

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

**Crim. Case No: HAC 10 of 2022**

**THE STATE**

vs.

**SERUPEPELI RAMAKITA**

Counsel : Ms. A.Vavadakua for the State  
Ms. M. Ratidara for the Accused

Dates of Hearing : 17, 18 May 2022

Date of Judgment : 20 May 2022

(Name of the Complainant is suppressed. She is referred to as PB)

**JUDGMENT**

1. The Accused, Surupepeli Ramakita was charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The Prosecution alleges that the Accused on 11 December 2021, in the village of Namuka, had carnal knowledge of PB, the Complainant, without her consent.
2. The Accused pleaded not guilty to the charge. The trial commenced on the 17 May 2022 and concluded on the 18 May 2022. The Prosecution presented the evidence of the Complainant and two other witnesses. At the end of the Prosecution case, the Accused was put to his defence. Only the accused gave evidence for Defence. At the end of the Defence case, the Court heard oral submissions from both Counsel. Having carefully considered the evidence presented at the trial, I now proceed to pronounce my judgment as follows.

3. I am mindful that the Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. The burden never shifts to the Accused at any stage of the trial. The presumption of innocence in favour of the Accused will prevail until the charge is proved beyond reasonable doubt.
4. According to the Information, the Accused is charged under Section 207(2) (a) of the Crimes Act which describes the offence of Rape as follows: *a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent.* In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the Complainant with the penis of the Accused. A slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
5. The fourth or the mental element of Rape developed by the common law has been retained by this jurisdiction as a matter of policy (there can be no offence in the absence of guilty mind) although such an element is not defined in the Crimes Act. Accordingly, the Prosecution is required to prove that the Accused knew or believed that the Complainant was not consenting or that he was reckless as to whether the Complainant was consenting or not.
6. The Complainant was a child of 14 years of age at the time of the offence. She appeared matured as she took stand. To be on the safe side, her testimonial competency was tested at the very outset. She understood the questions the Court put to her and the answers she gave were understandable or intelligible. She proved to be competent and passed the competency test. Considering that she is a child witness, I took all protective measures available at my disposal to protect a vulnerable witness. However, none of those measures will influence me in my judgment and I have not drawn any negative inference from them against the Accused.
7. The Complainant- PB gave evidence under oath. She was in class 7 at the time of the alleged incident. In December 2021, she was living in a remote village by the name of Namuka in the interior of Nausori. She was living with her mother and elder sister. The corrugated tin house in which they lived belonged to her uncle. Apparently, her father had abandoned them. She

regarded the Accused as her grandfather. He lived in the same neighbourhood as the Complainant and his house is situated a few steps away from the house where she lived.

8. According to the Complainant, the Accused Serupepeli (Seru) lived with his wife and a grandchild. The Complainant would go to Seru's house 'when he needed her' to wash their dishes and to clean up. She received food and money in return. On the morning of 11 December 2021, while she was cleaning her sitting room, Seru called her from his entrance and offered her pineapple. His wife and the grand child were away at that time. So were her mother and her uncle. Her sister was cooking in the kitchen which is separated from the house. She went to the entrance of his house to grab the pineapple which he was displaying. As she approached him and got closer to him, he pulled her by her shoulder and took her to the upper part of his living room. She knew something will happen. She was wearing pants, a panty and a singlet. He took off her pants and the undergarment. She felt scared. She wanted to push him and run outside. She pushed him but he pushed her down. He climbed on her and laid on her. He then inserted his male private part into her female private part. She described his private part as 'Ball' and her private part as 'Mimi'. She said the children use the private part to 'pee'. Right after that incident he gave her the pineapple and she ran outside the house. When she ran outside, she saw uncle Mudu. She was scared and did not speak to uncle Mudu. She went to a nearby house and uncle Mudu went back.
9. When she was lying down in that same house, uncle Mudu came back in five minutes. He wanted to talk to her about the incident and asked what took place inside Seru's house. She told him the whole incident.
10. By the time her mum returned home in the night, she was already asleep and that sleep continued for the following Sunday. She did not relay the incident to her mum because uncle Mudu had told her that he will inform her mother. However, the incident had been relayed to her mum by another lady.
11. A photograph No. 6, depicting a tin corrugated house was shown by Ms Ratidara in the course of her cross examination. PB confirmed that it is the Accused's house where the incident had happened. The Complainant denied that she would go to the Accused's house for food whenever she was hungry. She denied the proposition that the Accused never inserted his penis, his male private part into her female private part. She admitted that she never screamed or

shouted for help. She denied that she has come up with this story only because she was pressured by her mother after her hearing a rumour.

