

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 161 of 2023

STATE

vs.

SAIRUSI MOROCI

Counsel: Ms. S. Bibi with Ms. U. Tamanikaiyaroi for the State
Mr. S. Ravu for Accused

Dates of Hearing: 06th to 08th March 2024

Date of Closing Submission: 27th March 2024

Date of Judgment: 26th April 2024

JUDGMENT

1. On the 6th of June 2023, the Acting Director of Public Prosecution filed this Information, charging the Accused, Mr. Sairusi Moroci, with three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are:

COUNT 1

Statement of Offence

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

Particulars of Offence

SAIRUSI MOROCI on the 17th day of December 2020 at Naitasiri, in the Central Division had unlawful carnal knowledge of **KELERA TINAI** by inserting his penis into her vagina without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

SAIRUSI MOROCI on an unknown date between the 26th day of December 2020 and the 31st day of December 2020, at Naitasiri, in the Central Division had unlawful carnal knowledge of **KELERA TINAI** by inserting his penis into her vagina without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

SAIRUSI MOROCI on the 1st day of January 2021, at Naitasiri, in the Central Division had unlawful carnal knowledge of **KELERA TINAI** by inserting his penis into her vagina without her consent.

2. Consequent to the plea of not guilty entered by the Accused, the matter proceeded to the hearing. The hearing commenced on 06.03.2024 and concluded on 08.03.2024. During the course of the hearing, the Prosecution presented the evidence of two witnesses, including the Complainant. The Accused and his wife gave evidence for the Defence. Subsequently, the Court heard the Closing submissions of the learned Counsel for the Prosecution and the Defence. In addition to their respective oral submissions, both Counsel filed written submissions. Having carefully perused the evidence presented during the hearing and the

respective oral and written submissions of the parties, I now pronounce the judgment on this matter.

Burden and Standard of Proof

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until he is proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Elements of the Offence

4. The main elements of Rape under Section 207 (1) (2) (a) of the Crimes Act are:
 - i) The Accused,
 - ii) Penetrated the vagina of the Complainant with his penis,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.
5. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that the Accused committed these offences against the Complainant. There is no dispute about the correctness of the identification. The Accused and the Complainant are known to each other. The Accused never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator.
6. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.

7. Section 206 (1) of the Crimes Act defines the consent as:

"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."

8. Accordingly, consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. Consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent. Accordingly, the "capacity" is essential in making free and voluntary choices about consent.
9. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent differs from the hope or expectation that the Complainant was consenting.

Admitted Facts

10. The Defence tendered the following admitted facts under Section 135 of the Criminal Procedure Act.
- i) ***THAT*** the accused person's name is Sairusi Moroci (hereinafter referred to as "Sairusi")

- ii) **THAT** the Complainant's name is Kelera Tinai (hereinafter referred to as "Kelera")
- iii) **THAT** Sairusi is Kelera's step-father and is therefore known to the Complainant.
- iv) **THAT** Kelera's date of birth is on the 15th day of September 2004.
- v) **THAT** Sairusi and Kelera's mother share twin daughters together.
- vi) **THAT** at the time of the alleged offences, Sairusi was residing at Coloi, Naitasiri with Kelera.
- vii) **THAT** Kelera later relayed these alleged reflected in the Information to her teacher at Ballantine Memorial Secondary School namely Seini Nacika.

Prosecution's Case

11. The Complainant is the step-daughter of the Accused. The Complainant lived with the Accused, her mother and two step-sisters in Colai, Naitasiri in 2020. Her mother used to visit Sigatoka for work, leaving her and her two younger step-sisters with the Accused. The Complainant was studying at Ballantine Memorial School. On the night of 17th of December 2020, she was awoken from her sleep and found that the Accused was on top of her. Her two siblings were in the living room while her mother was away in Sigatoka. The Accused threatened her, saying that she should not shout or tell anyone else about what he was going to do. He then removed her undergarment and then his own. When the Complainant tried to scream, he squeezed her mouth with his hand. He then penetrated her vagina with his penis. The Complainant was lying on her back facing upwards. While penetrating her vagina with his penis, the Accused threatened the Complainant and told her that she should not tell anyone about this and that if she did so, he would smack her.

