

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 58 of 2019

STATE

V

WILIAME SUKANATABUA

Counsel : Ms. S. Swastika, Mr. U. Lal and Mr. A. Singh for
the State.
: Ms. B. Mohammed and Ms. S. Ali for the Accused.

Dates of Hearing : 01, 02, 03 March, 2023
Closing Speeches : 07 March, 2023
Date of Judgment : 08 March, 2023

JUDGMENT

(The name of complainant is suppressed she will be referred to as "J.A")

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

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

Particulars of Offence

WILIAME SUKANATABUA on the 7th of March, 2020 at Lautoka in the Western Division, had carnal knowledge of “J.A” without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the offence of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “J.A” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn’t care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis

without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
7. The second element is the act of penetration of the complainant's vagina by the penis.
8. The third element is that of consent, which means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

15. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
16. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

17. The complainant informed the court that she lives in Sydney, Australia on 3rd March, 2020 she arrived in Fiji for a 12 day holiday. The complainant had booked a bure at one of the resorts in the Mamanucas. This was her second trip to the same resort and during her earlier trip she made friends so she brought gifts for her friends who were mostly the resort staff. The bure at the resort had all amenities including a double bed, lounge and bathroom.
18. On 6th March throughout the day the complainant was in her bure because she was depressed after receiving some bad news from home. Since the complainant was a returnee guest the resort hosted a party and the complainant was invited to join. After a few drinks the complainant had dinner.
19. After dinner the complainant was invited to a kava session, she drank three bowls. The complainant sat beside Josaia who she knew as Joe from her earlier trip. Joe was translating what was happening, the merry making went on for a few hours. It started to rain so the complainant went to the shelter here she drank a glass of lemonade some of which had spilled on her dress.
20. After saying goodnight to everyone present the complainant went to her bure. The two connecting bures were empty, when she arrived at her bure it was after midnight. After having her shower the complainant got dressed into a nighty for bed. As the complainant was getting ready for bed she heard a knock on the door upon asking who it was the response was it is Joe and he had come to collect his gift.

21. The complainant took the gift opened the door and handed the gift to Joe. He took the gift and went away, before she could close the door she heard a voice yelling security! security! *"I need to come in and ask questions"*. The complainant responded by saying *"what about"* the person said that man could lose his job he is married with kids. The complainant said she was aware of it she was not able to see the face of this person because it was dark outside. The complainant closed and locked the door she got scared so she grabbed her phone and wanted to call her friend since her mind was so blank she could not dial out.
22. The person outside the bure continued yelling *"open the door I am security you have got to let me in security let me in"*. The complainant thought she had to answer the door because he was a security officer. When the complainant opened the door it was the accused he said *"I am security, I need to come in and ask you questions."*
23. The accused came in and sat on the lounge, pulled out his phone and showed the complainant a porn website where an elderly woman was having sex. The accused said this gets him off and it is his fantasy to have sexual relations with an elderly lady. The complainant was shocked she could not react. The accused asked for beer to drink, the complainant walked to the fridge and got one as she turned the accused was now sitting on her bed. The light in her bure was bright the door of her bure was closed. The accused was still watching the video in his phone he then asked the complainant to come and have a look at what he was watching. The complainant went and sat beside the accused and leaned over to watch an elderly couple having sex.
24. Shortly after the accused asked if he could kiss her the complainant said no, the accused did not say anything but pushed her on the bed and

started kissing her. The complainant also kissed him back. The next minute both were in upright position and the accused penetrated her vagina with his penis. The complainant could not do anything because she was numb. The complainant does not remember when her underwear was removed but what she remembers is that the accused had penetrated her vagina with his penis from a standing position with her legs around his body after he had pulled her legs up. According to the complainant the accused did not lose contact of her vagina with his penis even though he was standing.