12. Under re-examination, she said that she didn't shout or scream at that time because she was scared that the Accused might do something.
13. Vacolo Mudu (PW2) was called by the Prosecution. Mudu is PB's uncle, living in the same village. He is also closely related to Seru. His mother and Seru's wife are sisters. On the 11 December he woke up in the morning to go and have breakfast at Accused's house. When he was looking from the window of uncle Seru's house he heard Seru telling the kid to wear her undergarment. He stood up on a wooden slab (*'kawakawa'*) to see through the window. When he looked through the window, he saw his uncle and PB inside the house. Seru was wearing a towel. He heard his uncle telling her to wear her undergarment. PB was standing up to wear her T-shirt and the skirt. He called the uncle and went over to the other side because the doors were closed. As soon as he approached the front door, PB opened the door. Seru gave PB one pineapple and he sent her.
14. He went back to get a change and came back to see PB. She was sitting and crying. He asked the reason why she came from uncle Seru's house. She said that Seru showed her his male private part and they were together (*'Tiko vata'*). Then he told her to wait for her mum and, when she returns in the afternoon, he will relay the incident to her. Mudu said this incident happened between 6 a.m. and 8 a.m.
15. Under cross-examination, Mudu admitted that Seru's house is built on pine stumps and is at a higher elevation. When he was shown the photograph of the house (DE1) and suggested that he could not possibly look through the window and see inside the house, he denied the proposition and said that he was looking through the window at the back which is bit lower. He denied that he was hung over after drinks. He admitted that he is blind in one eye. He denied that he was mistaken.
16. Dr. Avelina (PW3) had seen PB on the 16 December 2021. Having perused the medical examination report (PE1) she, upon the examination of PB, prepared this report. Doctor said that patient's hymen was not intact. She had noted an old tear at 9 o'clock position of the hymen but there was nil fresh bruising or bleeding. She opined that the injuries might have occurred

in the manner the patient had stated (history). The patient was examined 5 days after the incident had occurred and healing would have taken place within that time. That is why she had noted no recent injuries. She opined that a penetration would have occurred given that the hymen was not intact.

17. Under cross examination, the doctor said that she would not of the opinion that the patient was sexually active because the hymen was intact all around except for the old tear at 9 o'clock position. She would expect more tears around or more of hymnal remnants remaining with someone who would be sexually active. She is unable to give a timeline for the healing process. If the injury was bad such as with a hymnal tear, it could likely be healed within a week. Superficial injuries would have been healed at least in 3 to 4 days. She did not agree that forceful penetration would always have identifiable surrounding bruises or other injuries around the vaginal area because of the elasticity of the vagina. It depends on how many days or how many hours after the assault that the patient is presented for medical examination. In most cases, about 60% to 80 %, there would be no identifiable injury as they do not use a microscope or any other equipment to help them identify injuries.
18. The Accused Serupepli Ramakita gave evidence for Defence. He completely denied the allegation. He confirmed that the corrugated iron house depicted in DE 1 is the house he was living in the latter part of 2021. On the 11 December 2021 he returned home at around 09 a.m. from the plantation. When he was sitting at home, PB came and asked for the pineapple he had brought from the plantation. Then he gave it to her and then she left.
19. Serupepli said that PB was there for 10 minutes when she came to ask for the pineapple. Then he said she came and swept outside and then she took the pineapple after spending about 3 minutes in the house. He denied putting his male private part into her female private part. He argued that if he raped PB, she should have been injured and her clothes torn. He said that it is impossible for one to stand outside and look through the window because the house is built on top of pine posts. When asked by the Court as to why this allegation has been made, he had no idea as to why she is blaming him. He said "may be there's something that's why she made up this allegation".
20. Under cross-examination, Seru agreed that PB came and entered his house asking for pineapple because she trusted him. He admitted that Vacolo Mudu is closely related to him and he

would occasionally offer him meals at his house. He admitted that pineapple was the reason she entered his house.

#### Analysis

21. There are two conflicting versions at the trial. The resolution of the dispute depends on who told the truth in Court. However, the Accused bears no burden to prove that he did not penetrate the vagina of the complainant. The Prosecution must prove all elements of the charge beyond reasonable doubt. The case for the prosecution will stand or fall on the testimony of the Complainant.
22. The Complainant PB is a child. Her evidence is straightforward and not evasive. There are no material inconsistencies or contradictions in her own evidence or with the evidence of others who gave evidence for the Prosecution. Merely because there is a difference, variation or contradiction in the evidence on a particular point would not make witness a liar. None of the so called contradictions highlighted by the Defence Counsel in her closing is material to the main issue at the trial. Complainant's immaturity and lack of capacity to understand the things as they are and her inherent inability as a child to translate her experience into words of adults in a court house would have prevented her from coming out with the same vigour and fluency expected from an adult witness. However, her manner of giving evidence prevents me from treating her as an untrustworthy witness. Having considered the overall evidence of the Complainant, and her demeanour, I am of the view that the Complainant was telling the truth in Court.
23. It was suggested by the Defence that the Complainant did not shout or scream for help although her house is situated close by. In my opinion, the behaviour of the Complainant is quite natural and understandable in the circumstances of this case. People react in different ways to unexpected situations and there is no standard behaviour for a person faced with such a situation. The Accused is related to the Complainant and also he is her neighbour. She used to go to his place for cleaning whenever she was required by the Accused. She must have been shocked to receive this kind of a treatment from the Accused who was regarded by the Complainant as her grandfather (according to the Accused, uncle). She said she was scared that the Accused might do something. She must have expected a dreadful reaction if she was bold enough to shout.

