

IN THE MAGISTRATE'S COURT

AT SUVA FIJI

CRIMINAL CASE NO: 11/2010

BETWEEN: THE STATE

PROSECUTION

AND: SEMISI TUBUNA

ACCUSED

Before: Resident Magistrate Ms. Sufia Hamza

For the Prosecution: DPP's Office, Suva

For the Accused: LAC, Nasinu

Date of Judgment: 19th May 2023

JUDGMENT

- [1] The accused is charged with the offence of Rape contrary to sections 149 and 150 of the Penal Code Act.
- [2] The accused was given his right to counsel. He exercised his right to counsel by engaging a Legal Aid counsel.
- [3] The matter proceeded to trial proper after the accused pleaded not guilty.

PROSECUTION EVIDENCE

[4] At the trial proper, the prosecution led the evidence of two witnesses. I now summarize the evidence led by the prosecution.

[5] The complainant gave the following evidence:

She is married now with two children; one child in form 4 and another child in class 2. On 18th October 2004, she was at home in Tailevu. She was living with her sister in law, sister and brother. Her paternal uncle, the accused also lives in the same area as she does. He came home and asked for her to go together to clean his boss's house in Davuilevu Housing.

Upon getting to that house, he told her to go to a room to fold clothes on the bed. There was no one else at the house. After she folded the clothes on the bed, he told her to clean underneath the bed. He told her to take the cartons from under the bed. As she was doing that, she could feel that he was massaging her thigh. He was using his toes to massage her thigh. She was still lying down underneath the bed. She was trying to get up from underneath the bed when he was massaging her thigh. When she got up from underneath the bed, he took her and put her on top of the bed. He tried to take off her clothes. She asked him why he is trying to do this to her. He told her not to say anything or he will do something to me. She was scared. He took out his private part and inserted it into her private part. It happened on top of the bed. Both of them weren't wearing clothes. He took off her clothes. He took off his clothes. He pushed her on the bed. He tried taking off her clothes. She tried pushing him off but she couldn't. He tried for them to have sex on the bed. He had sex with her on the bed. He bit her neck. After this, he told her to cook lunch. She didn't do this. She told him to open the gate to the house so that she could go to her home in Tailevu. She was scared. She went straight home and told her relatives; her brother and sister in law. Thereafter, they had gone to the police to report the matter; her sister in law and herself. Dock identification of the accused done.

During cross-examination, she stated the following:

She can't recall what she was wearing. Her paternal uncle, the accused frequented her home. She had come to Davuilevu Housing by bus. She can't recall if she did travel to Davuilevu Housing by bus. She had got in the bus by 9am and arrived by 10am. She started cleaning the house same time. She was told to start cleaning that one room. She didn't change her clothes. She pulled out five cartons from underneath the bed. There were a lot of cartons. It was small cartons. He told her to pull out the cartons from underneath the bed. As she was doing that, she felt someone massaging the side of her thigh. She was able to see who was behind her and it was her paternal uncle, the accused. She denied coming out from underneath the bed on her own volition. She denied coming up and standing next to him. She denied that he enticed or invited her to have sex with him. She stated that he forced her to have sex with him. She denied consenting to having sex with him as he is her paternal uncle. Soon after, she left the house and went back to her home. She went and told her family who then told her to report the matter to the police. Her family was angry with him because it's an uncle/niece relationship and he is also like a father to her. She stated that he raped her. He bit her neck and she showed this mark to her sister in law. She can't recall how many bite marks were there.

[6] The complainant's sister in law gave the following evidence:

In 2004, she was staying in Tailevu with her husband and sister in law, the complainant. On 18th October 2004, she was at home when the complainant's paternal uncle, the accused came over and asked the complainant if she was free for them to go together to clean his boss's house. She heard their conversation. She was married to the complainant's brother for about two years at that time. She knew that the complainant and the accused were in good terms and she respected him as her paternal uncle. He used to come to their home to eat together and have talks and tell stories. There was no romantic relationship between the complainant and the accused. She went at 9am and came back by 11am. She had groomed herself well before going. When she came back, she looked scared. Her hair was bushy. She was crying. She told her what had happened to her. They had gone to a house which was empty. He told her to go to one empty room to clean the cartons underneath the bed. He touched her thigh, pulled her out and pushed her on the bed. He raped her. He told her not to talk or he will do something to her. When she heard this from her, she was shocked. She couldn't believe that he could do such a thing. She called her husband, the complainant's brother. They reported the matter to the police. Dock identification of the accused done.

