

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 225 of 2019

STATE

V

EMONI SAUKIWERE

Counsel : Mr. Muhammed Rafiq with Ms. Sheenal Swastika and Mr. Unal Lal
for the State

Ms. Nimita Sharma with Ms. Shaheen Ali for the Accused

Dates of Trial : 18 and 20-22 July 2022

Closing Submissions : 25 July 2022

Judgment : 23 August 2022

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "MN".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Emoni Saukiwere, is charged with the following offence:

COUNT

Statement of Offence

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

Particulars of Offence

EMONI SAUKIWERE, between the 6th day of December 2019 and the 7th day of December 2019, at Nadi, in the Western Division, penetrated the vagina of **MN**, with his penis, without her consent.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

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

- [7] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

- (a) *the person has carnal knowledge with or of the other person without the other person's consent; or*
- (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*
- (c) *the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

[8] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

[9] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.

[10] Therefore, in order to prove the count of Rape, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) During the specified period (in this case between 6 December 2019 and 7 December 2019);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the vagina of the complainant MN, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[11] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[12] The second element relates to the specific period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[13] The fourth element involves the penetration of the complainant's vagina, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

[14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.

[15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(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.

[16] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not

care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

- [17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 14 years of age at the time of the alleged incident, and therefore, she had the mental capacity to consent.

The Admitted Facts

- [18] Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

- [19] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. The complainant is MN, 14 years, student of Sabeto, Nadi.
2. The accused is Emoni Saukiwera, 24 years, Labourer of Sabeto, Nadi.
3. The accused is also known as Moni.

- [20] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[21] The prosecution called the complainant, MN, her mother, Anaseini Marama, and PC 4199 Jolame Tuidroto, in support of their case.

[22] Evidence of the complainant MN

- (i) *The complainant's evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused during the time her evidence was being recorded.*
- (ii) *The complainant testified that she is currently residing at Nawaka, Nadi with a Pastor named Salote Save. She has been residing with Pastor Salote for two weeks.*
- (iii) *She is now 17 years of age. Her date of birth is 5 May 2005.*
- (iv) *The witness testified that in December 2019, she was living with her parents at Keolaiya in Sabeto. She had been living in Keolaiya since she was in Class 6. Her father's name is Simione Caganivalu and her mother's name is Anaseini Marama.*
- (v) *The complainant testified to the events which took place on 5 December 2019. She said that she was home during the day time doing the housework. Her parents were also at home. After completing the housework she had slept and woken up at 3.00 p.m. Thereafter, she had cooked food.*
- (vi) *The complainant stated that in the evening her parents had been angry with her. When asked why they were angry with her she said she cannot recall. She said: "They beat me". Thereafter, the complainant had left the house. She said: "I went beside the road. The Keolaiya Road. The road is beside the house."*
- (vii) *The witness said that she had walked about 15 meters on the road and had been sitting on the road for over an hour. The time was 9.00 p.m. or 10.00 p.m.*
- (viii) *The witness said that while she was sitting on the road a Fijian guy named Emoni had come there. She had told him that she had wanted to call her sister Kinisimere (who was 22 years old at the time). When asked why she wanted to call her sister, the witness said: "Because my parents were angry at me and I was crying".*
- (ix) *When the complainant was asked how she knew that the Fijian guy's name was Emoni she said she had asked her parents. She said: "After the incident took place then I asked my parents."*
- (x) *Emoni had told her that he will buy a recharge to call her sister. Thereafter, he had told her to come to their house and she had agreed. The complainant said that she had gone to Emoni's place and slept the night there. When she*

woke up it had been daylight. When asked who else were in the house when she woke up she said she can't recall.

(xi) After waking up she had again asked Emoni about the recharge to call her sister. Emoni had told her that they can go and buy the recharge and she had gone with him. Emoni had told her that the shop is a bit far from their house but she didn't know where exactly it was.

