

IN THE HIGH COURT OF FIJI AT SUVA
CRIMINAL JURISDICTION

Criminal Action No. HAC 348 of 2023

The State vs Esava Delai

For the State: Ms. S. Bibi

For the Accused: Mr. T. Varinava

Date of Trial: 14th August 2025

Date of Judgment: 12th September 2025

JUDGMENT

1. The complainant in this matter has been granted name suppression and will only be referred to by the initials AS. Any public records of this case shall not include any information that may lead to the identification of the complainant.
2. The Accused is charged with one count of Rape contrary to section 207 (1) and (2) (a) of the Crimes Act 2009 in the Information filed on the 16th of January 2024.
3. It is alleged that on the 21st of November 2023. At Tovata Feeder Road, Makoi, Esava Delai penetrated the vagina of AS with his penis, without her consent.
4. The Accused was first produced in the Nasinu Magistrate's Court on the 27th of November 2023 and the matter was transferred to the High Court.
5. He was first arraigned in the High Court on the 8th day of December 2023 and the Court gave directions for Information and Disclosures to be filed.

6. On the 29th of January 2024, the Accused entered a Not Guilty plea to the charge and the matter was adjourned for the parties to attend to Pre Trial Conference and to file Agreed Facts.
7. On the 5th of April 2024, the parties filled the following Agreed facts pursuant to section 135 of the Criminal Procedure Act 2009: -
 - i. The name of the charged person is Esava Delai [Esava].
 - ii. Esava was born on 10th February 2003 and he was 20 years old in November.
 - iii. Esava was a Security Officer and resided at Tovata Road, Makoi where he is the neighbour of the complainant AS.
 - iv. Esava and AS are known to each other as they are neighbours at Tovata Road, Makoi.
 - v. On 21st November 2023, Esava and AS had met at the Mini Market shop at Tovata Road, Makoi.
 - vi. On the same day after 6 pm, Esava had gone to AS's house, whereby he had sexual intercourse with her by penetrating his penis into her vagina.
 - vii. It is agreed that the admissibility and the contents of the following document is not in dispute and the same is tendered by consent and annexed as follows: -
 - (a) Birth Certificate of AS
8. The parties also filed the Pre Trial Checklist and the Trial was fixed from the 11th to the 15th of August 2025.
9. The Trial did not actually proceed on the 1st day as State counsel had sought leave for a short adjournment in order to attend to witness conferences and preparation for the Trial.
10. The Trial proceeded on the 14th of August 2025.

The evidence for the State

11. In her evidence AS stated that she resides in Tovata, Makoi with her sister Kelera Vakacegu and her husband. She is now 18 years of age and she was born on the 16th of July 2007.
12. In 2023 she was 16 years of age and she was a Form 3 student. She resided at the same address in Tovata, Makoi.
13. He recalls on the 21st of November at 6pm, Esava came to her home, entered her room and locked the door.
14. She was lying down on the mattress when he entered and lay down on top of her. She tried to scream but he covered her mouth with a pillow. She then tried to stand up but he pushed her down with one hand, closed her mouth and with the other hand he tried to remove her pants.
15. Esava then removed his pants and after that he inserted his penis into her vagina. After doing this he stood up and went outside.
16. She was the only one inside the house at this time as her sister and her husband had gone to work.
17. She did not consent for him to have sex with her but she did not tell him so. She did not know whether Esava was aware that she was not consenting to what he was doing to her.
18. The whole incident only took a short while and after he finished, he wore his clothes and left and she went and had her shower.
19. Later she told her sister what had happened to her. She told her that Esava had come to her home and molested her. Her sister then told her that they would go and report

- the matter to the Tuirara Community Post. Her sister returned home at 9pm and Esava had left well before 9pm.
20. Under cross examination initially she denied that between 5-6 pm she was sitting at the Mini Market near her home. She also denied that Esava approached her as she sat there. She also denied that Esava had asked how old she was and whether she was single or not. She also denied that she had responded that she was 18 years of age.
 21. She also denied that they had flirted, and he had then asked if they could have sex and she had agreed to it. She also denied that she took him to her home, that she opened the door to him and that they entered and had sex consensually.
 22. Counsel then confirmed from AS that she had given a statement to the Police shortly after the incident and this statement was given when everything was still fresh in her mind. Counsel then pointed out material contradictions pointing to a different version to what she had stated in her evidence in chief.
 23. In re-examination she explained that she had forgotten most of the details of what happened that day. She also explained that she was afraid to go and report to the Police because she was afraid of his friends.
 24. The second witness was Kelera Vakacegu. She is the elder sister of AS and they live together at her home in Tovata, Makoi.
 25. On the 21st of November 2023, she returned from work at 8pm and she saw that the school uniform was hung up although the door was closed. She found the key and opened the door but AS was not at home.
 26. She called out AS's name, but she did not answer. She was told that AS has a boyfriend and the boyfriend's home was close to her home. She looked for AS and went to her friend's house, but they said that she had not been there that day. When she could not find AS she returned home and went to sleep.

27. Later, at around 5:45 the next morning she was woken by knocking from the door. She opened the door and saw AS standing there. She asked her where she had been all night and AS was shaking and crying. She said that she was afraid and earlier that night someone had come into the house, entered her room and tried to remove her pants. AS did not specify what this person did to her.
28. Kelera then asked AS where she had been and AS led her to where this person was. When they arrived at that spot, she called him out but he did not come, so she told him that they were going to go to the Police Post to report this and she went with AS to the Community Post.
29. As she did so, the young men followed them, and they arrived together at the Tovata Community Post. She lodged the report there and the Police arrested him. From there she came to know that his name is Esava.
30. When she saw her sister AS that morning, she was crying and had grass in her hair.
31. That was the State's case.