24. It was further suggested that the Complainant did not promptly complain to her mother when she returned home. Her explanation is that she was asleep when her mother returned home. In fact, she told uncle Mudu and she expected him to relay the incident to her mother as promised. Mudu in his evidence confirmed that he undertook to relay the incident to her mother once she returned home. Her belief in Mudu's undertaking or cultural taboos in our society would have prompted her not to complain to her mother.
25. The Accused argued that the Complainant should have received injuries and her clothes torn if she was raped. The absence of injuries in the body or vagina does not necessarily suggest that she was never raped or that the sexual intercourse was consensual. Evidence of physical injuries or torn clothes can generally be expected in a situations where physical resistance has been offered. In the present case, it is highly probable that the Complainant submitted to the aggression of the Accused given his relatively high strength, the physique and not to mention the fear that was instilled in her mind.
26. Doctor Avelina's evidence dismisses the myth that a rape victim must necessarily have injuries. The doctor ruled out the possibility that a forceful penetration should always have identifiable surrounding bruises or other injuries around the vaginal area due to the elasticity of the vagina. However, it should be noted that, in the present case, the doctor in fact noted an old tear at 9 o'clock position of Complainant's vagina even five days after the alleged incident.
27. It has to be accepted that doctor's evidence does not have a corroborative effect on the evidence of the Complainant as it does not implicate the Accused. However, her evidence supported the Complainant's evidence that she was penetrated. The doctor, based on her findings, opined the Complainant to be sexually inactive. There was no evidence that the tear at 9 o'clock position of Complainant's vagina had been caused other than by an act of penetration. The doctor's evidence is consistent with the evidence of the Complainant.
28. The Accused is related to the Complainant. There is no apparent reason for her to make up this allegation. Even the Accused could not say as to why she should make up a false allegation against him. I am convinced that the Complainant told the truth in Court.

29. However, to be on the safe side, I looked at the other evidence adduced by the Prosecution to satisfy myself beyond reasonable doubt that the Complainant told the truth in Court, although no corroboration of Complainant's evidence is required to prove a charge of Rape.
30. Mudu (PW2) was called by the Prosecution to support the version of the Complainant. According to his evidence, he heard the Accused tell the kid to wear her undergarment. When he looked through the window of the Accused's house, he saw the Accused and the Complainant inside the house. He also, upon her being questioned, received an explanation as to what really happened inside the house on that particular morning. He also saw the Complainant crying, in a distressed condition, a short while after the alleged incident.
31. Mudu's evidence, if believed, is important for the Prosecution case in two ways. Firstly, he is a direct witness who had seen and heard an important fact or circumstance that supports the evidence of the Complainant. Secondly, he spoke about the distressed condition of the Complainant soon after the alleged offence. Each piece of evidence, if believed, would bolster the case for Prosecution. The Prosecution contends that Mudu's evidence should also be considered as one that of recent complaint, as a matter going to her credibility and reliability as a witness (not to corroborate).
32. Whether a complaint is recent or not will depend on the facts and circumstances of the case. See: Cummings [1948] 1All ER 551. On the facts of this case, I am unable to agree with the proposition of the Prosecution for the simple reason that the Complainant did not make a complaint and Mudu did not receive a complaint that can be regarded as 'recent'. The Complainant did not complain to Mudu at the first available opportunity when she came out of Accused's house. One can argue that she had a good reason not to complain in the presence of the Accused. However, she did not, technically speaking, 'complain' to Mudu even in the second meeting.
33. In Rex v Osborne [1905] 1 KB 551 at 561 Ridley J in giving the decision on a case submitted to the Court for the Consideration of Crown Cases Reserved, said:

"We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within



such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility."

