

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

**Criminal Case No.: HAC 11 of 2017**

**STATE**

**V**

**TUBALE LATINARA**

**Counsel** : Mr. S. Seruvatu for the State.  
: Ms. K. Vulimainadave for the Accused.

**Date of Hearing** : 01 February, 2023  
**Closing Speeches** : 03 February, 2023  
**Date of Judgment** : 06 February, 2023

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**JUDGMENT – TRIAL IN ABSENTIA**

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

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***

TUBALE LATINARA on the 6<sup>th</sup> day of December, 2016 at Nadi in the Western Division, penetrated the vagina of "A.R" with his penis, 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 for 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.
4. The trial of the accused was conducted in his absence after this court had accepted the application by the state counsel that the accused had chosen not to appear in court after he was granted bail. The law provides for an accused to be tried in his absence known as *trial in absentia*. Although the accused was not in court throughout the duration of his trial he was accorded a fair trial and was represented by his counsel.
5. The absence of the accused from this trial has not been taken against him or his non-attendance negatively.

## **ELEMENTS OF THE OFFENCE**

6. 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 "A.R" 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.
7. This trial proceeded on the basis of a not guilty plea. 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.
8. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
9. The second element is the act of penetration of the complainant's vagina by the penis.
10. The third element is 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.

11. 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.
12. 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.
13. 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.
14. 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.
15. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
16. As a matter of law, I have to 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.

17. 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. However, I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

### **PROSECUTION CASE**

18. The complainant in the year 2016 was living in Nadi with her sister and family. One night she was at home with her sister Jojiana, the accused and Miliana's three children. Miliana (complainant's sister) and her husband were at work. The accused and the complainant are cousins after cooking at about 10pm the complainant went to sleep in the sitting room, according to the complainant while sleeping the accused removed all her clothes, tied her legs and mouth with a cloth and also blocked her mouth with a pillow.
19. Upon further questioning the complainant said that she was sleeping beside Jojiana when the accused came pulled her by her legs away from Jojiana to about 6 meters away. The accused after tying both her legs with a cloth, parted her thighs blocked her mouth with the pillow after she screamed, pulled down her shorts to her feet. Thereafter he removed her tights and panty and also straightened her legs. The accused lay on top of the complainant and then penetrated her *pussy* meaning vagina with his *boci* meaning penis which was painful. According to the complainant her tights and panty were near the bedroom door.
20. At this time there was a knock on the door the complainant opened the door and told her brother in law Ravuama that her clothes were wet. At this time the accused left and ran to the other room. Shortly, after the

complainant told Jojiana the accused had removed her clothes blocked her mouth, straightened her legs and had inserted his *boci* into her *pussy*.

21. The complainant also stated that since she was screaming the accused blocked her mouth with the pillow. The complainant did not agree with what the accused had done to her.
22. There was no cross examination by the defence counsel.
23. The final witness Jojiana Tagicakibau informed the court that the complainant is her younger sister in 2016 she was living with the complainant in the two bedroom house of her sister Miliana. On the night of 6<sup>th</sup> December, 2016 the witness woke up after she heard her husband calling her as he had come back from work.
24. The witness saw the accused lying near her head and the complainant was sitting beside her. The witness asked the complainant what had happened to her. The complainant told her when she woke up the accused was on top of her, had pulled up her dress, sucked her breast and they had sex.
25. Upon hearing this, the witness did not do anything but waited for Miliana and her husband to come home. The complainant also told the witness that her clothes were wet and she had to change. The witness changed the complainant's panty and dress and noticed that the complainant's panty was wet when she asked the complainant she was told the clothes got wet during sex.
26. Miliana and her husband came home the next day and reported the matter to the police. According to the witness the complainant was 17 years in 2016.

## **RECENT COMPLAINT EVIDENCE**

27. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
28. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight would be given to the fact that the complainant told her sister Jojiana that when she woke up the accused was on top of her after pulling up her dress sucked her breast and they had sex.
29. This is commonly known as recent complaint evidence. The evidence given by Jojiana is not evidence of what actually happened between the complainant and the accused since this witness did not see what had happened.
30. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told Jojiana the accused had pulled up her dress sucked her breast and they had sex immediately after the incident shows that she wanted to tell someone about what the accused had done. The prosecution is further asking this court to consider the fact that the complainant had relayed crucial and important information about what the accused had done to her.

31. The information given by the complainant was sufficient to alert Jojiana that something had happened to the complainant. The prosecution also says there was no need for the complainant to go into every detail of what had happened to her when narrating her story to Jojiana. The complainant was 17 years at the time and she did not hesitate to tell her sister about what had happened to her and therefore she is more likely to be truthful.
32. On the other hand, the defence contention is that the complainant did not tell the truth she made up a story against the accused. The complainant did not give details of any forceful encounter between the accused and her. The complainant was of a reasonable age who knew what she was doing had told her sister clearly that she had sex with the accused that night. What the complainant told her sister is specific that both the accused and the complainant had sex. There was no suggestion by Jojiana that the complainant was distressed or affected by the sexual encounter.
33. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
34. There was no cross examination by the defence counsel.
35. This was the prosecution case.



## **DEFENCE CASE**

36. On 3<sup>rd</sup> March, 2017 the information was put to the accused and he had pleaded not guilty to the charge. When the information was read in court on the first day of the trial a not guilty plea was entered for the accused in his absence.
37. At the end of the prosecution case, a case to answer was ruled which required the accused to open his defence the accused was deemed to have exercised his right to remain silent.
38. As mentioned earlier the burden to prove the guilt of the accused beyond reasonable doubt remains with the prosecution. The absence of the accused is not an admission of guilt and adds nothing to the prosecution case and therefore no adverse or negative inference is drawn against the accused.
39. Although the defence counsel did not cross examine both the prosecution witnesses it can be deduced from the evidence that the defence contention is that the evidence of the complainant should not be believed. Jojana did not inform the court that she heard any scream as mentioned by the complainant. The complainant also did not say anything about being threatened by the accused before, at the time of and after the incident.
40. Jojana the elder sister of the complainant did not say that the complainant had told her of any forceful sexual intercourse by the accused. On the contrary the complainant told Jojana that she had sex with the accused and Jojana did not do anything.
41. This was the defence case.

## **ANALYSIS**

42. The prosecution alleges that in the year 2016 the complainant was 17 years of age, she was living in the house of her sister Miliana in Nadi. On 6<sup>th</sup> December, 2016 Miliana and her husband were at work. The complainant, her sister Jojiana, the accused and Miliana's three young children were in the house.
43. Whilst sleeping in the sitting room with Jojiana the complainant was pulled away from Jojiana by the accused who removed her shorts, tights and panty. The accused then tied her legs with a cloth pulled down his pants straightened her legs separated her thighs and had forceful sexual intercourse by penetrating his penis into her vagina. When the complainant screamed the accused placed a pillow on her face to stop her from screaming.
44. The accused was so close to the complainant that she saw it was the accused and no one else who had forceful sexual intercourse with her. Furthermore, the accused and the complainant are cousins who were living in the same house therefore there is no doubt in the identity of the accused. The complainant did not consent to have sexual intercourse with the accused that night.
45. On the other hand, the defence position (as construed from the evidence) is that the complainant did not tell the truth her version is at odds with the evidence of Jojiana. The complainant told Jojiana that they (the accused and the complainant) had sex. Jojiana did not respond or do anything to question the complainant or the accused who was there.
46. The defence contention is that this court should not give any weight to the complainant's evidence whatever she told the court does not make

sense. The complainant had not raised any complaints to Jojiana but was only narrating what they (the accused and the complainant) had done.

### **DETERMINATION**

47. 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.
48. After carefully considering the evidence adduced by the prosecution, I am not satisfied beyond reasonable doubt that the accused had penetrated the vagina of the complainant with his penis without her consent.
49. I do not accept the evidence of the complainant as truthful and reliable. She gave an account of what had happened to her in a convoluted, incomprehensible and inconsistent manner. Despite taking into account passage of time and the complainant's education level I am unable to accept the complainant's evidence that the accused had penetrated her vagina with his penis without her consent.
50. I do not believe the complainant when she told the court that the accused had blocked her mouth with a pillow in fact I do not accept that the complainant had screamed as mentioned by her. It was the complainant who had opened the door of the sitting room after her brother in law had knocked on the door. The complainant told her brother in law that her clothes were wet and immediately after the complainant told her sister

that they (the accused and the complainant) had sex. When Jojiana woke up she saw the complainant sitting beside her and the accused lying down near the head of Jojiana.

