

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 155 OF 2020S

STATE

VS

ALIVATE SOROVAKARUA

Counsels : **Ms. A. Vavadakua for State.**
Ms. S. Prakash for Accused.
Hearings : **25 and 26 July, 2022.**
Judgment : **29 July, 2022.**

JUDGMENT

1. On 25 July 2022, in the presence of his counsel, the following 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

ALIVATE SOROVAKARUA on the 9th day of May, 2020 at Tao Settlement, Naitasiri, in the Eastern Division, had carnal knowledge of **M.N.** 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

ALIVATE SOROVAKARUA *on the 9th day of May, 2020 at Tao Settlement, Naitasiri, in the Eastern Division, inserted his tongue into the vagina of **M.N.** without her consent."*

2. He said, he understood the charges and pleaded not guilty to the two counts. Consequently, the two 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 May 2020, at Tao Settlement, Naitasiri, in the Eastern Division?
 - (ii) On count no. 2, did the accused insert his tongue into the complainant's (PW1) vagina on 9 May 2020, at Tao Settlement, Naitasiri, in the Eastern Division?

3. As a matter of law, the burden to prove the accused's guilt beyond reasonable doubt rest on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. There is no obligation on the accused to prove his innocence. He is presumed innocent until proven guilty beyond reasonable doubt in a court of law.

4. 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 vagina with his tongue (count no. 2);
 - (iv) without her consent; and

- (v) he knew, that the complainant was not consenting to 4 (ii) or 4 (iii), at the time.
5. The slightest penetration of the complainant's vagina by the accused's penis (count no. 1) or the slightest penetration of the complainant's vagina by the accused's tongue (count no. 2), is sufficient to satisfy elements 4 (ii) or 4 (iii) above. Whether or not the accused ejaculated, is irrelevant.
 6. "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.
 7. 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.
 8. After the accused's not guilty pleas were taken, the prosecution opened her case. Later, she called the complainant (PW1) as her only witness. PW1 said, she was born on 6 March 2002. On 9 May 2020, the date of the alleged rape, the complainant said she was 18 years old. She said, she had a fight with her boyfriend that morning and was walking along the road towards the Vunidawa Police Station. She said, she was at Tao Settlement. She said, she was met by one Jonetani on the way. She said, they became friendly and Jonetani took her to the accused's house at Tao Settlement. She identified the accused's house in Photos No. 2, 3, 4 and 5 in the Booklet of Photos, tendered into evidence, as Defence Exhibit No. 1.

9. PW1 said, she met the accused. PW1 said, Jonetani later left them alone in the accused's house. PW1 said, the accused later offered her a meal of beef and cassava. PW1 said, she ate the same and later rested for a while. PW1 said, before she ate, the accused took her \$10 bus fare from her. PW1 said, she asked the accused to return her \$10 bus fare. PW1 said, the accused then told her that they had to have sexual intercourse first before he returned her bus fare. PW1 said, she told him they can't have sex because she had a boyfriend. PW1 said, the accused later grabbed both her hands. She said, she yelled. PW1 said, the accused then kicked her right leg on the shin with his left foot, which made her fall on the floor in a sitting position.

10. PW1 said, the accused later covered her mouth with a pillow and/or cushion, which resulted in her lying down on the floor, facing up. PW1 said, the accused then laid ontop of her, pinning her to the floor, as he was very heavy. PW1 said, with one hand he took off her pants and panty, and with the other hand, he held a pillow/cushion over her mouth, so that she could not raise the alarm. PW1 said, he then inserted his erect penis into her vagina, without her consent (count no. 1). PW1 said, after a while the accused ejaculated into her vagina. PW1 said, at the time they were having sexual intercourse, she was crying. PW1 said, after ejaculating into her vagina, she said the accused licked her vagina. PW1 said, the accused inserted his tongue into her vagina, without her consent (count no. 2). PW1 said, after having sex with her, the accused went outside the house. PW1 said, after the above incident, she walked to the Vunidawa Police Station and reported the accused to police. She said, the police later took her to Vunidawa Hospital for a medical examination. PW1 said, the police later took her statement. PW1 said, the police later dropped her at Nabua, Suva.

11. The parties submitted as "Admitted Facts", dated 25 July 2022. It had 5 paragraphs of "admitted facts". The parties agreed that Mr. Alivate Sorovakarua

was the accused in this case, and he was 34 years old, at the time of the alleged rape. The parties also agreed that the complainant was Ms. M.N., and on 9 May 2020, at Tao Settlement, both the complainant and the accused were in the accused's house. Both parties also agreed that on 9 May 2020, the two had sexual intercourse, wherein the accused penetrated the complainant's vagina with his penis. The parties agreed that the sole issue to be determined in this case was whether or not PW1 consented to the accused penetrating her vagina with his penis (count no. 1) at the time, and whether or not PW1 consented to the accused penetrating her vagina with his tongue (count no. 2), at the time. The prosecution then closed her case.

12. The parties agreed that the accused had a prima facie case to answer, given the total evidence so far laid before the court. The court agreed with the parties and ruled accordingly. The standard options were given to the accused. He chose, through his counsel, to give sworn evidence in his defence, and chose not to call any witness.
13. The defence's case was very simple. The accused admitted he inserted his penis into the complainant's vagina on 9 May 2020, and they had sexual intercourse for about 3 to 5 minutes. He said, the complainant consented to sexual intercourse with him, at the material time. He said, the complainant willingly removed her own clothes, before sex. He said, when having sexual intercourse, the complainant consented to sex with him, in return for him to give her \$10 for her bus fare home. The accused said, because of the above, he knew at the time that the complainant was consenting to sex with him, at the time. The accused pleaded not guilty to inserting his tongue into the complainant's vagina, at the material time. While giving evidence, the accused failed to mention anything about count no. 2. That was the defence's case. The parties later made their closing submissions.

14. Has the prosecution proved their case against the accused beyond a reasonable doubt on the two counts of rape? The court had carefully listened to the complainant and the accused, when they were giving evidence in court. The court had carefully observed their demeanour while they were giving evidence in court. In my view, the complainant was forthright and persuasive when she was giving her evidence. She withstood the defence's cross-examination on the issue of consent. She said, she didn't give the accused permission to insert his penis into her vagina, nor his tongue into her vagina, at the material time. She said, the accused forced her into sex with him by kicking her leg, forcing her to the floor, lying ontop of her to pin her down, smothered her with a pillow over her mouth to stop her raising the alarm and stealing her \$10 bus fare. In the court's view, the accused took advantage of the complainant's naivety by forcing himself sexually on her. I reject the accused's version that the complainant consented to sex with him and was prostituting herself to him, at the time. I find the complainant 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 of events.
15. Given the above, I find the prosecution had proven their case against the accused beyond a reasonable doubt, on both counts. I therefore find the accused guilty as charged on count no. 1 and 2, and I convict him accordingly on both counts. I order so accordingly.



Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused : **Legal Aid Commission, Suva.**