

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 199 OF 2020

STATE

V

INIA NAVAKAROKO

Counsel : Mr J. Nasa for Prosecution

Mr. J Niudamu for Defence

Dates of Hearing : 16,18 October 2023

Dates of closing Submissions: 17, 25 October 2023

Date of Judgment: 25 October 2023

(The name of the complainant is suppressed. She is referred to as TT)

JUDGMENT

1. The accused is charged with one count of Rape contrary to Section 207(1) and (2) (a) of the Crimes Act 2009. The information reads as follows:

Statement of Offence

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

Particulars of Offence

INIA NAVAKARKO on the 6th day of December, 2020 at Matavekai Village, Rakiraki in the Western Division, had carnal knowledge of TT, with his penis, without her consent.

2. The accused pleaded not guilty to the charge. At the ensuing trial, Prosecution presented the evidence of the complainant and her mother and closed its case. At the end of the Prosecution case, the accused was put to his defence when the Court found that the Defence had a case to answer. The accused and two other witnesses presented evidence for the Defence. The counsel from both sides tendered written submissions. Having carefully considered the evidence presented at the trial and the submissions made by the counsel, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence and that burden must be discharged beyond reasonable doubt. That burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt. The accused is under no obligation to prove his innocence or prove anything at all.
4. The accused in his evidence took up an *alibi* as a defence. But the accused is under no obligation to prove his *alibi*. It is for the Prosecution to disprove the *alibi* and prove beyond reasonable doubt that it was the accused Inia Navakaroko and no one else that had penetrated the vagina of the complainant with his penis on 6 December 2020.
5. Section 207(2)(a) of the Crimes Act defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slightest penetration is sufficient to prove the element of penetration.

6. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.

7. I shall now summarise the salient parts of evidence led in this trial.

PW 1: TT (The Complainant)

8. TT is 17 years old (DOB-10th May 2006). She said that in 2020, she was living with her grandparents, Iliavi Sokula and Analeta Vukici and her uncle Inia Navakaroko. Her mother (single) Pauline lived separately in the same village.

9. On 6 December 2020, her mother was attending a funeral. In the afternoon at around 7 p.m., she had dinner at her grandfather's house with her grandparents and her uncle Inia Navakaroko. After having dinner, her 'big uncle' Inia went to drink grog and her grandfather went to sleep. She and her grandmother went to sleep at her mother's house which is situated 10 metres away from her house.

10. On that night, there was an unplanned electricity power outage, so they took two kerosene lanterns with them. There's only one room and one bed in that house with three doors. After entering the mother's house, one of the lanterns was placed at the entrance to the bedroom and the other lantern was placed at the entrance of the house.

11. Before going to sleep, she closed the doors of the house. Two of the doors were locked with door fasteners (normal locks), and the other door was closed with a nail. The bedroom did not have any doors, but it had a curtain. She told her grandmother to sleep

inside the bedroom because there was only one bed in the room. After 8 p.m., she went to sleep in the living room on a mattress because of the power outage.

12. When she was lying down sideways in position facing the wall, she could sense at around 12 at night that somebody was looking at her. She could see the shadow of the person and she knew that somebody was looking at her and moving closer to her.
13. She recognized this person as Inia Navakaroko from the light coming from the lantern. The lantern that was placed at the door was off, but one placed in the room was lit. Inia came to her and sat on her lap and, at the same time, he closed her mouth with his hands. She was shocked. Inia placed both of her hands between her thighs and sat on them. Inia covered her mouth very tightly with one hand and slowly took off her skirt, trousers and panty with the other hand. The hand that was free was used to squeeze her breasts. After that, he took off his trousers up to his knee length and inserted his penis into her vagina for a short while. It was painful. She did not shout because his hand had tightly shut her mouth.
14. She managed to loosen her hand and she pushed him away successfully. After pushing him away, she ran to her grandmother who was sleeping in the room. Inia ran outside of the house. Her grandmother woke up and asked her what had happened. She informed her grandmother that Inia, the Village Headman's son, sat on her thighs, closed her mouth, took off her clothes, touched her breast and inserted his penis into her vagina. Her grandmother did not believe her because Inia was her real uncle. The grandmother asked, why did Inia do that to her when he was her real uncle. The grandmother was silent for a moment and then started crying. After that, her grandmother went outside to call her big Uncle Inia Navakaroko (mother's brother), the namesake of the accused. Her mother's brother and Turaga-ni-Koro's son Inia shared the same name.
15. He did see Inia clearly from the light coming from the lantern. The curtain on the right side was let down and the one on the left was tied up. The lantern in the room was placed closer to the sitting room so that it could lighten the room, as well as the sitting room.