12. Sometimes, around Christmas time, her aunty Losana, who was the Accused's sister, passed away. During the funeral rituals, the Complainant and her family moved to Meresi's house as their house was packed with people who came to the funeral. One of the nights during this period, the Complainant went to sleep with her two younger siblings in the room at Meresi's house. Her siblings were sleeping just an arm length from her. While she was asleep, the Accused came to her and laid on top of her. She tried to move away and struggled, the Accused then held her hand and forced her to stay still. He squeezed her mouth when she tried to shout. He threatened her again as he did during the previous incident. The Accused then removed her undergarment and unzipped his shorts, and put his penis out. After that, the Accused penetrated the vagina of the Complainant with his penis. One of the siblings woke up at that time. The Accused pretended to be sleeping and left the place when the sibling fell asleep.
13. On the 1st of January 2021, the Accused again sexually assaulted the Complainant, penetrating her vagina with his penis while she was sleeping in the room at their house. The Complainant saw the Accused come to the room and pull the window curtain down while she was asleep in the bed. He then came and laid on top of her. She tried to push him away, but he managed to overpower her. He removed her undergarment and penetrated her vagina with his penis. The Complainant's mother was away in Sigatoka, and the two siblings were in the living room. She tried to shout, but the Accused squeezed her mouth. However, the siblings heard her shout and came to the room. The Accused got out of the bed and hid beside the bed and the drawer. Once the siblings left the room, he left, too.
14. The Complainant eventually reported to her school teacher about these sexual assaults by her stepfather, which was then reported to the Police.

Accused's Case

15. The Accused denies this allegation and suggests that the Complainant made up this allegation as the Accused was acquitted by the High Court in an earlier prosecution based

on an allegation made by the Complainant. Moreover, the Accused's wife, who is the Complainant's biological mother, testified that she was at home with the family during those three days.

Evaluation of Evidence

16. According to the evidence adduced by the Prosecution and the Defence, the Accused denied the allegation, stating such alleged incidents had never occurred, and the Complainant made up this false allegation as she had a *mala fide* motive of doing that. Under such circumstances, the Court must consider all of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. In doing that, the Court must evaluate the evidence presented in the Court. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to provide evidence. Therefore, such evidence presented by the Accused and the Defence's witness needs to be considered when determining the facts of this case.

17. Lord Reading CJ in **Abramovitch (1914) 84 L.J.K.B 397** held that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."

18. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. If the Court rejects

the Accused's version, that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the Information.

19. In evaluating the evidence, the Court must determine the testimonial trustworthiness of the evidence given by the witnesses based on the credibility and reliability of their evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (**vide; Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**)
20. During the cross-examination of the Complainant, I observed that the learned Counsel for the Defence raised certain contradictions and omissions between her evidence and the statement she made to the Police. The statement made to the Police is not evidence of facts. Still, it could be employed to impeach the credibility and reliability of the witness's evidence if there is a materially important contradiction or omission between the statement and the evidence presented in Court. Under such circumstances, the Court must consider the explanation or the reasons provided by the witness for such a contradiction or omission in determining how such contradiction or omission affected the credibility and reliability of the evidence given by the witness.
21. The Complainant resolutely explained during the cross-examination that the Police recorded her statement in a question-and-answer form. Hence, she only answered the questions posed to her. I observed that the Complainant, in unwavering firmness, stated that what she testified in Court had actually occurred to her. Considering these factors, I do not find any reasons to conclude that those contradictions and omissions between the evidence given by the Complainant and the statement she made to the Police had adversely affected her credibility and reliability.

