

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 019 of 2020

BETWEEN : STATE

AND : VAKANANUMI VUNIVESI

Counsel : Ms W. Elo for the State
Mr. K. Verebalavu and Mr. E Veibataki for the Accused

Dates of Hearing : 18 & 19 January 2021

Closing Speeches : 19 January 2021

Date of Summing up: 21 January 2021

Date of Judgment : 22 January 2021

(The name of the Complainant is suppressed and she will be referred to as FN)

JUDGMENT

1. The Accused is charged with three counts of rape. The statements of offences and particulars of offences are as follows;

First Count

Statement of Offence

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

Particulars of Offence

Vakananumi Vunivesi between the 23rd day of November 2017 to the 13th day of January 2017 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

Second Count

Representative count
Statement of Offence

Rape : Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Vakananumi Vunivesi Between the first day of January 2018 to the 31st day of December 2018 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

Third Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Vakananumi Vunivesi the 15th day of November 2019 at Vunisei village in the Eastern Division had carnal knowledge of FN without her consent.

2. The Prosecution called only the Complainant, and after the closure of the Prosecution case the Accused chose to remain silent.
3. The assessors returned with a unanimous opinion that the Accused is guilty of all three counts. During the summing up I gave directions on standard of proof,

corroboration and representative counts, among other things. Having directed myself in accordance with the summing up I will now pronounce my judgment.

4. The Accused is the stepfather of the Complainant. She gave evidence that she is now 18 years of age. According to the evidence given by the Complainant, in 2017 she had moved to Vunisei to live with her mother, stepfather and the siblings. During the third term school holidays in November- December in 2017, the Accused had started having sexual intercourse with her.
5. In respect of the first count the Complainant described how the Accused forced her to take off her clothes when her mother was not at home. She had been scared of the Accused and had submitted herself to him to have sexual intercourse as she thought he would assault her or do something else. She gave evidence that the Accused inserted his penis into her vagina, and she stated that she had to bear the pain as it was hurting.
6. The Complainant explained as to why she did not complain about that incident to her mother. It appears that the Complainant had been scared that the Accused would do something to her and her mother, if her mother confronted him.
7. The second count is a representative count, and it relates to the period from 1 January 2018 to 31 December 2018. According to the Complainant the Accused had continued to have sexual intercourse with her during the year 2018 as well. Although she could not specifically mention a date, she confirmed that the Accused used to have sexual intercourse with her when she returns from school and when her mother was at work. She gave evidence that she did not give consent for the Accused to insert his penis into her vagina on those instances. According to her evidence she had submitted herself to the Accused to have sexual intercourse due to fear. She further stated that she did not tell her mother as she was scared.
8. On 15 November 2019 the Accused had again inserted his penis into the Complainant's vagina. According to the Complainant the Accused had had sexual

intercourse while she was crying. Before the Accused had sexual intercourse, he had assaulted the Complainant when he saw a love bite on her neck. The Complainant stated that she was having a swollen face and body pains due to the assault. She further said that she did not give consent for the Accused to have sexual intercourse with her. As per the admitted facts the Accused admits that he had sexual intercourse with the Complainant on 15 November 2019. He only contested the issue of consent.

9. The Complainant explained how she finally told her mother about the incidents. She repeatedly said that she was scared of the Accused and she could not tell her mother as she thought it would lead to a situation where the Accused would cause harm to them.
10. I have carefully considered the evidence given by the Complainant. I have observed her demeanour and I am satisfied that she was forthright in giving evidence about the incidents happened to her. The Defence could not challenge her evidence or impeach her credibility. In my opinion she gave consistent, reliable and credible evidence.
11. It appears that she had been a little over 15 years of age when the Accused first had sexual intercourse with her. When totality of her evidence is considered it is very clear that the Accused had exercised his authority to make the Complainant submit herself to him to have sexual intercourse with her. The evidence given by the Complainant very clearly demonstrated that she had submitted herself as she had no other option. It was very evident that she had thought about her family and the plight of her mother and the siblings if she had complained. I am satisfied about the explanations given by her as to why she did not complain about these incidents even when her mother asked whether she had a relationship with the Accused, after observing the manner in which the Accused used to treat her. Given her young age and how she thought about repercussions that could follow after complaining against her stepfather, I have no hesitation to accept the

explanations given by her for the delay in complaining. It appears that the assessors too have accepted her explanations to be reasonable.

12. The main issue in this case in respect of all three counts is consent. It is true that there was no evidence to support that the Complainant physically resisted to the acts of the Accused.

13. However, the law does not require a person to physically resist and submission without physical resistance by the victim shall not alone constitute consent. The word 'consent' is defined under section 206 of the Crimes Decree 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”

14. It is crystal clear that the Complainant had submitted herself to the authority of her stepfather due to fear for the safety of herself, her mother and the siblings. She

specifically said in respect of the first count that she had to bear pain when the Accused was having sexual intercourse. When she gave evidence regarding the representative count, she stated that she did not consent for the Accused to have sexual intercourse with her. In her evidence she stated that on one occasion she did not return home after school, as she did not want the Accused to have sexual intercourse with her. In respect of the last incident, she stated that the Accused kept on having sexual intercourse with her even though she was crying. It can be clearly seen that her submission to the Accused to have sexual intercourse clearly reflects lack of consent. With all these circumstances the only conclusion that can be reasonably arrived at is that there was no consent freely and voluntarily given by the Complainant in respect of all the alleged incidents.

15. In **Tukainiu V State [2017] FJCA 118;AAU0086.2013 (14 September 2017)** it was held that Section 207 of the Crimes Act does not specify a fault element and in view of section 23(2) recklessness becomes the fault element for the physical element of rape. Further the Court of Appeal stated that;

“Therefore, I conclude that the prosecution in the case of rape has to establish (a) carnal knowledge (i.e. penetration to any extent) (b) lack of consent on the part of the victim and (c) Recklessness on the part of the accused as defined in section 21(1).

.....Therefore, in the case of rape the fault element would be established if the prosecution proves intention, knowledge or recklessness as defined in sections 19, 20 or 21 respectively. The presence of any one of the three fault elements would be sufficient to prove the fault element of the offense of rape.”

16. The evidence given by the Complainant elaborates that the Accused had no reasonable ground to believe that the Complainant was consenting in the above-mentioned circumstances. The Accused’s conduct manifestly demonstrates that

he was reckless as to whether the Complainant was consenting or not. Therefore, I am of the view that the Prosecution proved beyond reasonable doubt that Accused was reckless as to whether the Complainant was consenting or not.

17. In the circumstances it is my considered opinion that the Prosecution proved beyond reasonable doubt that the Accused had sexual intercourse with the Complainant in respect of the first count, without her consent.

18. Further I am satisfied that the Prosecution proved the representative count of rape beyond reasonable doubt by establishing that during the period from 1 January 2018 to 31 December 2018 the Accused had sexual intercourse with the Complainant at least on one occasion without her consent.

19. Also, I am satisfied that the Prosecution proved the third count as well beyond reasonable doubt.

20. It appears that the assessors have believed the evidence given by the Complainant and they have correctly decided that the Prosecution proved all the elements of the three counts. I have no reason to disagree with the unanimous opinion of the assessors.

21. Accordingly, I find the Accused guilty of the three counts of rape and convict him as charged.



At Suva

22 January 2021

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission