

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 182 of 2022

STATE

V

VITORIANO KOROI CAGICA

Counsel : Mr. U. Lal for the State.
: Ms. K. Vulimainadave and Ms. Qaloinakorovusa
for the Accused.

Dates of Hearing : 31, July, 01 August, 2024
Closing Speeches : 05 August, 2024
Date of Judgment : 05 August, 2024

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 17th January, 2023:

COUNT ONE

Statement of Offence

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

Particulars of Offence

VITORIANO KOROI CAGICA, on the 15th day of November, 2020 at Sigatoka in the Western Division, had carnal knowledge of "S.A" without her consent.

2. In this trial, the prosecution called one witness and after the prosecution closed its case, this court ruled that the accused had a case to answer for one count 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 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. This element is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the accused penis. This element is also not in dispute.
8. The third element of consent is in dispute, 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 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 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.

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 on 14th November 2020, she came to Sigatoka Town for an open air church service. During the programme the complainant received a phone call from her boyfriend Koroi asking her to join him for some drinks at Kabisi.
18. By the time the complainant arrived at Kabisi it was night time. At Kabisi Road the complainant met Koroi and they went to the place where Koroi was drinking beer with about 7 or 8 boys. The complainant joined the drinking session, it was here she came to know that the accused was Koroi's cousin.
19. After a while, the complainant started feeling sleepy so she asked Koroi if they could take the lead. Shortly after, all left the drinking spot and they went to the house where Koroi was staying. This house was provided for cane cutters by the owner of the cane farm.
20. The drinking continued at the porch of the house, at around 2.00 am the next day the complainant wanted to sleep so she informed Koroi. In the porch of the house the complainant was sleeping between Koroi and the accused. After sometime the complainant was woken by Koroi to have sex with her for which she agreed.
21. By this time the others had left the porch and were drinking about 7 meters away at another house. The complainant was sleeping in the middle, Koroi was on her left and the accused on the right. The complainant had consensual sexual intercourse with Koroi, after Koroi slept the accused asked the complainant if he could have sex with her. The complainant refused, but the accused removed his clothes and had

forceful sexual intercourse with her by inserting his penis into her vagina. The complainant was pushing the accused from on top of her but she could not.

22. According to the complainant, she used her right hand to push the accused and with her left hand she was trying to wake Koroi but he did not wake up. When the accused was having sexual intercourse, the complainant did not like it because she did not know the accused.
23. The accused had sex with the complainant for about 10 minutes. At this time the other boys were drinking in the porch of another house 7 meters away. The complainant was in pain and she said, "oilei", "oilei" but no one came. After the accused finished having sexual intercourse, the complainant wore her clothes and she was waking Koroi to inform him that she wanted to go home. Koroi woke up, did not say anything and walked away.
24. The complainant left the porch, and was walking on the road when Koroi came and returned her phone as he was leaving the complainant asked for her fare to go home Koroi did not respond. The complainant said "okay, go on your way, from here I am going straight to the Police Post to report it."
25. The complainant walked about 15 minutes to the Vatudradra Police Post and lodged a report that she had been raped by Koroi and the accused. Later in the day, her police statement was taken. After sometime the complainant went to the police station and withdrew her allegation against Koroi by telling the police that she was raped by the accused only.
26. In cross examination the complainant stated that she lied to her mother that she was going home from the open air church service but instead she went to Kabisi. The complainant stated that she slept in the porch of the

house where they were drinking and there was no light in the porch, however, she was able to see the entire porch.

27. The complainant stated that she was a bit drunk when she was giving her police statement. She disagreed that after Koroi had left the porch to answer his phone, she had turned to the accused and started kissing and hugging him. However, the complainant agreed that the accused had removed his pants, lifted her skirt and inserted his penis into her vagina but she was not hugging and kissing him at this time. When it was suggested that the sexual intercourse with the accused was fast and it lasted for a minute, the complainant said, "*not that fast, roughly 5 minutes*".
28. The complainant agreed that Koroi came back after the accused had finished and thereafter she again had sexual intercourse with Koroi. After this, all three lay on the porch when the accused left the complainant fell asleep, when she woke up, she was ready to go home.
29. The complainant agreed that Koroi did not talk to her and give her fare to go home which made her so angry that she lodged a police complaint. Upon further questioning, the complainant said that she reported to the police because the accused and Koroi had raped her and also Koroi had not responded to her. On 2nd May, 2024 she had gone to the Lautoka Police Station and gave another police statement stating that she had consensual sexual intercourse with Koroi on 9th November, 2020.
30. When it was put to the complainant that if she had mentioned in her police statement that she had consensual sex with the accused, she would have been charged by the police for giving false information, the complainant said she was not scared. The complainant denied she had consensual sexual intercourse with the accused.

31. This was the prosecution case.

DEFENCE CASE

32. 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.
33. The accused informed the court that on 14th November 2020, he was with his namesake Koroi and other cane cutters at Kabisi, Sigatoka. Koroi is the boyfriend of the complainant.
34. In the evening, all the boys went to buy a carton of Fiji Bitter which they started to drink near the shop. Later the complainant joined them in drinking. After sometime, all went to the barrack where they were staying. The drinking continued in the porch of a vacant house about 8 meters away from the barrack.
35. After the drinking finished, the accused brought his beddings in the porch, he slept with Koroi and the complainant. The complainant lay in the middle, the accused saw the complainant and her boyfriend talking, hugging and both were under the blanket for some time.
36. After sometime, Koroi stood up and left, the complainant was lying down. Shortly after, the complainant turned towards the accused and started hugging, kissing and touching him. At this time, the accused knew the complainant wanted to have sexual intercourse with him. The accused removed his clothes and so did the complainant and they had sexual intercourse.

37. It was from the behaviour of the complainant he knew she was consenting to have sexual intercourse with him. The accused denied that he had forceful sexual intercourse with the complainant. After this, Koroi came back and had sexual intercourse with the complainant. Thereafter, Koroi left and the accused also left for his home. The accused maintained that the complainant had consented to have sex with him.
38. In cross examination the accused denied he had a lust for sexual intercourse with the complainant when she was lying beside him. The accused stated that at first instance he did not want to have sex with the complainant but when she started hugging and kissing him, he knew she wanted to have sex.
39. Upon further questioning, the accused said he did not bother about the whereabouts of the boyfriend because it was the complainant who wanted to have sex with him. The accused agreed that the complainant liked it and she was not angry with him and both were happy. When it was put to the accused that despite not being angry the complainant still went ahead to lodge a complaint against him, the accused stated, maybe she was not happy with the way Koroi had treated her. The accused denied committing the offence as alleged.
40. This was the defence case.

ANALYSIS

41. The prosecution submits that the complainant, her boyfriend Koroi and the accused were sleeping in the porch of a house after a drinking session. During the early hours of 15th November, 2020 the complainant had consensual sexual intercourse with Koroi.

42. After Koroi left to answer his phone the accused asked the complainant if he could have sex with her. Despite the complainant's refusal, the accused removed his clothes and had forceful sexual intercourse with the complainant by inserting his penis into her vagina. The complainant was pushing the accused away from on top of her but she could not.
43. The complainant used her right hand to push the accused and with her left hand she was trying to wake Koroi but he did not respond. When the accused was having forceful sexual intercourse the complainant did not like it.
44. The complainant was in pain and she said, "oilei", "oilei" but no one heard her. After the accused finished having sexual intercourse, the complainant wore her clothes and she woke Koroi to inform him that she wanted to go home.
45. The complainant did not consent to what the accused had done. The prompt and immediate reporting by the complainant shows that she was genuine and her allegation against the accused is founded on what the accused had done to her and therefore she should be believed.
46. On the other hand, the defence says the allegation does not make sense. Firstly, there was no force on the complainant to sleep between the accused and Koroi. Secondly, the complainant being an adult had consented to have sexual intercourse with the accused but has now changed her story. It was the complainant who had conducted herself in a way that prompted the accused to have sexual intercourse with her.
47. The defence further submitted that both the complainant and the accused had enjoyed having sexual intercourse and if there was any force used on the complainant she would have immediately told Koroi but she did not.

This is a typical case of crying rape after a session of consensual sexual intercourse. The complainant also did not raise any complaint about being raped by the accused even after having sex with Koroi the second time to alert him about what the accused had done.

48. Moreover, the only reason for the police complaint was the anger of the complainant towards Koroi who did not talk to the complainant after he had sex with her the second time that early morning and his refusal to give her fare to go home.
49. In her state of anger towards Koroi the complainant made a false complaint against the accused. The complainant lied to the police that she was raped and about two months before the trial in May this year the complainant withdrew her complaint against Koroi shows that the complainant cannot be believed.
50. There is no evidence before the court that the complainant had expressed any anger against the accused. She had been a willing partner and she had invited the accused to have sex by her conduct. Even when Koroi had returned her phone still she did not tell Koroi anything about forceful sexual intercourse by the accused.
51. The defence submits that the complainant did not say that the accused had threatened her to submit to him. She even comfortably slept beside the accused after the sexual intercourse.
52. The defence further submits that this is a case of withdrawal of consent and false complaint against the accused. The complainant had all the opportunity to inform Koroi but she did not speak volumes about the authenticity of the allegation.