The evidence for the Accused

32. In his evidence, the Accused testified that on the 21st of November 2023 between 5 – 6 pm he was returning from work as a Security Officer.
33. As he walked home, he noticed AS sitting in the Mini Market near her home. He approached her and they started talking and after a while they started flirting. He asked her if they could have sexual intercourse and she agreed.
34. She told him they could go to his house, and they went there, and she opened the door because she had the key. They entered the room, removed their own clothes and had sexual intercourse. After that they each put on their own clothes, and they agreed to meet up later at the Mini Market. He was clear that she consented to sex.

35. He then went home, had his shower and changed. After that he went to the Mini Market where she was waiting, and they walked together to the store to buy juice. After buying juice they parted ways in front of her house, and he went home to rest.
36. After 8 – 9 pm he came out and saw that she was still sitting in the Mini Market. One of his cousins had returned from overseas and he had bought alcohol. He met two of his friends – Susitino and Vesi, and they decided to go and drink. As they went to drink, AS followed them, none of them forced her to go with them.
37. They drank and partied, and they finished at around 4 to 5 in the morning and AS left. He remained at that place and after a while AS came back with her sister, AS pointed him out and they went to the Community Post. Esava and his friends followed them to find out what they were going to do.
38. He was arrested that same day.
39. He maintained this evidence under cross examination.
40. The second defence witness was Sositino Tamanivalu. He testified that on the 21st of November 2023 between 8 to 9 pm he was at home. He met one of his friends, Esava, and Esava invited him to go drinking.
41. He went with Esava and saw that he was with a girl AS. He had come up with Esava and they saw her waiting at the Mini Market. They went drinking together and they all walked together.
42. On the way to the drinking spot there are about 10 to 20 houses and at no time did AS call for help or try to run away.
43. They started drinking and everyone was having fun and enjoying themselves. After they finished the drinks, AS returned to her home. After a while, AS returned with her sister. Her sister started telling them off and told them that she would report this matter to the Police. AS and her sister then left for the Police Post, and they followed

them to find out what they were going to do. At the Police Post, Esava was arrested, and he left at that stage.

44. The last witness was Timoci Naqari, the father of Esava Delai. His testimony was that he is neighbours with Kelera Vakacegu, the elder sister of AS. He testified that on two different occasions AS has asked if she could sleep in their home as she had been chased out by her elder sister. He agreed to her requests as he is a father and Esava, as part of his bail conditions, was no longer staying at their home.

45. That was the evidence for the Accused.

46. At the close of the evidence, the parties made closing submissions, and the matter is now adjourned for the judgment.

Analysis

47. The Accused, Esava Delai is charged with the offence of Rape contrary to section 207 of the Crimes Act 2009, which provides: -

“The offence of rape

207.-(1) Any person who rapes another person commits an indictable offence.

Penalty– Imprisonment for life.

(2) A person rapes another person if-

1. (a) the person has carnal knowledge with or of the other person without the other person’s consent; or
2. (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without the other person’s consent; or
3. (c) the person penetrates the mouth of the other person to any extent with the person’s penis without the other person’s

consent.

(3) For this section, a child under the age of 13 years is incapable of giving consent.”

48. The parties have filed Admitted Facts and, pursuant to section 135 of the Criminal Procedure Act – the identity of the Accused Esava Delai is established and the act of sexual intercourse between Esava Delai and AS is also established beyond a reasonable doubt.

49. The burden is on the State to prove beyond a reasonable doubt that the act of sexual intercourse was without the consent of AS. The Accused elected to give evidence although he does not have to prove or disprove anything.

50. Consent is defined in law at section 206 (1), (2) of the Crimes Act 2009 as follows:-

“(1) 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.

(2) Without limiting sub-section (1), a person’s consent to an act is not freely and voluntarily given if it is obtained–

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.”

51. There are two versions of what happened on the night of the 21st of November 2023 before the Court. The version of events as narrated by AS is contradicted by her own sister’s evidence and her own earlier out of Court statement.

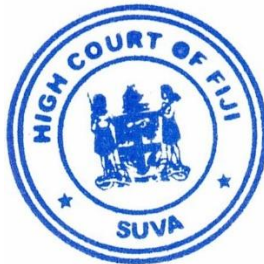
52. The timeline of the evidence of the Accused is supported by the evidence of Kelera Vakacegu and bolstered by his own witness. In assessing the evidence, I find that I prefer the evidence of the Accused. He was straightforward and clear in his evidence.
53. As for the evidence of the complainant AS, I found her to be evasive, and her evidence was contradicted in a material way by her own elder sister. A persuasive argument can be mounted that she came up with these allegations after her sister was angry at her for being out all night.
54. The State had the burden of establishing beyond a reasonable doubt that at the time that the Accused Esava Delai had sexual intercourse with AS, she did not consent and, at the time Esava Delai either knew she was not consenting, or he was reckless as to whether she was consenting or not.
55. There is nothing in the evidence to show that Esava Delai did any of the acts constituting vitiating the victim's freely given consent as follows: -
- (a) by force; or - reasonable doubt has been raised
 - (b) by threat or intimidation; or - no evidence provided
 - (c) by fear of bodily harm; or – no evidence provided
 - (d) by exercise of authority; or – no evidence provided
 - (e) by false and fraudulent representations about the nature or purpose of the act; or – no evidence provided
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner. – no evidence provided.


56. That being the case, the State has failed to establish beyond a reasonable doubt that Esava Delai had sexual intercourse with AS, without her consent.

This is the judgment of the Court: -

1. Esava Delai for the offence of Rape – you are acquitted

30 days to appeal





Mr. Justice U. Ratuville
Puisne Judge

cc: Office of the Director of Public Prosecutions
Legal Aid Commission