51. Jojiana being the elder of the two sisters did not react or show any interest in what the complainant had told her. It is obvious to me that Jojiana accepted what the complainant had told her. The evidence of Jojiana does not suggest that the complainant was making any complaint but narrating an incident in which the complainant took part voluntarily. I have also kept in mind that the complainant was not expected to tell every detail of what she had encountered to Jojiana, however, from the evidence of Jojiana the complainant did not raise any complaints.
52. The essence of recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. In this case the complainant was not consistent in what she told Jojiana. Jojiana was not concerned about what the complainant had told her hence Jojiana did not do anything.
53. In fact without questioning the complainant any further Jojiana assisted the complainant in changing her clothes and it was again the complainant who told Jojiana that her clothes got wet during sex. However, in her evidence the complainant had said that her tights and panty were completely removed and were near the bedroom door.
54. The Supreme Court in *Anand Abhay Raj vs. The State*, CAV 0003 of 2013 (20<sup>th</sup> August, 2014) at paragraphs 37 to 45 made an important observation about the above as follows:

*[37] Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms*

of the complaint: **Kory White v. The Queen** [1998] UKPC 38; [1999] 1 AC 210 at p215H. This was done here.

[38] The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[39] The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence. The judge should point out inconsistencies. These he referred to in an earlier paragraph.

[40] The Petitioner's argument is that the complainant did not go so far as to complain to the witnesses about rape. The cousin sister said the complainant told her that the Petitioner was touching her body and breasts. The same story was related by the aunt, the mother of the cousin sister, and by the grandmother.

[41] However when alone with the doctor, the complainant told a fuller story. She recorded the complainant as saying "Her stepdad Anand usually touches her breasts and at times would remove her panties and insert his fingers into her. He also sucks her breasts and twice he put his 'susu' into her 'susu'."

[42] In **The State v. Waisea Volavola** Cr. App. HAA 106/2002S in dealing with recent complaint and the issue of the complaint being "recent" Shameem J said at p13:

*“However, her silence could easily have been consistent with her shame at the incident, connected with cultural taboos in relation to discussing sexual matters with elders. To say that an absence of recent complaint confirms consent is an error of both fact and law. On the facts of this case, there was nothing to suggest that her silence meant consent to the sexual intercourse.”*

*[43] This might explain the lack of explicit forthrightness by the complainant on the extent of the molestation when speaking to her relatives, as against the opportunity to put the story to the doctor when she was not overshadowed by those taboos. Certainly it was open to regard the report to the doctor as a recent complaint in view of the fear with which she was observed preventing her from telling the full story, and the fear of which she testified. Strict dicta to the contrary in **Peniasi Senikarawa v. The State** Crim. App. AAU0005/2004S 24th March 2006 may have been setting too inflexible a rule. A complainant’s explanation as to why a report was not made immediately, or in its fullest detail, is to be expected. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.*

*[44] There were of course several difficulties with the recent complaint evidence in **Senikarawa**. The mother’s evidence did not tally well with that of the complainant daughter. But one must bear in mind as was said in **Spooner v. R** [2004] EWCA Crim. 1320 Eng. Court of Appeal it is not necessary for the complainant to describe “the full extent of the unlawful sexual conduct.” It is enough here, besides the evidence of touching the body all over, the touching the breasts, touching of private parts, and the inserting of fingers into the vagina. Molested traumatised children are not to be expected to provide answers with confident all-encompassing and anatomical precision as if to a Board of Examining Surgeons.*

*[45] In **White** supra at p220C, the Privy Council held that since the case turned entirely upon the complainant’s credibility, it was not possible to*

*apply the proviso and the appeal had to be allowed and the conviction set aside. In that case the persons to whom she complained were not called to give evidence, and so there was no supportive evidence of her consistency and credibility.*

55. Upon a holistic assessment of the evidence I do not find the complainant believable and consistent in her evidence she also gave a different version of events to her sister Jojiana. In my considered judgment it is unsafe to convict the accused.
56. There is a reasonable doubt in the prosecution case hence I have no option but to find the accused not guilty and acquit him accordingly.
57. This is the judgment of the court.



**Sunil Sharma**  
**Judge**



**At Lautoka**

06 February, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**