

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 164 OF 2020S

STATE

VS

ILAISA BALEKANA

**Counsels : Ms. K. Semisi and Ms. S. Bibi for State
Ms. L. Filipe for Accused**
Hearings : 26, 27 and 28 April, 2022.
Judgment : 3 May, 2022.

JUDGMENT

1. On 26 April 2022, in the presence of his counsel, the following amended information was read over and explained to the accused:

“Count 1

Statement of Offence

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

Particulars of Offence

ILAISA BALEKANA on the 9th day of June 2019 at Babavoce Settlement in the Eastern Division had carnal knowledge of M.T.L.S 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

ILAISA BALEKANA on the 9th day of June 2019 at Babavoce Settlement in the Eastern Division penetrated the vulva of M.T.L.S with his tongue without her consent."

2. He said, he understood the two counts in the information and he pleaded not guilty to the same. So, the questions that needed to be answered in this case were as follows:
 - (i) On count no. 1, did the accused rape the complainant (PW1) on 9 June 2019, at Babavoce Settlement in the Eastern Division?
 - (ii) On count no. 2, did the accused rape the complainant (PW1) on 9 June 2019, at Babavoce Settlement in the Eastern Division?

3. For the accused to be found guilty of rape, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) penetrated the complainant's vagina with his penis (count no. 1); or
 - (iii) penetrated the complainant's vulva with his tongue (count no. 2);
 - (iv) without her consent; and
 - (v) he knew, that the complainant was not consenting to 3 (ii) or 3 (iii), at the time.

4. The slightest penetration of the complainant's vagina by the accused's penis (count no. 1) or the slightest penetration of the complainant's vulva by the accused's tongue (count no. 2), is sufficient to satisfy elements 3 (ii) or 3 (iii) above. Whether or not the accused ejaculated, is irrelevant.

5. "Consent" is to agree freely and voluntarily and out of her own freewill. If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.

6. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting, at the time. The court will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
7. On 27 April 2022, the prosecution opened her case. She then called the complainant (PW1) as her first witness. The complainant said she was born on 5 April 2003. She tendered her birth certificate as Prosecution Exhibit No. 1 to verify the same. She said, she recalled 9 June 2019. She was residing in a village in Tailevu with her parents. She said, she was 16 years old at the time and was a Form 5 student at a secondary school in Narere. She said, on 9 June 2019, her parents and her family went to attend church. She said, before the church, the accused took her in a car to drop her family's washed clothes in their house in the village.
8. She said, thereafter the accused took her to his house to get a spare tyre. She referred to a Booklet of Photos, tendered as Prosecution Exhibit No. 2, by the prosecution. She said, they stopped near the accused's residence, as shown in Photo No. 7, 8, 9 and 10. She said, she was sitting in the front passenger seat, while the accused was in the driver's seat. She said, when they stopped, the accused told her to go to the back seat of the car. She said, she did so. She said, the accused later came to her. She said, the accused opened the door next to the back seat. It was dark at the time.
9. She said, the accused told her he wanted to have sex with her. She said, she asked him why he wanted to have sex with her, as he was married and had children and grandchildren. She said, he was also related to her. She said, the accused told her to shut up and threatened her to do as he says, or he will do something to her. She said, she was scared and thought he might kill her, so she decided to do as he says. She said, he made her turn to him, as she was sitting

on the back car seat. She said, he was holding onto her thighs from the outside. She said, he unbuttoned her dress and then pulled her panty down to her ankles. The complainant said, the accused then in a squatting position, put his head between her thighs and licked her vulva/vagina. She said, she felt pain in the vagina, as the accused bit her vagina.

10. She said, she told the accused she could not take it any longer and she said, she was crying. She said, he stopped and then stood up. She said, she saw him taking his penis out of his $\frac{3}{4}$ pants. She said, she tried to pull up her panty while facing the back seat of the car, from the opened door. She said, the accused suddenly pushed her into the car and she fell on the back seat on her stomach. She said, he was holding both her hands from the back. She said, he then inserted his penis into her vagina from the back, and then moved his penis in and out of her vagina for about 5 minutes. She said, she felt pain in her vagina and shouted for help. She said, the accused blocked her mouth with one hand and told her to shut up. She said, she then started crying. She said, both her legs were hanging out of the car. She said, she later kicked the accused. She said, she did not consent to the accused inserting his tongue into her vulva, and neither did she consent to him inserting his penis into her vagina, at the material time. That was basically the prosecution's case on the two rape allegations in count no. 1 and 2.
11. A prima facie case was found against the accused and he chose to give sworn evidence in his defence. He did not deny penetrating the complainant's vulva with his tongue, at the material time. He also did not deny penetrating the complainant's vagina with his penis, at the material time. In fact, he admitted the above in paragraphs 3 and 4 of the "Agreed Facts", dated 27 April 2022. He admitted he was 49 years old at the time, while the complainant was 16 years old, at the time. In his defence, he appeared to say that the complainant

consented to him inserting his tongue into her vulva, and inserting his penis into her vagina, at the material time.

12. The court had carefully listened to the complainant's evidence, and had also carefully listened to the accused's evidence. The court had also carefully examined and considered their demeanour, while they were giving evidence in court. The age difference between the two was 33 years. The complainant was young enough to be his daughter. When cross examined by the prosecution, the accused admitted it was morally wrong for him to have sex with the complainant. He said, the complainant was much younger than him, and he admitted what he did to the complainant was not right. After carefully comparing the complainant and the accused's evidence, I find the complainant to be a credible witness, and I accept her evidence and version of events. I find the accused not to be a credible witness, and I reject his version that the complainant consented to the sexual acts on count no. 1 and 2.
13. Given the above, I find the prosecution had proven its case against the accused on count no. 1 and 2 beyond a reasonable doubt, and I find the accused guilty as charged on count no. 1 and 2. I convict him accordingly on those two counts. I order so accordingly.



Solicitor for State :
Solicitor for Accused :

A handwritten signature in blue ink, appearing to read "Salesi Temo".

Salesi Temo
JUDGE

Office of the Director of Public Prosecution, Suva
Legal Aid Commission, Suva