

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 130 OF 2021**

**BETWEEN** : **STATE**

**AND** : **VATILIAI WARA BAKALEVU**

**Counsel** : **Ms W Elo for the State**  
**Mr A Waqanivavalagi for the Accused**

**Date of Hearing** : **30 May 2023 – 31 May 2023**

**Date of Judgment** : **15 September 2023**

## **JUDGMENT**

### **[1] Charges**

The accused is charged with two counts of rape contrary to section 207 (1) (2) (a) of the Crimes Act. The charges read:

Count 1 – the accused on 1 May 2021 at Tacirua had carnal knowledge of LNC without her consent.

Count 2 - the accused on 1 May 2021 at Tacirua on an occasion other than that referred to in count one had carnal knowledge of LNC without her consent.

### **[2] Burden and Standard of Proof**

The burden is on the prosecution to prove each charge beyond a reasonable doubt.

[3] The accused chose to give evidence but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[4] **Elements of Rape**

To prove the offence of rape as alleged in counts one and two, the prosecution must prove the following elements beyond a reasonable doubt:

1. On the date and place alleged, the accused penetrated the vagina of the complainant with his penis.
2. The complainant did not consent to penetration of her vagina.
3. The accused knew that the complainant was not consenting.

[5] Slight penetration is sufficient to amount to rape. It is not necessary to prove that the accused ejaculated.

[6] The term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

[7] Consent or the absence of consent can be communicated by the words or acts of the complainant. The knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.

[8] **Admitted Facts**

The identity of the complainant and the accused is not an issue. The complainant is an adult female. The accused is 25 years old and worked as a carpenter at the

relevant time. On 1 May 2021, the complainant and the accused were at a property under construction at Tacirua New Subdivision, drinking alcohol with others. The accused had sexual intercourse with the complainant (penetrated her vagina with his penis) on one occasion on 1 May 2021.

[9] **Prosecution Case**

The prosecution case is wholly depended on the complainant's evidence.

[10] The complainant's evidence is that on 30 April 2021 she went to a house at Tacirua for drinks after work. At the time she was working at a local supermarket. They drank a cartoon of Woodstock. She got drunk and was lying in the living room when the accused called out to her to go inside a room. She refused but the accused insisted for her to go into the room as one Merelita was already there. She got up and went to the room. All the males remained in the living room and continued drinking.

[11] The complainant was lying in the room when the accused entered and tried to take off her clothes and tried to do something to her. She resisted by pushing him but he pulled her hair. He sucked her breast and bit her neck. She kept pushing him but couldn't because she felt weak. He then forced himself and had sexual intercourse with her. She did not consent. After sexual intercourse the accused returned to the living room. She did not report because everybody in the house was drunk and asleep. She went to sleep.

[12] Early in the morning the accused came back into the complainant's room. This time he pulled down his pants and tried to force her to suck his penis by pulling her head towards his penis. When she resisted he took out his pants and had sexual intercourse with her for the second time. She was angry and tried to push

him away. She did not consent to sexual intercourse. She did not raise alarm because everybody in the house were asleep.

[13] When the complainant woke up in the morning she did not report the incidents to anyone in the house. She said that she was too ashamed to report. She remained in the house for three nights from Friday till Monday because of the Covid lockdown. On Monday she went and stayed at her friend's home. She did not report to her friend because she was ashamed. On Wednesday she returned to her home. She was staying with her aunt at the time. She then accompanied her aunt to the police to file a report. She knew her aunt by then had filed a missing person report on her.

[14] **Defence Case**

The defence case is that on 30 April 2021, the accused was residing at a construction site at Tacirua with three other work colleagues. On this day (Friday) they decided to hold a drinking party. They started drinking around 8 pm. They were drinking when another group of people joined them. He knew some of the people but not the complainant. They all started drinking, talking and telling jokes.

[15] The accused's evidence is that while they were drinking the complainant flirted with him. He thought she wanted to have sex. He asked her and she said yes. He then told her to go into the room and he will follow her. She went into a room. After 2-3 minutes he followed her into the room. When he entered the room she was lying on the mattress. They removed their clothes and engaged in sex. He first went on top of her for about 3-4 minutes and then she told him to lie down and she would go on top of him. When she came on top she took his penis and

put it in her vagina. The accused said that he was drunk and he fell asleep while she was on top of him. He does not know what happened next.

[16] When the accused woke up at around 10 or 11 am everybody were up and preparing breakfast. After breakfast the accused was in his room when the complainant came and apologized to him regarding what happened between them the previous night. She told him she was really drunk. He forgave her and told her that he was drunk as well. They spend the weekend in the house playing cards and telling stories. On Monday at around midday the complainant left the house after having lunch with him.

[17] **Analysis**

There are two versions of the evidence before the court. If the accused's account is true or may be true, then he is not guilty of the charges. But even if his account is false, that does not mean that he is guilty of the charges. His guilt is dependent on whether I believe the complainant's account.

[18] I approach both accounts dispassionately, without sympathy or value-laden rules regarding how women and men should conduct themselves. For me to believe the complainant, I do not need corroboration.

[19] This is a classic case of his word against her word. The complainant may be telling the truth but the accused may also be telling the truth. His evidence is equally plausible. His evidence has not been discredited in any material regard.

[20] I am not sure of the accused's guilt because his account may be true. That means I have a reasonable doubt about the accused's guilt. When the Court feels unsure

of guilt, the prosecution has not discharged the burden to prove the charges beyond a reasonable doubt.

[21] **Verdict**

The verdict of the Court is that the accused is not guilty. He is acquitted of the charges.



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**Hon. Mr Justice Daniel Goundar**

**Solicitors:**

Office of the Director of Public Prosecutions for the State

Legal Aid Commission for the Accused