

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 195 of 2020

STATE

V

VILIKESA TOKALAULEVU

Counsel : Mr. Setefano Komaibaba for the State

Ms. Alanieta Bilivalu for the Accused

Dates of Trial : 11-12 May 2022

Closing Submissions : 13 May 2022

Judgment : 6 July 2022

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "MV".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Vilikesa Tokalaulevu, is charged with the following offence:

ONE COUNT

Statement of Offence

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

Particulars of Offence

VILIKESA TOKALAULEVU, on the 6th day of April 2020, at Varoko, Ba, in the Western Division, had carnal knowledge of **MV**, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 2 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:
- (1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*
 - (2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*
 - (3) *In this Decree (Act)—*

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.
- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.
- [6] Section 207(1) of the Crimes Act reads as follows:
- 207. — (1) Any person who rapes another person commits an indictable offence.*
- [7] Section 207(2) of the Crimes Act is reproduced below:
- (2) *A person rapes another person if —*
 - (a) *the person has carnal knowledge with or of the other person without the other person's consent; or*
 - (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*

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

- [8] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic or legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.
- [9] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.
- [10] Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 6 April 2020);
 - (iii) At Varoko, Ba, in the Western Division;
 - (iv) Had carnal knowledge with the complainant MV;
 - (v) Without the consent of the complainant; and
 - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [12] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [13] The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable

doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

- [14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (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.
- [16] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
- [17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 16 years and 11

months of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

The Admitted Facts

[18] Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[19] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. The accused is Vilikesa Tokalaulevu, born on the 6th of April 1988, Fisherman.
2. The complainant is MV, born on the 13th May 2003.
3. The complainant is the daughter of Jojivini Adi and Samuela Sugu of Varoko, Ba.
4. The accused is the brother of Jojivini Adi, hence the maternal uncle of the complainant.
5. In April 2020, the accused was residing with his sister and her family at Varoko, Ba.
6. That the accused had sexual intercourse with the complainant.
7. That on the 29th of September 2020, the complainant was medically examined by Dr. Vani Niumataiwalu at Ba Mission Hospital.

8. That on the 23rd of November, 2020, the accused was interviewed in the i-Taukei language by DC 2832 Seru.
9. That on the same above mentioned date, the accused was formally charged in the i-Taukei language by DC 5015 Sekove, with PC 6775 Seru as the witnessing officer.

A copy of the Birth Certificate of MV has been tendered by the consent of both parties.

[20] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[21] The prosecution, in support of their case, called the complainant, MV, and her mother, Jojivini Adi, in support of their case.

[22] Evidence of the complainant MV

- (i) *The complainant’s evidence was recorded in a ‘closed court’ and a screen was placed so that the complainant could not see the accused during the time her evidence was being recorded.*
- (ii) *The complainant testified that she currently residing in Varoko, Ba and is doing domestic duties (she is unemployed). She had attended school up to Form 3 (Year 9).*
- (iii) *She is now 19 years of age. Her date of birth is 13 May 2003. A copy of her birth certificate has been tendered to Court by the consent of both parties. The said birth certificate is marked as Prosecution Exhibit **PE1**.*
- (iv) *The witness testified that her father’s name is Samuela Sugu and that her mother’s name is Jojivini Adi. She is the second oldest child in her family of six siblings.*
- (v) *She resides with her father, mother and her siblings in Varoko, Nailaga in Ba.*
- (vi) *It is an admitted fact that the accused is the brother of Jojivini Adi and as such the maternal uncle of the complainant. It is also an admitted fact that in April 2020, the accused was residing with his sister and her family at Varoko in Ba.*
- (vii) *The complainant testified to the events which took place on 6 April 2020. She said that it was a Monday. Around 9.00 in the morning she said she had been at home. She had been in the house cleaning and washing the dishes. Her parents had gone to town to get their Social Welfare voucher. Her other siblings had all gone to school.*

- (viii) *The witness said that the accused Vilikesa had also been in the house at the time. She said: "He was drunk he was lying down inside the room".*
- (ix) *She said she had come inside the house to watch a movie. While she was watching TV, Vilikesa had come and called her. He had told her to go into the room. She had complied. He had also told her to take off her clothes. After that he took off his clothes. When asked to explain, she said he took off his ¾ pants. Thereafter, he had taken off her clothes – her shorts, t-shirt and panty.*
- (x) *The following questions were then asked from the witness and she answered as follows:*
- Q. *What happened (thereafter)?*
 A. *He told me to lie down on the bed.*
- Q. *What happened?*
 A. *He spread my legs.*
- Q. *Then what happened?*
 A. *Then he inserted his penis into my vagina. [For penis the complainant used the iTaukei terms 'qalana', and for vagina she used the term 'magaqu'].*
- Q. *How long did he do this for?*
 A. *15 seconds.*
- Q. *What happened after that 15 seconds?*
 A. *I stood up and went to the bathroom.*
- Q. *What did you feel when Vilikesa had put his penis into your vagina?*
 A. *I felt pain.*
- Q. *What was Vilikesa doing when you went to the bathroom?*
 A. *He told me not to tell mum and dad. He wore his clothes and he went to lie down.*
- Q. *At what stage did Vilikesa tell you this?*
 A. *After lying together.*
- Q. *How did you feel when Vilikesa told you not to tell your father and your mother?*
 A. *I was scared.*
- Q. *Why were you scared?*
 A. *Because my mother and my father might beat me.*