25. The complainant was in a shock she could not react and had basically frozen. The complainant did not consent to what the accused had done to her. When the accused was penetrating his penis into her vagina with her hands the complainant was holding the accused so that she does not fall on the floor. In a short while the complainant was dropped on the bed and the accused ran into the bathroom.
26. The complainant was sitting on the bed when the accused came from the bathroom he sat on the bed as well. At this time the accused said *"you can now tell people that you have been with a boy with a big black dick."* After this the accused said that she is to keep a promise not to tell anyone about what had happened. The accused got dressed and on his way out he said *"you made my dream come true"*.
27. After the accused left the complainant locked the door went to her bed and started crying she had her shower and went back to her bed and cried till she fell asleep. The same morning 7th March when the complainant was going to have her breakfast she saw a security officer in uniform. The complainant started crying and asked if all the security officers wore a uniform the answer was yes. She then told the security officer that

someone was in her room last night. The complainant was told to immediately report this to the General Manager. When she went to the General Manager he was busy with someone two times she wanted to talk to the General Manager and on both occasions he said he was busy. The complainant walked back to her bure and took an overdose of her medication but before this she texted a goodbye message to her friends.

28. After sometime she heard a banging on the door the complainant did not get up from her bed to open the door when it was opened it was her friend Henry and other female workers. The complainant did not have enough energy to say anything.
29. The next day a nurse and a police officer escorted the complainant to a boat and whilst in the boat she tried to jump off because she wanted to die. On the mainland the complainant was taken to the Lautoka Police station and then to the Lautoka Hospital for medical examination. After a week the complainant flew back home. At home she was treated for depression and trauma she was put through counseling and has been seeing a psychologist every week. According to the complainant this incident has changed her life completely she used to be a happy person now she is too scared to be around men, she does not socialize, hardly lives her house and is not able to enjoy life like before.
30. In cross examination the complainant agreed that during the returnees party she had informed Joe that she had brought a gift for him. The complainant said she had let the accused into her room after he had yelled saying he was a security and he asked to be let in and at this time she was wearing a nighty only. She denied offering beer to the accused.

31. When the accused had asked for her permission to kiss her she had said no. The complainant also denied that after kissing each other she had pushed the accused on the bed and got on top of him and sat on his face.
32. The complainant denied the suggestion that she and the accused had done a number of positions of sexual intercourse. The complainant also denied that she was sitting on the accused face and he had licked her vagina. She also denied after taking off their clothes she had sat on the penis of the accused and they had sexual intercourse.
33. The complainant said she did not cry out for help because she was affected by kava and she was totally numb during the entire happening. She also did not make any attempts to shout or yell for help or run away or seek assistance or defend herself. The complainant denied the suggestion that she did not do any of the above because whatever had transpired was consensual. When asked why she was holding the accused when he was in standing position the complainant explained she was holding his arms so that she does not fall on the floor.
34. The complainant also stated that when the accused went into the bathroom she did not run out of her bure because she was numbed by the effect of drinking kava and this was also the reason she did not seek any assistance after the accused left her bure. For the same reason the complainant did not defend herself or had fought with the accused.
35. In re-examination the complainant said after the accused had left she was trying to get over what had happened to her she was scared and numb.
36. The final witness Josaia Oscar Namuva informed the court that in the year 2020 he was working for a resort in the Mamanucas. On 6th March, 2020

in the evening he met the complainant who was a regular guest of the resort. In the evening an entertainment program was organized for the guests and there was a kava session as well. The complainant was part of the event before the kava session finished the complainant said that she had a gift for him.

37. After the complainant left the kava session the witness went to the bure of the complainant to get his gift by this time it was past midnight. The complainant gave him his gift and he went away. In the morning at 8 am the witness started work on the way to the maintenance department he met the complainant who was crying. The witness asked her what happened the complainant asked "*did you see anyone after picking the gift*", the witness said no. He then asked why she said someone had followed him to her bure. The witness asked the complainant to inform the General Manager.

38. This was the prosecution's case.

DEFENCE CASE

39. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.

40. The accused informed the court that he was employed by the resort in the Mamanucas where the complainant was a guest. Prior to the alleged incident he met the complainant in the evening when he was helping a workmate load things in the boat.