Nothing was blocking her view when she saw him sitting on her lap. Inia is her mother's cousin and she has known the accused since she was small.

16. TT explained everything that had happened to her big uncle. Her mother ran to the Village Headman to complain. When the Village Headman heard the story, he did not believe that his son Inia could have done such a thing to TT. Then they sat down with TT and asked whether she was sure it was Inia. TT said that she blamed Inia because she saw him with her own eyes. Her grandmother said that the matter would be reported to the police. On Monday, she lodged a report with the Rakiraki Police Station. TT identified the accused in the dock identification as the perpetrator.
17. Under cross-examination, TT said that it was an unplanned power shutdown after dinner. 'Big Uncle'-Inia knew that she and her grandmother were going down to her mother's house to sleep but nobody else. The room that her grandmother was sleeping in had one small bed and only one person could fit in that bed. She could not sleep in that room because it occupied a lot of items. She displayed the place where the lantern was placed with reference to the rough sketch plan tendered in evidence (PE -2).
18. There was no lantern at that time in the sitting room. However, it was not that dark as the large lantern in the bedroom was placed just beside the curtains that were tied up. It was bright enough to identify the accused. She quickly put on her panty before she ran to her grandmother.
19. In her witness statement given to police the day after the incident, she agreed that she had mentioned that she ran without a panty. After refreshing her memory, she admitted that what she said in the statement was the truth. When the accused sat on her lap, she was surprised and, at the same time, he closed her mouth so she could not shout. During the whole incident, he was closing her mouth while squeezing it.
20. After the incident had happened, she heard stories that the accused does things to mothers who are married in the village. She admitted saying to police, that she wanted the matter

investigated because it was not the first time the accused had done that to girls and ladies in the village, though they were not reported. After the incident, she came to know that the Village Headman did not report when something like that was heard about his son.

21. She was taken to the hospital and examined. The only time she identified the accused was through the lantern light that was coming from the bedroom. She never heard anything from the accused in terms of his voice.

PW 2 -Analeta Vukici

22. In 2020, Analeta was residing in Mataveikai, Tokaimalo, Ra, with her husband, her son and her granddaughter TT.
23. On 6 December 2020, after having dinner, she and TT went to TT's mum's house to sleep. There was no power, so they took two lanterns, one to be placed in the room where TT was sleeping and one in the room where she was sleeping. When she was sleeping late at night, she heard TT calling out, Nau, Nau, Nau. TT was crying when she approached her, TT was not wearing anything down below. She saw blood stains on TT's clothes. The lanterns were off, but at that moment, it was morning.
24. She woke up and asked TT what had happened. TT then told her that Uncle Inia took off her clothes, sat on her lap, shut her mouth and inserted his private part into her private part. She then went home and told her son Inia to go to the Village Headman's house and informed him about what Inia had done to TT. They denied that Inia had done that thing. The next morning, she went to Village Headman's house and told them that she was going to report the matter to the police. They did not say anything.
25. Under cross-examination, Analeta said that he (the accused) turned off both the lanterns. Upon being asked by the Court whether she saw it, Analeta replied in the negative and said that she was asleep and she only woke-up when TT came to call her.

Case for Defence

DW1 - Inia Navakaroko

26. Inia is married with a child and was residing in Mataveikai with his parents and his brother. TT's mother is his sister. On 6 December 2020, in the evening, he went to drink grog at Iliesa Nadau's place with his namesake (Inia Navakaroko) and Suli. At around 11 p.m. that night, he and Suli left for Samu's house to light a Suki while his namesake and other boys were still drinking grog. Having smoked suki, at around 11:30 p.m., he went home and slept. There was a power outage that night and he did not go anywhere after leaving Samu's house.
27. While he was still sleeping, he was informed that her grandmother and grandfather arrived in the morning and blamed him that he had been seen at TT's house that night. TT's grandfather after asking some questions started punching him in the presence of his parents. He denied the allegation. How could he do that thing since TT calls him uncle?
28. Under cross-examination, Inia agreed that TT is his niece, and he has known her since she was a little girl. He agreed that his relationship with TT's parents and grandparents has always been good and respectful and that they had no personal differences or grudge against him.
29. He denied that, during the kava session, his namesake had informed him that TT and her grandmother Analeta were occupying Paulini's house. He denied that he had gone to Paulini's house where TT and her grandmother were sleeping.

