to make her lie down in the boat and then penetrated her vagina with his penis. I am mindful that count three is a representative count, but the Prosecution must present evidence with clarity and precision. I am not in a position to comprehend whether the Complainant explained about one incident that took place in the boat or two separate incidents in which the first time, she managed to push the Accused away, but the second time, he succeeded with his sexual assault. Unfortunately, the learned Counsel for the Prosecution made no effort to clarify the materially essential aspects of the Complainant's testimony, leaving it difficult for the Court to conclude appropriately.

23. The Complainant said she was scared of the Accused because he threatened her not to tell anyone about these incidents; therefore, she did not inform anyone about this. However, her aunt found a recorded telephone conversation between the Accused and the Complainant and then questioned her about the Accused. There are no specific details about the nature or content of the recorded telephone conversation. The Complainant then related these allegations to her mother and the aunt.
  
24. Besides her explanation for the delay in reporting this matter, she admitted that the details of this allegation came out after she got pregnant when she was in Lautoka. She admitted during the cross-examination that she blamed the Accused because of her pregnancy. I reproduce the questions and answers of the Complainant below regarding her pregnancy and making this allegation;

*Mr Varinava: I don't understand where you went to Lautoka Madam. But my question is the reason why you had blamed Tevita was to save yourself from being caught pregnant?*

*Complainant: Yes My Lord, I was confused as I did not know who was the father.*

*Mr Varinava: So that is why you blamed Tevita?*

*Complainant: Yes my board, that was happening there and I went to Lautoka and I staying with a boyfriend,*

*Mr Varinava: So my final question Madam, you blamed Tevita for raping you because you were pregnant. Is that correct?*

*Complainant: Yes,*

25. During the re-examination, the Complainant reaffirmed that she correctly understood the questions put to her by the learned Counsel for the Defence during the cross-examination and confirmed that she blamed the Accused because of her pregnancy.
26. These answers of the Complainant need to be evaluated with the evidence she gave. She did not inform or report this matter to the Police even after she left the Accused's house and moved to Lautoka. The Complainant did not give any explanation as to whether the Accused was still threatening her or she was still afraid of him even after she left him. Moreover, there are no specific details or explanations of the nature and the content of the recorded telephone conversation between the Accused and the Complainant that her aunt found. The Complainant had not resisted or alarmed anyone when she was taken to the motel during the daytime. The Complainant only explained that she was scared because the Accused threatened her.
27. Considering the above reasons, the Court could reach three possible inferences. The first inference is that the Accused had actually raped her as the Complainant claimed, but she did not inform anyone until she found herself being pregnant. The second inference is that she had consensual sexual intercourse with the Accused and then blamed the Accused to cover up her embarrassment of getting pregnant. The third inference is that she was embarrassed and blamed the Accused instead of revealing the real person who made her pregnant. There is no evidence whether she eventually disclosed to her mother about her boyfriend with whom she stayed in Lautoka.

28. In view of these reasons, there is a reasonable doubt about the credibility and reliability of the evidence given by the Complainant. Therefore, the Prosecution failed to prove beyond reasonable doubt that the Accused committed these two offences as charged under counts three and four in the Information.
29. In conclusion, I find the Accused not guilty of the two counts of Rape contrary to Section 207 (1) (2) (a) of the Crimes Act and acquitted of the same accordingly.
30. Thirty (30) days to appeal to the Fiji Court of Appeal.



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

**At Suva**

09<sup>th</sup> February 2024

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.