Q. Did you agree to have sexual intercourse with Vilikesa?

A. No.

- (xi) The complainant next testified to the events which had taken place on 2 September 2020. She said that they had gone to the Nailaga Health Centre. When asked why she went there, she said: "For my breast to be examined". When asked why she had to get her breast examined, she said: "Because I was sick – my breast was swollen".*
- (xii) The witness further testified that she was given a referral for her to be seen at the Lautoka Hospital. Thereafter, on 9 September 2020, she had gone for a scan to the Lautoka Hospital, with her mother. She said: "They scanned my breast and my stomach area as well – and they said I was 5 months pregnant".*
- (xiii) The complainant said that she had then informed her mother that she was pregnant. "I told her that my uncle got me pregnant (uncle Vilikesa)". She said she had also told her mother what her uncle did to her. [However, it must be mentioned that the witness was not asked as to what exactly she had told her mother about what the accused had done to her].*
- (xiv) When asked as to what her mother's reaction was, she said that her mother was afraid and embarrassed.*
- (xv) The complainant identified the accused in the dock as Vilikesa Tokalaulevu.*
- (xvi) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with the defence case.*
- (xvii) The complainant agreed that her uncle, the accused, was working as an Electrician at some point in time when he was staying with her family. She also agreed that he had been selling fish and earning an income for the family. She further agreed that sometimes she would ask the accused money for spending and for buying some things she wanted from town. She also agreed that her uncle was not married at the time.*
- (xviii) It was suggested to the witness that she and the accused were in a secret relationship and that the incident which took place on 6 April 2020, was not the first time that the accused had sex with her. The witness denied this suggestion.*
- (xix) The following questions were then asked from the witness and she answered as follows:*
 - Q. You have told the Court that this was the first time your uncle had sex with you. But your uncle instructs me that you and your uncle had sex many times?*
 - A. Yes.*
 - Q. On all those other times you had sex with your uncle Vilikesa, you did not tell anyone about it?*
 - A. No.*

Q. *Wouldn't it be true that one of these times was at the cassava patch, past the clothes line, outside your house?*

A. *Yes.*

Q. *Would you agree with me that sometimes your uncle would tell you, if you want to have sex with him, you can follow him to the cassava patch?*

A. *No.*

Q. *Wouldn't it be true that one of those times you had sex with your uncle was in the living room – when your whole family was asleep?*

A. *No.*

Q. *Did you like your uncle or you started to have feelings for him?*

A. *No.*

Q. *Regarding that one time you had sex with your uncle at the cassava patch – and you did not tell anyone about it - Vilikesa instructs me that on that day you had gone earlier to the cassava patch and he arrived later. And when he came later you asked him, what took you so long?*

A. *No.*

(xx) *The witness agreed that the only incident she told her mother about was the incident of 6 April 2020. When asked what exactly she told her mother about this incident, she said that Vilikesa had impregnated her.*

(xxi) *The witness testified that there were 2 rooms in their house. One room was her parents' room and the second room was where Vilikesa occupied. She and her 5 siblings slept in the living room.*

(xxii) *It was suggested to the witness that on all occasions the two of them had sex, it was never on the bed (in the room), but always at the cassava patch outside the house or in the living room. She denied this suggestion.*

(xxiii) *The witness was then asked, where then did she have sex with her uncle Vilikesa. She answered: "In the room on the bed". When asked to clarify whether at all times she had sex with Vilikesa, it was on the bed in the second room, she answered yes.*

(xxiv) *With regard to the incident of 6 April 2020, the witness agreed that when the accused called her into the room, she went into the room. When asked in what order her uncle had taken off her clothes, she said, that he first took off her shorts, then her panty and then her t-shirt.*

(xxv) *The witness further agreed that she had lied down on the bed when her uncle had asked her to do so. When she was lying down on the bed, her uncle had been taking off his clothes.*

(xxvi) *It was suggested to the witness that she had agreed or given permission for the accused to insert his penis into her vagina. She denied the suggestion.*