(xii) The following questions were then asked from the witness and she answered as follows:

Q. Did you reach the shop?

A. No.

Q. So where did you go?

A. Beside the river – Korobebe River.

Q. Have you been there before?

A. No.

Q. What was the time like?

A. I think 8.00 a.m.

Q. Can you describe how the place looked like?

A. There was forestry – there were trees.

Q. Was there anything else in that area?

A. No.

Q. What happened when you reached the river?

A. I asked Emoni where is the shop. He replied that the shop is in the forestry-besides the river.

Q. What happened after that?

A. I told him the shop is not there. I can just see the forest.

Q. Then what was his response?

A. "The shop is there. The shop is there."

Q. What was your response?

A. I did not say anything else. I ran back.

Q. Where were you running to?

A. To get back to the road.

- Q. *Why were you running away?*
A. *Because I was afraid and because he also lied that the shop was there.*
- Q. *What happened while you were running?*
A. *He ran after me.*
- Q. *What happened then?*
A. *He touched my shoulders and he lifted and carried me [Witness demonstrated as to how this happened].*
- Q. *How was he carrying you?*
A. *He carried me on his shoulders.*
- Q. *What was your reaction to this?*
A. *I told Emoni not to do anything to me. The witness said that she had said "don't do that to me" three times.*
- Q. *What did he then do?*
A. *So he carried me on his shoulders to the other side of the road. Later, the witness said that he carried me to the forest not far from where he lifted me.*
- Q. *Why did you then mention that he carried you to the other side of the road?*
A. *I said I ran towards the road because I was running towards the road. But before I could get to the road he carried me to the forest.*
- Q. *What did he do next?*
A. *Then he put me down. Then he try to take off my skirt.*
- Q. *Where did he put you?*
A. *On the grass.*
- Q. *What position were you in?*
A. *I tried to push Emoni.*
- Q. *Which side were you facing?*
A. *I was looking up/face upwards.*
- Q. *When Emoni put you on the grass where was he?*
A. *Emoni went on top of me.*

- Q. *What did he do?*
A. *Then he kept trying to pull down my skirt and my pants.*
- Q. *What was your reaction to this?*
A. *I was afraid.*
- Q. *What did you do?*
A. *I tried to get up but I couldn't because he was on top of me.*
- Q. *What happened next?*
A. *I was trying to push Emoni away – for him not to be on top of me.*
- Q. *Did you manage to push him away?*
A. *No.*
- Q. *Then what happened?*
A. *I was weak because he was holding on to my hands.*
- Q. *Why were you feeling weak?*
A. *Because he was on top of me and he was holding on to both my hands.
[Witness demonstrated as to how this happened].*
- Q. *What happened next?*
A. *Then he tried to remove my panty.*
- Q. *Was he successful in pulling out your skirt and pant?*
A. *He lifted up my skirt and pulled down my pants.*
- Q. *Did he manage to remove your panty?*
A. *Yes.*
- Q. *What did Emoni then do?*
A. *Then he tried to have intercourse with me.*
- Q. *Could you further explain by what you mean by intercourse?*
A. *In the intercourse, he tried to put his penis into my vagina.*
- Q. *What was your reaction at this time?*
A. *I was feeling sore.*
- Q. *Where were you feeling sore?*
A. *My vagina.*

- Q. *Did Emoni manage to insert his penis into your vagina?*
A. *Yes.*
- Q. *How do you know that his penis was inside your vagina?*
A. *When I started feeling sore. That is when I knew.*
- Q. *For how long did Emoni continue doing this to you?*
A. *I can't recall.*
- Q. *While he was inserting his penis into your vagina, what did you do?*
A. *So I tried pushing him again – and this time he got up.*
- Q. *What was your reaction when you felt pain? What was your reaction to the pain?*
A. *When I felt the pain I tried pushing him away.*
- Q. *What did he do then?*
A. *Then he said sorry to me.*
- Q. *Then what did you do?*
A. *I just got up and walked towards the road.*
- Q. *Was Emoni also coming with you?*
A. *I went first and he came after.*
- Q. *During the incident, when he inserted his penis into your vagina, how close was Emoni to you physically?*
A. *He was on top of me [the witness tapped her chest to indicate this].*
- Q. *Were you able to see his face clearly?*
A. *Yes.*
- Q. *Was there anything between Emoni and you that would have disturbed (obstructed) your view?*
A. *No.*
- Q. *Do you remember what Emoni looks like?*
A. *Yes.*
- Q. *What is the reason to remember how he looks like?*
A. *His face and his height. Later the witness said: "When I see him I knew".*