53. Finally, the defence submits that the accused had consensual sexual intercourse that early morning, what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court not to believe the complainant who is falsely implicating the accused.

DETERMINATION

54. At the outset I wish to mention that during the evidence of the complainant it was revealed that she had consensual sexual intercourse with her boyfriend Koroi before and after the accused had sexual intercourse with her.
55. In view of the above and with the concurrence of both counsel it was agreed that the above evidence of the complainant not be expunged due to its direct relevance to the facts in issue and to exclude it would be contrary to the interests of justice. As far as this court is concerned no inference as to the general disposition or propensity of the complainant in sexual matters will be drawn as per section 130 (3) and (4) of the Criminal Procedure Act.
56. 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.
57. In this case, there are two different versions, therefore this court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the alleged offence. It is not for this court to decide who is acceptable between the complainant and the accused.

58. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as 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] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).
59. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

60. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court at paragraph 45 as follows:

The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

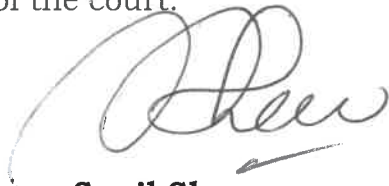
61. The only issue in this trial is whether the complainant consented to have sexual intercourse with the accused. There is no dispute that the complainant and the accused were drinking together with others for some time before going to the porch of a house to sleep. The complainant slept between the accused and her boyfriend Koroi, this was the first time the accused had met the complainant.
62. After carefully considering the evidence adduced by the prosecution and the defence, I do not believe the evidence of the complainant as truthful and reliable in respect of the fact that she did not consent to have sexual intercourse with the accused that early morning. The narration by the complainant about forceful sexual intercourse by the accused is not plausible on the totality of the evidence in fact what she told the court is not believable.
63. From the evidence of the complainant it is obvious to me that she was comfortable in having sex with the accused after Koroi left to answer his phone. When Koroi returned the complainant did not complain about any forceful sexual intercourse by the accused. It is to be noted that there was no threat by the accused to the complainant to submit to him at any time.

The complainant was angered by lack of reaction towards her by Koroi after he had sexual intercourse the second time and this was further aggravated by the fact that Koroi did not give any fare to the complainant to go home.

64. In my considered judgment and from my observations of the complainant when she was narrating the above version in court she was emotionally affected by the sudden non-responsive behaviour of Koroi. She had travelled from Sigatoka Town after lying to her mother taking a one and half hours minivan ride to be with Koroi only to be ignored by him in such a manner. The complainant obviously did not have the fare to go home hence she had asked Koroi for money who did not react to her and/or give her fare to go home. The anger of the complainant was so uncontrollable that she lied to the police that she was raped by Koroi and the accused.
65. The evidence is glaringly obvious that the complainant had no complaints or anger against the accused and yet she made a complaint of rape against him is to be considered upon a holistic assessment of all the evidence. The complainant told the court that she was ready to go home she had her bag with her but for the behaviour of Koroi things changed for the detriment of the accused. The accused became a victim of the complainant's anger which had nothing to do with him. The accused was not even at the place where the complainant and Koroi were having a conversation about the fare requested by the complainant.
66. It is important to take a pause and think if the accused had forceful sexual intercourse with the complainant contrary to her wishes the complainant would have immediately complained to Koroi and would not have slept in the same porch beside the accused.

67. In my considered judgment the complainant did not give an honest account of what had happened that early morning involving the accused, what she told the court is not believable. The complainant had consented to have sexual intercourse with the accused but she told the court otherwise is not obvious to me on a realistic review of all the evidence before this court.
68. The evidence of the complainant brings to the fore more questions than answers. This is a case of late withdrawal of consent by the complainant after Koroi's reaction towards her. Although the anger of the complainant was due to Koroi the complainant's lie to the police was an unwarranted overreaction in which she falsely implicated the accused.
69. In view of the above it is unsafe to convict the accused and therefore the benefit of the doubt ought to be given to him. This court is not satisfied beyond reasonable doubt that the accused on 15th November, 2020 had penetrated the vagina of the complainant with his penis without her consent.
70. The accused in his evidence maintained that it was the complainant who had consented for him to have sexual intercourse and on the evidence I find him to be a reliable and truthful witness. The accused was forthright and revealing he was able to withstand cross examination and was not discredited.
71. There is a reasonable doubt in the prosecution case which this court cannot ignore. This court is not satisfied beyond reasonable doubt that the accused is guilty and therefore this court has no option but to acquit the accused of one count of rape as charged.

72. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

05 August, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.