41. The complainant came and the accused was introduced to the complainant by his workmate Tui. The accused and the complainant shook hands and she introduced herself. Both shared few words and after a while the complainant shared her family problems with Tui and the accused. During the conversation the complainant asked the accused about his work what time he finishes and if they could meet later.
42. The accused responded that he was a chef and he did split shift the complainant said whenever the accused will be free both can meet up. After this the accused went to his room. The accused observed that the complainant was flirty in the way she was talking to him. When questioned what made him say this, the accused said during the entire conversation the complainant's eye contact was on him including her facial expression and body language.
43. The accused saw the complainant the next day during the kava session and he was the one mixing kava. After the kava session finished the accused went to his room.
44. After changing clothes he went to the complainant's bure because she had said whenever the accused was free from work they can meet. When the accused was close to the bure he saw Joe at the complainant's bure. After Joe left the accused went to the complainant's bure and knocked on the door. The complainant called out who it was, the accused said security.
45. When the complainant opened the door she recognized the accused and invited him into the bure and offered a seat in the lounge. The complainant came and sat down beside him and both their knees were touching. The complainant offered beer to the accused and he started watching a pornographic clip on his phone which he tried to hide but the

complainant said it was okay so both watched it together. Shortly after the accused went to the bathroom when he returned he saw the complainant sitting on the bed.

46. Thereafter both continued watching the porn clip together on the bed. As they continued watching the clip the accused asked for permission to kiss her, she agreed so he kissed her and she kissed him back. After the kiss both laid on the bed. The complainant crawled on top of the accused and sat on his face allowing the accused to lick the complainant's vagina.
47. After a while the accused removed his pants the complainant crawled down and sat on his erected penis, the kissing continued. The accused then asked the complainant to lie down and he went on top of her and they had sexual intercourse.
48. Both the complainant's legs were wrapped around the accused waist. After that he stood up her hands were behind his neck then they had sex in a standing position. This all lasted for about 10 minutes, the complainant did not do anything to stop him. According to the accused the complainant loved it when the accused felt he will ejaculate he laid the complainant on the bed and went to the bathroom.
49. After washing himself the accused went and lay beside the complainant thereafter both had a deep conversation the complainant thanked the accused for what had happened and she invited him to meet her the next day. The complainant also saw his swollen injection scar. After kissing goodbye the accused left by this time it was early morning after 1am.

50. The accused does not know why the complainant has complained against him, the accused maintained that he did not rape the complainant and as far as he was concerned everything that happened was consensual.
51. In cross examination by the state counsel the accused said he has no sexual desires of older women and even though he was watching porn clip that night it was not relating to elderly people having sexual intercourse. However, the accused agreed that the sexual positions he had told the court were from porn video and he had learnt from such videos.
52. The accused agreed that the complainant had not invited him to her bure that night, however, he had decided to go to her bure in the middle of the night since that is the only time he was free.
53. The accused knows the resort policy that no staff is to be seen around the guest accommodation at night. He knew the complainant was alone and despite knowing the resort policy he took his chances. When the accused knocked on the door of the complainant's bure he had said security once only. The reason for saying security was to surprise her in a friendly way and not to harm her.
54. The accused upon further questioning accepted that it was not appropriate to sit on the complainant's bed. When he was seated on the bed he continued showing the pornographic video to the complainant and at no time had he demanded a kiss from her, according to the accused he had requested for a kiss.
55. When asked whether it was an appropriate thing to do as an employee of the resort to a guest the accused accepted it was not but according to him

she had agreed. The accused agreed he had not requested the complainant to have sexual intercourse with him.

56. The accused denied uttering the words *“now you can tell people you have been with a boy with a big black dick”* and at no time he had asked the complainant to keep a pinkie promise not to tell anyone about what had happened. The accused denied having forceful sexual intercourse with the complainant.
57. This was the defence case.