- (xxvii) *The witness agreed that accused was her mother's younger brother and that in their culture having sex with her uncle is a taboo. She also agreed that she feared that if her parents found out that she and the accused had sex, not only will her parents beat her up but her uncle will also be in trouble.*
- (xxviii) *The complainant said that she had given birth to a baby girl on 25 January 2021. She agrees that the father of the baby is the accused. She is now taking care of the baby. When asked how her parents treated her baby after the baby was born, she said: "They were happy".*
- (xxix) *In re-examination, the State Counsel asked the following questions from the witness and she answered as follows:*
- Q. *How many times did you have sex with Vilikesa?*
- A. *One time.*
- Q. *And that one time where did you have sex with Vilikesa?*
- A. *Inside the room.*
- Q. *Can you give us the exact date you had sex with Vilikesa?*
- A. *On 6 April 2020.*

[23] Evidence of Jojivini Adi

- (i) *The witness testified that she is currently residing at Varoko in Ba and is 38 years of age. She is doing domestic duties.*
- (ii) *She said that she is married to Samuela Sugu for the past 22 years. She has 6 children with Samuela. Her eldest child is 22 years old, while the complainant is 19.*
- (iii) *The witness said that she has 5 siblings. The accused, Vilikesa, is the youngest of her siblings.*
- (iv) *She recalls the events which took place on 2 September 2020. On that day her daughter MV had been sick. Her breast was swollen so she had taken her to the Hospital in Nailaga. The doctor there had examined her breast. She was told to take her daughter to the Lautoka Hospital to get scanned.*
- (v) *Accordingly, she had taken her daughter to the Lautoka Hospital. After examining the complainant, the doctor had called and informed the witness that the complainant was 5 months pregnant.*
- (vi) *The witness said that she could not believe what she had heard. Later she had questioned her daughter as to who had impregnated her. Her daughter had said, it was the accused.*
- (vii) *The witness testified that Vilikesa was staying with her family for about 6 years. Even at the time the doctor had confirmed that the complainant was pregnant, the accused was still living with her family. Even after the complainant had said that it was the accused who had impregnated her, the*

witness said that the accused had been staying at her house. She said: "He continued staying at home until the Police came and took him".

(viii) In cross-examination, the witness said that on the day she had got to know that the accused had impregnated her daughter, the accused had been out fishing. He had returned home 3 days later.

(ix) Upon the accused's returned home, she and her husband had sat down and spoken to the accused about her daughter's pregnancy.

(x) She and her daughter had reported the matter to the Police about 2 weeks later.

(xi) The following questions were then asked from the witness in cross-examination and she answered as follows:

Q. Vilikesa tells me that when you and your husband sat down and spoke to him – you told him that you were not angry and that you have accepted the fact that your daughter is pregnant and will give birth to a child and that you just wanted to talk to him about that?

A. We were upset at both of them. He was drunk. I also got angry at my daughter because she knew that he was drunk. We were angry at both of them. And I informed my daughter – you know your uncle was drunk and he was doing that act to you – you should have run away.

Q. So then what made you and your husband report the matter after talking to Vilikesa/after 2 weeks?

A. Because my husband's side of the family were talking about it.

Q. Were you and your husband embarrassed about what happened between your daughter and your brother?

A. Yes we were embarrassed.

.....

Q. So wouldn't it be true that Vilikesa continued to stay with your family until the time he was arrested by the Police and taken into custody?

A. Yes.

[24] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[25] The accused decided to testify on his own behalf.

Case for the Defence

[26] Evidence of Vilikesa Tokalaulevu

- (i) *The witness testified that he is 34 years old and is an Electrician by occupation.*
- (ii) *He is originally from Yaqeta in Yasawa. He had been residing at Varoko, Ba since 2016. The reason he moved to Varoko, Ba was for his work as an Electrician. He had been staying at his sister Jojivini Adi's house.*
- (iii) *The witness said that the reason he was staying at his sister's house was because it was easy for him to go about on his work as it was close to Ba town. He also helped his sister's family with the house expenses. In the year 2020, he was employed as a fisherman. He was not doing work as an Electrician at the time due to the lockdown due to Covid.*
- (iv) *The witness said that at the time he moved in to his sister's house in 2016, the complainant was 13 years old. She had been schooling at the time.*
- (v) *The complainant used to always ask money from him. He used to give her money. When asked what his relationship with the complainant was like, he answered: "We stayed at home – one day I informed her that I love her".*
- (vi) *When asked what made him say that to the complainant, he said: "Because she does everything. Whenever my clothes are dirty, she always comes, takes it and does the washing".*
- (vii) *The witness said that the complainant had accepted what he had told her. When asked how he knows that she had accepted what he had told her, the witness said: "Whenever I want her, she came to me..... When we had started having sex, she always comes to me.....She finds her own way to come to the place I have told her to come to".*
- (viii) *The accused said that whenever he had told the complainant to come to either the cassava patch or to the sugar cane field, which was besides the house, she would come there. He and the complainant used to have sex in the cassava patch and in the sugar cane field.*
- (ix) *He said they were hiding what they were doing so nobody finds out. This had been going on since 2019.*
- (x) *When asked specifically about the incident which took place on 6 April 2020, the accused said: "From the hospital, after the scanning when they found out that she is 5 months pregnant, from there they worked themselves out to count 5 months backwards. Because they were afraid of the father's side of the family talking about it".*
- (xi) *The witness said that he remembers the incident where he had sex with the complainant in the room (on the bed), when the complainant's parents had gone to town and her siblings were in school. When asked what exactly happened on that occasion, the accused said: "I told her that I love her. She*