34. The Complainant, in this case, relayed the incident to Mudu only upon being questioned about something Mudu had heard and seen inside the Accused's house. The 'complaint' did not come naturally from the Complainant but as a result of questioning by Mudu. Therefore, in my opinion, there is no recent complaint here. However, I do not consider the lack of recent complaint to be fatal to this case. It is a fallacy to assume where there is no "hue and cry" immediately after a rape, that there was therefore no rape. Not all victims of rape can be assumed to complain of rape immediately after the event.
35. The Prosecution submitted that the evidence of Mudu should not be acted upon either because he is a liar or he is mistaken as to the identity of the Accused. The contention of the Prosecution relating to Mudu's trustworthiness is that, given his tallness, it is impossible for him to look through the window as the house is built on pine stumps, at a higher elevation. Mudu, in his evidence, explained how he was able to see inside the house. He was standing on a wooden slab or bridge and had looked through the rear window at the backside of the house which is lower than other windows. The photograph DE1 confirms that there is a window at low level at the back. Therefore it would not be impossible for him to peep through that window.
36. On a comparison of his evidence with that of the Complainant, it would be observed that there is an inconsistency in respect of the type of the clothes the Complainant was wearing at the time of the alleged incident. I do not expect Mudu to have a photographic memory on this peripheral matter. What matters is not what she wore but whether Mudu had actually seen and heard something that supports the version of the Complainant. I do not consider this so called contradiction to be material enough to discredit the witness. Mudu is closely related to the Accused and apparently he has no reason to put the Accused in trouble by making up a false allegation. I am convinced that Mudu is a credible witness.
37. Was Mudu Mistaken? This question cannot be answered in the affirmative on the evidence led in trial. Mudu admitted that he is blind in one eye. But it was obvious that he could see things from the other eye. He denied the proposition of the Defence Counsel that he was hung over after having consumed liquor. There is no evidence that he was suffering from a hang over after drinking alcohol. Mudu cannot possibly be mistaken on the Accused as Mudu knew


him for a long time as his is his uncle. He testified to an incident that took place no other place than his uncle's house during broad daylight. Even the Accused confirmed that the Complainant spent some time in his house that morning. I am not convinced that Mudu is mistaken. I accept the evidence of Mudu as being credible and believable. His evidence supported some important events of the Prosecution's case although he could not 'corroborate' the complainant's evidence and implicate the Accused in the offence of Rape.

38. The Defence is not burdened to prove anything in this case. However, upon his rights being explained, the Accused elected to give evidence under oath. Even though I prefer the evidence for the Prosecution, I must not convict unless I am sure beyond reasonable doubt of the truth of that evidence. Therefore it is incumbent upon me to analyse the evidence of the Defence to see if a reasonable doubt has been created in the Prosecution case.
39. I now turn to the evidence of the Accused, who is the only witness for Defence, to see if it is believable, bearing in mind that he has nothing to prove in this case. His evidence is one that of complete denial. He admitted that the Complainant came to his house that morning and asked for pineapple. However, he denied that she came on his invitation and that he used the pineapple to lure her into his house. He denied inserting his penis into Complainant's vagina.
40. At one point of his evidence, he said that the Complainant spent 10 minutes in his house. He soon realised that a span of ten minutes is too long for her to receive the pineapple and came with an explanation that she spent only 3 minutes inside and the rest of the time cleaning outside. However, his version that the Complainant was also cleaning outside in addition to receiving pineapple was never put to the Complainant when she took stand. The Accused had no idea as to why this serious allegation has been levelled against him by the Complainant. In the absence of an apparent motive, it is hardly possible for a girl of her age to fabricate a case of this nature. I am unable to accept his denial. In desperation, he was trying to save his own skin. I reject the evidence of the Defence and accept the version of events of the Prosecution case.
41. Having satisfied with the credibility of the version of the Prosecution, now I proceed to see if all the elements of Rape as charged have been satisfied. The Prosecution proved that it was the Accused that has committed this offence. Evidence of the Complainant and that of Mudu clearly established the identity of the Accused. The Accused is known to both of them for a

long time and the Accused himself admitted that the Complainant came to his house that morning.

42. The Complainant said that the Accused inserted his male private part into her female private part. She described the private part as the body part that the children use to 'pee' or urinate. I have no doubt that the Complainant was referring to the respective genital organs in her own language. The fact that the Defence Counsel did not make an application for no case to answer at the end of the Prosecution case indicates that even the Defence was satisfied that there was some evidence on each element of the offence of Rape including that of penetration. The Complainant is a child and it is natural for her not use the words penis and vagina to describe the genital organs. Her evidence and that of the doctor proved that a penetration of her vagina had taken place.
43. There is clear evidence that the Complainant did not consent to the sexual intercourse. She was forcibly pulled into the living area by her shoulder when she came to take the pineapple. She was scared and she wanted to run outside. She tried to push the Accused and she managed to push him. She was finally overpowered by the Accused to climb on her. I am convinced that the sexual intercourse was not consensual. When the Accused was being pushed and resisted he must have known that the Complainant was not consenting to a sexual intercourse. The fourth element of Rape is also satisfied. I am satisfied that the Prosecution proved all elements of the offence of Rape as charged beyond reasonable doubt.
45. I find the Accused guilty of Rape. The Accused is convicted accordingly.



  
Aruna Aluthge  
Judge

23 May 2022  
At Suva

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Accused