ANALYSIS

58. The prosecution alleges that the complainant a 62 year old Caregiver came to Fiji for a holiday. She checked in at a resort in the Mamanucas this was her second trip at the same resort. During the first trip the complainant made many friends at the same resort. As a kind gesture from a satisfied guest the complainant brought gifts for her friends.
59. Since the complainant was a returning guest on 6th March, 2020 she was invited by the resort management to an evening party and dinner. The complainant had a few drinks followed by dinner. The staff had also organized an Island Night which was mainly a fund raiser by one of the landowning groups. This fund raiser involved drinking of kava in which the complainant took part. She drank about three bowls of kava according to the complainant there was music and lots of merry making and the complainant enjoyed the night. During the kava session Josaia Namuva a staff of the resort was sitting next to the complainant he was basically narrating to the complainant what was happening.

60. Finally the complainant had a glass of lemonade some of which accidentally got spilled on her dress. By this time it would have been around midnight the complainant retired to her bure. After the complainant had changed into her nighty and as she was preparing to go to sleep she heard a knock on the door. The complainant asked who it was, the person outside said it was Joe the complainant inquired what was it. Joe said that he was there to collect his gift. The complainant opened the door and gave the gift to Joe.
61. Shortly after Joe left the accused came near the complainant's bure and started yelling security! security! open the door and let me in what was that person doing. The complainant got scared after closing and locking the door she tried to call one of her friends from her mobile phone but she was unable to dial out due to her nervousness.
62. The yelling continued the accused was saying "*let me in you have to answer some questions*" the complainant opened the door and let the accused in. The accused went and sat on the lounge took out his phone the complainant saw that he was watching a porn site of an elderly couple having sexual intercourse. At this time the accused made a remark that he had a fantasy for older women and such videos made him click.
63. The accused asked the complainant to get a can of beer the complainant went to the fridge and got a can of beer. By this time the accused went and sat on the bed he then called the complainant to come and watch the video. The complainant went and sat beside the accused and watched the video on the accused phone.
64. After a while the accused asked the complainant if he could kiss her the complainant refused, at this time the accused pushed the complainant on

the bed and started kissing her. The complainant as a natural response kissed the accused as well.

65. The complainant does not remember when her underwear was removed the next moment the accused was on top of the complainant. He pulled her in an upright sitting position opened her legs which went around the accused waist, he then forcefully inserted his penis into her vagina and he went into a standing position. Even in this position the penis of the accused was in her vagina. The complainant did not consent to what the accused had done to her.
66. After this the accused left the complainant and went to the bathroom. When he came back he made the following remarks *“you can now tell people that you have been with a boy with a big black dick and “you made my dream come true”*.
67. The complainant could not believe what had just happened she started crying had a shower and went to bed but she could not sleep. In the morning the complainant was seen by Josaia Namuva in a distressed state. The incident was reported to the police.
68. On the other hand, the defence says the allegation is a made up story by the complainant. She has raised an unfounded allegation against the accused. A scrutiny of the complainant’s evidence will show that it was the complainant who had led on the accused from her behaviour. The interesting aspect of the complainant’s evidence is that she had wrapped her legs around the waist of the accused. If she was not consenting then why did she do this? Whatever happened that early morning was with the consent of the complainant.

69. Firstly, the accused had asked for a kiss and it was the complainant who had kissed the accused in reciprocity. If she was not willing and/or not interested she would not have responded positively there was no force on the complainant to open her mouth and kiss back. The excuse that it was a natural response does not make sense. In reality this was a sweetener by the complainant to encourage the accused on her.
70. Secondly, the complainant had sat beside the accused in the lounge both had their knees touch each other to watch a porn video which continued on the bed as well. If she was not interested she would have immediately told the accused to leave but she did not.
71. Thirdly, the complainant had held the neck of the accused with both her hands basically aiding him in the actual act of penetration when the complainant had her legs wrapped around the waist of the accused when he was standing.
72. The defence is asking this court to consider the fact that the complainant had not fought back or done anything to stop the accused from having sexual intercourse with her. The complainant was blaming the effect of kava on her for her none reaction is not justified at all but a story narrated to blame the accused. If the complainant was numb like she mentioned then why did she kiss the accused.
73. Furthermore, the complainant did not at any time shout or do anything to resist the accused. There was no violence on the complainant to surrender she was conscious of what was happening and she had participated willfully. The complainant consented to have sexual intercourse with the accused at the time but has now turned around to blame the accused.