22. The learned Counsel for the Defence suggested to the Complainant that she made up this allegation as she wanted to send the Accused to prison since he was acquitted in the previous High Court matter. The Complainant vehemently and assertively denied the said suggestion and affirmed that these sexual assaults actually happened, as she explained. The Defence proposed that she refused to go to Vatukarasa after the first High Court matter because she wanted to make up this allegation against the Accused. The Complainant categorically denied that proposition and explained further that she actually went to Vatukarasa after the arrest of the Accused for this matter. In his evidence, the Accused said nothing happened after the first trial. Only the mother of the Complainant gave evidence supporting the said proposition. Hence, I do not find any *mala fide* motive to make up this allegation.
23. The Complainant specifically stated that she recognized the perpetrator as the Accused on all three occasions from the light came from the living room. There is no dispute that she knew the Accused, as they lived in the same house. Moreover, the Defence raised no allegation of mistaken identity in the matter.
24. Gamlath JA in **State v Serelevu [2018] FJCA 163; AAU141.2014 (the 4th of October 2018)** has extensively discussed the issue of delay in reporting. Gamlath J found that "the totality of the circumstance test" is the correct approach to evaluating the delay in reporting and how it affects the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
25. The delay in reporting the matter cannot be used as a stringent rule to discredit the authenticity of the Prosecution case. It only cautions the Court to seek and consider a satisfactory explanation for such a delay and then determine whether there was a possibility of embellishments or exaggeration in the facts explained in the evidence if there is an unsatisfactory explanation for the delay or unexplained delay. (**vide; Masei v State [2022] FJCA 10; AAU131.2017 (3 March 2022)**)

26. In this matter, the Complainant did not inform or report to anyone immediately. She explained that her relationship with the Accused was founded on fear and suspicion. The mother of the Complainant also asserted that the Accused was very strict, especially towards the Complainant. Considering their fragile relationship, I am inclined to accept the Complainant's explanation of not reporting this matter promptly due to the threat made by the Accused. Moreover, she felt that her mother would not believe or stand for her if she told her because of the previous criminal Prosecution against the Accused. She did not want to tell anyone else in the village as the accused might find it or others would start to talk badly about her. She eventually related this matter to her school class teacher, whom she found most suitable to do so. I accordingly do not find the delay in reporting this matter adversely affected the credibility and reliability of the evidence given by the Complainant.
27. I observed the manner in which the Complainant gave evidence. Though she was slow and took time to answer the questions posed to her, she was focused, consistent, and coherent in her answers. The Complainant persistently maintained her position against the Accused throughout the course of her evidence.
28. The Prosecution presented the evidence of the school teacher as a witness of the recent complaint. The teacher explained in her evidence that the Complainant approached her and then confided her about this allegation, stating that her stepfather had sexually abused her, penetrating her vagina with his penis. The Complainant had further told her that her mother was away during all these occasions when the stepfather sexually assaulted her in that manner.
29. The Supreme Court in Raj v State [2014] FJSC 12; CAV0003.2014 (20 August 2014) enunciated the purpose and the scope of the evidence of a recent complaint, where Gates CJ outlined that:

"[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

30. The Complainant had told the teacher the nature of the sexual assault committed by her stepfather on her, thus explaining the material facts of this alleged Rape. I accordingly find the evidence of the teacher as evidence of recent complaint based on the **Raj v State (supra)** guidelines.
31. The foregoing reasons, which I discussed, persuaded me to conclude that the Complainant's evidence is credible and reliable; hence, I accept her evidence as the truth.
32. I shall now turn to the Defence's evidence. The Accused denied this allegation, stating that such incidents alleged by the Complainant had never occurred. As I discussed above, I do not find the Complainant made up these allegations. Hence, I do not see the Accused's evidence as true and/or may be true. Therefore, the Accused's evidence failed to create any reasonable doubt in the Complainant's evidence.
33. The learned Counsel for the Defence cross-examined the Complainant and the teacher regarding the inconsistency of the Complainant's mother's location during these alleged incidents. The Complainant testified in Court, stating that her mother was in Sigatoka. However, it was recorded in her statement given to the Police that her mother was in Suva. The teacher said that the Complainant told her that her mother was in Suva.
34. The mother of the Complainant admitted that she had gone to Sigatoka and left the Complainant and her other two daughters with the Accused whenever she went away,

which the Accused also revealed in his evidence. Taking into consideration my above conclusion regarding the testimonial trustworthiness of the evidence given by the Complainant, I find the evidence of her mother stating that she was present during those three occasions when these three incidents of Rape occurred, is not true or may not be the truth.

35. In conclusion, I find that the Prosecution has proven beyond reasonable doubt that the Accused had committed these three offences of Rape as charged in the Information. Therefore, I hold that the Accused is guilty of three counts of Rape, contrary to Section 207 (1) (2) (a) of the Crimes Act and convict of the same accordingly.



A handwritten signature in black ink, appearing to be "R. D. R. T. Rajasinghe", written over a horizontal dotted line.

Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

26th April 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.