came to me. She undressed herself. We had sex". "After having sex, we went our separate ways".

(xii) The witness said that the complainant had agreed to have sex with him that day. When asked how he knows that she had agreed to have sex with him that day, he said: "Because she herself undressed herself".

(xiii) When asked that the complainant had stated in her evidence that she did not agree to have sex with him on the bed that day, he said: "No. Because she was hearing a lot of words being said..... (from her) father's relatives".

(xiv) The accused stated that he had remained at his sister's house until November 2020, until the time the Police came and took him into custody. He has been in remand since November 2020. He stated that he had not applied for bail.

(xv) While in remand, he had got to know from the complainant and her mother that the complainant had given birth.

(xvi) The witness was cross examined by the State Counsel. The prosecution's version of the events were put to the witness during his cross-examination.

Analysis

[27] The prosecution in support of their case, called the complainant, MV, and her mother, Jojivini Adi. The accused testified on his own behalf.

[28] The burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the charge beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraph 10 of this judgment.

[29] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[30] Based on the said admitted facts it is admitted that in April 2020, the accused was residing with his sister and her family at Varoko, Ba. It is also admitted that the accused had sexual intercourse with the complainant. Therefore, the only issue left for the determination of this Court is the issue of consent. That is whether the accused penetrated the complainant's vagina without the consent of the complainant and that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

- [31] I have summarized the evidence of all the witnesses led during the trial. The complainant had testified as to how the accused had inserted his penis into her vagina, on the 6 April 2020. She has testified that she did not agree or consent to the accused inserting his penis into her vagina.
- [32] However, she admitted that she had gone into the room when the accused had called her into the room. She denies that she removed her clothes when the accused had asked her to remove her clothes, and that it was the accused who had removed her clothes. She also admits that she lied down on the bed when the accused had asked her to do so. When she was lying down on the bed, her uncle had been taking off his clothes.
- [33] She had not reported this incident to anyone after it happened. She says the accused had asked her not to inform her mother or father about it.
- [34] The matter only came to light when it was found that the complainant was 5 month's pregnant, with the accused's baby. This was on the 9 September 2020. The matter was reported to the police only thereafter. However, the accused had continued to stay with the complainant's family even after the matter had been reported to the police. He had remained in the house until November 2020, when the police had come and taken him into custody.
- [35] The accused's position is that he was in a romantic relationship with the complainant. He had expressed his love to her and she had accepted. When asked to explain as to how he knows that she had accepted what he had told her, the witness said: *"Whenever I want her, she came to me..... When we had started having sex, she always comes to me.....She finds her own way to come to the place I have told her to come to"*.
- [36] The defence position is that the accused and the complainant had been having sexual intercourse, on numerous occasions, prior to the incident complained of. In fact, the complainant has agreed that she had sexual intercourse with the accused at the cassava patch which was besides their house.
- [37] With regard to the incident complained of the accused's position is that the complainant had agreed to have sexual intercourse with him on the said day. When asked how he says this he answered: *"Because she herself undressed herself"*.
- [38] The accused states that the reason why the matter was reported to the police was due to the fact that relatives on the complainant's father's side had been talking adversely

about the complainant being impregnated by her own uncle. This had brought much shame and embarrassment to the family.

[39] Having analysed all the evidence led in this case in its totality, I am of the opinion that the accused's version is more probable and believable than that of the prosecution.

[40] Therefore, it is my opinion that the prosecution has failed to prove the charge of rape against the accused beyond reasonable doubt.

[41] In the circumstances, I find the accused not guilty of the charge of Rape with which he is charged.

[42] Accordingly, I acquit the accused of the charge of Rape.

[43] The accused has been in remand for this case since his arrest in November 2020. I order his immediate release from custody.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 6th Day of July 2022

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused:

Office of the Legal Aid Commission, Lautoka.