Evaluation/ Analysis

30. The Prosecution alleges that the accused penetrated the vagina of the complainant with his penis without her consent. The only dispute relates to the identity of the accused. The accused completely denies the allegation. He says that the complainant has mistakenly

identified him as the culprit. In support of his defence, he raised a defence of *alibi* in his evidence and said that he was elsewhere at the time of the alleged incident.

31. The Prosecution substantially relied on the evidence of the complainant. Her mother Analeta was called to prove the consistency of the conduct of the complainant. Firstly, I shall test the honesty of the complainant to satisfy myself if she told the truth in Court. Then I would test if her evidence on identification is reliable.
32. The complainant was a child at the time of the offence. Soon after the alleged incident she ran to her grandmother Analeta and informed her that Inia, the Village Headman's son, sat on her thighs, closed her mouth, took off her clothes, touched her breast and inserted his penis into her vagina. Analeta gave evidence and confirmed that she received the complaint to that effect.
33. Both the complainant and the recipient of the complaint testified as to the truthfulness of the complaint. The evidence of the complainant in this regard is materially consistent with that of Analeta.
34. Analeta said she could not believe what she heard from the complainant. It was natural for her to disbelieve what she heard because the accused was the complainant's uncle. Analeta was confident the accused did that and that's why she relayed the matter to her son Inia the same night who went to the accused's house in the morning to complain to the accused's father who is the Turaga-ni-Koro of the village. Analeta is closely related to the accused. She was straightforward in her evidence and had no apparent reason to lie under oath against the accused. I accept that Analeta told the truth in Court.
35. The complaint was made soon after the incident. The complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the accused which supports the credibility of the complainant.
36. The complainant frankly admitted that she did not shout or scream, alerting her grandmother that night. Her explanation was that the accused sat on her lap, she was

shocked, and the accused tightly shut her mouth and squeezed it with his hand preventing her from shouting. This explanation is reasonable and consistent with the conduct of a person faced with such a situation.

37. When the complainant ran to her grandmother, she was scared and crying. She was not wearing anything for the bottom part of her body. This evidence was confirmed by Analeta. In her examination-in-chief, the complainant said that she quickly put on her panties and ran to her grandmother. Under cross-examination, when the complainant was shown her witness statement where she had stated that she ran without her panty, the complainant after refreshing her memory, admitted that what she told the police was the truth. I find this inconsistency to be not martial enough to discredit the complainant's evidence.
38. The accused agreed that the complainant is his niece, and he has known her since she was a little girl. He agreed that his relationship with the complainant's parents and grandparents has always been good and respectful and that they had no personal differences or grudge against him. That shows that the complainant or her grandparents did not have any reason to make up an allegation to put the accused in trouble.
39. I observed the complainant's demeanour. She was straightforward and not evasive. I find the complainant to be an honest witness. The crucial question then is whether she is reliable so far as her identification evidence is concerned. This issue is extremely important because even honest witnesses sometimes make mistakes when it comes to visual identification. Was the complainant mistaken in this case?
40. Bearing Turnbull Guidelines on visual identification in mind, I shall now proceed to examine the complainant's identification evidence. The alleged offence took place at around midnight. There is no dispute that there was an unplanned power outage in the village that night. The complainant's evidence that they took two lanterns with them and that one of the lanterns was placed in the sitting room and the other in the bedroom was confirmed by Analeta.

41. The complainant was honest in her evidence saying that the lantern that was placed in the sitting room was not lit at the time of the incident and that the observation was made solely through the light coming from the lantern that was placed in the bedroom. This bigger lantern was placed closer to the door to the room so that it could lighten both the bedroom and the sitting room. The curtain on that side was folded and tied up. She admitted that the light coming from the lantern was not so bright but it was bright enough for her to identify the accused. She displayed the place where the lantern was placed and where she was sleeping with reference to the rough sketch plan tendered in evidence (PE -2).
42. It was rather a recognition than an identification because she had known the accused, who is her uncle, since she was a little girl. There had been no obstruction to her view when the accused was sitting on her lap. It was not a fleeting glance identification. He spent a considerable time with the complainant during the sexual encounter. The bitter encounter would have left an indelible mark in her mind of the assailant. With the foundation she had had, there was no way that she could have been mistaken.
43. The Defence argues that the complainant's evidence is not consistent with that of her grandmother who said that both lanterns had been turned off. The question is when they were turned off. Analeta said that she saw blood stains on the complainant's clothes, but at that moment, it was morning. It is not clear if Analeta was talking about the lighting condition which enabled her to make her observation about the blood stains. Analeta frankly admitted that she did not see who had turned the lanterns off.
44. The fact remains that Analeta was fast asleep when she was woken up by the complainant after the incident and therefore, she was not able to testify about the lighting condition in the sitting room or whether the lantern placed in the bedroom was still lit by the time the alleged rape occurred. The complainant's evidence was that the lantern in the bedroom was still lit and that she made the observation from the light coming from that lantern. I am satisfied that the lighting condition in the sitting room was bright enough to recognise the accused.