During cross-examination, she stated the following:

He had come home to ask the complainant to accompany him. She can't recall the clothes that she was wearing. Her hair was brushed neatly. Her hair was bushy when she came back. He had asked the complainant to go with him to clean the house. The matter was reported to the police. She gave a police statement. The part about the complainant trying to come out from underneath the bed, forced to lie on top of the bed is not in her police statement. If a romantic relationship existed between the complainant and the accused, then it would have been frowned upon. The complainant's father told her to report the matter to the police. They couldn't believe that such a thing could happen to the complainant.

During re-examination, she stated the following:

The complainant also wanted to report the matter to the police. She couldn't believe that her paternal uncle, the accused could do this to her.

DEFENCE EVIDENCE

[7] The accused gave sworn evidence. He stated the following:

In 2004, he was employed as a mini van driver. He went to his brother's home and asked his niece to accompany him to clean his boss's house at Davuilevu Housing. They boarded a bus and went to Davuilevu Housing. At the house, they started cleaning. He was cleaning in the sitting room. She was in another room. He told her to collect boxes from under the bed. She is his brother's daughter. It was the first time that he had taken her to clean the house. As they were cleaning the house, he asked her for them to sleep together. This conversation took place in the same room that she was cleaning. She didn't hesitate and said yes. He took her yes that she also wanted them to sleep together. They slept together until both of them climaxed. He had taken off his clothes. She had taken off her clothes. She asked him if she could go back home after that. He paid for her bus fare. The doors were all unlocked and she could leave at any time. It would have angered their family if they knew about this relationship. It was sex by consent.

During cross-examination, he stated the following:

He denied not being in a romantic relationship with the complainant. On 18th October 2004, it was the first time that he had sex with her. She regards her as a father. She didn't say anything let alone saying no to him. She said yes. He told her to pull the cartons out from underneath the bed. After they agreed to have sex, she returned home. She went to another room and groomed herself and left for home. She didn't clean the other rooms. She was taken to clean the house. He didn't have intention to have sex with her. The purpose to clean the house was not achieved. He was arrested on the same day. It was about three to four hours later. It was about 11am that she left the house. He didn't force her to have sex with him. He asked her to have sex with him. Her sister in law wouldn't have known about this if she had not been told by the complainant. They both agreed to have sex. He pictured her as an adult. He never saw her as his brother's daughter. He didn't force her to have sex with him.

LAW RELATING TO RAPE

[8] Sections 149 and 150 of the Penal Code Act states that:

“Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.

Any person who commits the offence of rape is liable to imprisonment for life, with or without corporal punishment."

[9] The elements of the offence are:

- (a) Any person who has unlawful carnal knowledge of a woman or girl
- (b) without her consent

[10] In criminal proceedings, the standard of proof is that of beyond reasonable doubt. The burden of proof always lies with the prosecution to prove the guilt of the accused. The burden of proof never shifts to the accused and he does not need to prove his innocence.

[11] In the case authority of **State v Fong** HAC 300 of 2011S, Justice Temo made the following remarks with regards to the definition of burden of proof and standard of proof in criminal trial at paragraphs 4, 5 and 42.

"As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion, that he is not guilty.

Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged."

[12] I have considered all the evidence adduced by the Prosecution. The Prosecution relied on the evidence of the first and second prosecution witnesses to prove the elements of the offence of Rape. I have also considered the evidence adduced by the Defence.

[13] From all that the court has heard and observed from the witnesses for the Prosecution and for the Defence, I find that there exists no reasonable doubt as to the guilt of the accused.

[14] Therefore, I find that the Prosecution has proved its case beyond reasonable doubt against the accused for the offence of Rape contrary to sections 149 and 150 of the Penal Code Act. I find the accused guilty as charged and convict him accordingly.

On this 19th day of May 2023



Sufia Hamza

Resident Magistrate