74. The defence is asking this court not to believe the complainant she did not tell the truth because after consenting to have sexual intercourse with the accused she is now changing her tune. The accused was forthright in what he told the court he gave a detailed account of what had happened that early morning he was honest in admitting the act he did and what the accused did would not have been possible had the complainant not consented.

DETERMINATION

75. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. The only issue in this trial is whether the complainant had consented to have sexual intercourse with the accused.
76. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegation.
77. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. The complainant also told the truth in court when she said that she had kissed the accused as a natural response to his kiss. In my considered judgment this reaction by the complainant was not an invitation to the accused to have sexual intercourse with the complainant without her consent.

78. The accused had entered the bure of the complainant on a false pretence he was a security officer he deceived the complainant in a bid to get the complainant to open the door. The accused wanted to get into the bure of the complainant by any means. I accept that the complainant had not done anything to lure the accused towards her and have sexual intercourse.
79. From the conduct and remarks of the accused it appears that the accused has an obsession for elderly women and it was this lust and/or desire that got the better of him. The fact that the accused was watching a porn clip in the presence of the complainant more so about an elderly couple having sexual intercourse suggests volumes about his behaviour in the bure of the complainant. The accused took advantage of the complainant's vulnerability at the time and the fact that she was scared of what was happening.
80. The complainant was caught off guard with an unexpected sexual encounter, the accused knew the bure of the complainant and the fact that she was alone. The complainant did not sit beside the accused on the bed on her own volition but was told by the accused to do so. It cannot be ignored that from the time the accused started knocking the door and yelling at the complainant he was in control.
81. I accept that the accused was much stronger than the complainant and to avoid falling on the floor she had no option but to hold on to the arms of the accused. This does not mean that she was aiding the accused in having sexual intercourse with her. The failure by the complainant to shout or yell also does not mean that the complainant was consenting to what the accused was doing to her.

82. Individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not, the fact that the complainant did not resist or shout or yell or put up a fight does not mean that she was consenting to what was being done to her.
83. The circumstances of the complainant were such that she could not do anything. I have accepted the explanation of the complainant in regards to her kissing of the accused that the reaction of the complainant was a normal occurrence in the circumstances. I also accept the complainant had not consented to what the accused had done to her. I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed herself clearly against what the accused had done.
84. I also accept that the complainant was misled by the accused that he was a security officer who wanted to ask something about Joe who according the rules of the resort was not supposed to have been at the bure of the complainant that late night. The accused wanted to enter the bure of the complainant that is why he was yelling outside the door of the complainant to instill fear in the complainant.
85. The fact that the complainant's hands and legs were not restrained and she did not do anything does not mean that she was consenting. It is to be noted that the legal meaning of consent is wide which also includes submission without physical resistance to an act of another shall not alone constitute consent.
86. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible. It is difficult to accept that the accused was led on by the complainant to have sexual intercourse with

her. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said the complainant had consented to have sexual intercourse with him.

87. The accused was telling the court about various sexual positions that he and the complainant had supposedly engaged in was a considered effort to divert the attention of the court away from the main issue of lack of consent by the complainant. The accused also did not tell the truth when he said the complainant had said to see him to meet later in her room whenever he was free. I reject the evidence of the accused as unreliable and untruthful.
88. This court also accepts the evidence of Josaia as believable, he had seen the distressed state of the complainant the same morning. Both the prosecution witnesses were reliable and credible. On the other hand this court rejects the defence of consent as not worthy of belief.
89. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

90. This court is satisfied beyond reasonable doubt that the accused on 7th March, 2020 had penetrated the vagina of the complainant with his penis without her consent.
91. This court also accepts that the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

92. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.

93. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka

8th March, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.