45. The next important issue is whether the complainant's complaint was based on guesswork and whether she named the accused the culprit because she had heard about the accused's alleged past misdeeds of a similar nature. To resolve this issue, it was important for the Court to know exactly when she had learned about the accused's alleged past misdeeds.
46. Under cross-examination, the complainant said that, after this incident had happened, she heard stories that the accused does these things to the mothers who are married in the village. The complainant admitted saying to police, that she wanted the matter investigated because it was not the first time that the accused had done this thing to the girls and ladies in the village, though they were not reported. She had also told the police that the Village Headman had not reported when something like this was heard about his son.
47. The Court sought clarification from the complainant in that regard. The complainant confirmed that she came to know about this news right after the incident in which she was raped. Therefore, there is no basis for the Court to assume that her complaint implicating the accused in this offence had any bearing on the rumours that had existed before the incident in the village about the accused.
48. Let me now analyse the evidence of the accused. The accused said that on 6 December 2020, he was drinking grog at Iliesa Nadau's place with his namesake (Inia Navakaroko) and Suli and at around 11 p.m. he and Suli left for Samu's house to smoke a 'suki' while his namesake and other boys were still drinking grog. Having smoked 'suki', he said that at around 11:30 p.m., he went home and slept. He denied going anywhere thereafter and going to Pauline's house that night.
49. Bearing in mind that the accused does not have to prove his *alibi* or prove anything at all, I will analyse the accused's evidence to see if it could create a reasonable doubt in my mind as to the guilt of the accused. One would wonder why the accused did not inform his *alibi* to the police so that they could record statements from the people who were

associated with him that night and from his brother who opened the door when he arrived home at around midnight.

50. Analeta said that she went to the accused's house and informed him that she would go and complain to the police. The accused admits that the complainant's grandmother and grandfather arrived in the morning and blamed him for the rape. The accused said that the complainant's grandfather, after asking some questions, started punching him in the presence of his parents. He did not say what actions he or his father took for assaulting him. If he was wrongfully blamed and assaulted without reasonable cause, why didn't he complain to the police even when he was aware that the complainant's grandparents would go to the police? Why his father, being the Turaga-ni-Koro of the village, did tolerate the assault on his son? The reasonable and plausible assumption that I can make is that the accused and his father tolerated everything because they knew the accused was guilty.
51. The accused admitted that he was having kava that night with his namesake (complainant's mother's brother) but denied that his namesake had informed him that the complainant and her grandmother were sleeping Pauline's house that night. No one knew that the complainant was sleeping Pauline's house that night except for accused's namesake who is complainant's 'big uncle' (mother's brother). It can reasonably be assumed that the information about the complainant's sleepover was shared during the kava session and the accused took that opportunity to commit this crime.
52. The version of the Defence is not appealing to me. I reject the version of the accused and his *alibi*. The version of the Defence failed to create a reasonable doubt in the version of events of the Prosecution case. However, I bear in mind that the rejection of the Defence version does not mean that the accused should be guilty. Prosecution has to prove its case beyond reasonable doubt. Having considered the overall evidence, I am satisfied that the Prosecution proved beyond reasonable doubt that it was the accused who penetrated the complainant.

53. Having accepted the version of the Prosecution, I now proceed to see if all the elements of Rape have been established. The Prosecution established the identity of the accused, which was the main contention taken up by the Defence, beyond reasonable doubt. The accused trespassed the house at night and he squeezed and blocked the complainant's mouth. The complainant said that the accused forcefully penetrated her vagina without her consent. Anlaleta saw blood on the complainant's clothes. The complainant pushed the accused and ran to her grandmother. The complainant was a child, and by her conduct, the accused must have known that the complainant was not consenting to a sexual intercourse.
54. I am satisfied that the Prosecution proved all the elements of Rape as charged beyond reasonable doubt. I find the accused guilty and convict him accordingly.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

25 October 2023

Solicitors:

Office of the Director of Public Prosecutions for State
Niudamu Lawyers for Defence