Q. Do you know where he live at that time?

A. Yes. Not from the same village, but we stay in the same area.

Q. Have you seen him before this incident?

A. No.

Q. How long did the incident take in time? From the time Emoni got on top of you?

A. I can't recall.

- (xiii) The complainant identified the accused in the dock as Emoni Saukiwere.
- (xiv) The complainant said that after the incident the accused was trying to apologize to her. Then the accused had told her to go to his house. When asked why she didn't go to her house, the witness said because she was told by Emoni's parents that the Police was looking for her and she was frightened. This was while at Emoni's house. The time was around 10.00 in the morning.
- (xv) The witness said that she did not tell Emoni's parents what Emoni had done to her because she was afraid.
- (xvi) Thereafter, the witness said that Emoni took her down to a forest near his home and told her to sleep. So she went off to sleep in the forest. She doesn't recall what time she woke up.
- (xvii) After waking up Emoni had taken her back to his house. Emoni's parents had told her that the Police had left. They had told Emoni to drop her off at her house. But Emoni had refused.
- (xviii) Thereafter, Emoni's parents had taken the complainant to her house. When she reached home her parents were there. They had asked her where she had stayed the night. The witness said that she had told her parents that she had stayed at Emoni's house.
- (xix) Then her parents had told her to go and change her clothes. At that stage they saw the blood on her clothes (on her skirt). At the same time her father had called the Police and told them to come.
- (xx) The complainant testified that the police had come picked her up and taken her to the hospital. At the hospital they had examined her and after that written a paper and given to the police. Thereafter, she had returned home.
- (xxi) When asked why the Police had been looking for her earlier, the witness said because her parents had informed the Police that she had not been at home.
- (xxii) The witness said that she had only informed her parents about what Emoni did to her after she had been examined at the hospital.
- (xxiii) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with the defence case.

- (xxiv) *It was suggested to the witness that she knew Emoni prior to the date of the incident. She denied this suggestion. It was also suggested to the witness that she had twice visited Emoni's house together with her parents prior to the date of the incident. The witness denied the suggestion.*
- (xxv) *The complainant confirmed that she had been residing at Keolaiya in Sabeto for 3 years prior to the date of the alleged incident.*
- (xxvi) *It was suggested to the witness that the reason her parents had been angry with her (the night prior to the incident) and the reason her father had beaten her with a stick was because she had been seen with a boy in the village. The witness said she cannot recall and also said that she doesn't know.*
- (xxvii) *It was suggested to the complainant that when Emoni had seen her on the road (the night prior to the incident), he had asked her to go back home and that the complainant had said that she doesn't want to go back home because she was scared of her parents. The witness said that she cannot remember.*
- (xxviii) *It was further suggested to the witness that she had then followed Emoni to Rohit's house where he was headed to watch a Fiji rugby match that night. On reaching Rohit's house that Emoni had gone inside to watch the rugby match, while she remained outside on the road. The witness said that she cannot remember. However, she said she knows who Rohit was. He was the owner of the sugarcane farm and he had hired labourers to cut sugarcane for him. One of the labourers was Apenisa Nalagi.*
- (xxix) *It was suggested to the witness that amongst the people watching rugby was Apenisa Quarita, who was the boy she had been seen with in the village. The witness said she cannot remember.*
- (xxx) *It was further suggested to the complainant that the said Apenisa Nalagi had called her to come and sit inside the house and when she did so he had asked her what she was doing outside. Again the witness said that she cannot remember.*
- (xxxi) *It was suggested to the witness that she had sat and watched the rugby match at Rohit's place until early morning. The witness said she cannot recall.*
- (xxxii) *It was suggested to her that Apenisa Nalagi had even offered to take her back to her house, but that she had refused. The witness said she cannot recall.*
- (xxxiii) *It was further suggested that after the rugby game finished at Rohit's house, Apenisa Nalagi had told the complainant to go back home with Emoni. She said she cannot remember.*
- (xxxiv) *It was suggested that Emoni then went to his house and that she had followed him. On reaching Emoni's house that she had breakfast there. The witness said she cannot recall. However, the witness confirmed that Rohit's*

house is close to her house. She also confirmed that if one were to go from Rohit's house to Emoni's house that they have to pass or cross her house.

(xxxv) It was suggested to the witness that thereafter she had followed and accompanied Emoni to his boss Messi's house. The witness said she cannot recall. It was further suggested that on the way back from Messi's house they had met one Bijay who is very familiar with her parents. The witness said she can't recall.

(xxxvi) It was suggested that on returning to Emoni's house, Emoni's parents had informed her that the police were looking for her. Thereafter, that Emoni's parents had taken her back to her house and that they took yaqona with them as an offering, so that her father would not beat her up. Again the witness said she cannot recall.

(xxxvii) The complainant agreed that after Emoni's parents had left that she had been questioned by her parents as to her absence from home the previous night.

(xxxviii) The following questions were inter-alia asked from the witness and she answered as follows:

Q. When you returned home after the incident, your father had vigorously questioned you about your whereabouts the previous night?

A. Yes.

Q. And you had to have a good reason to explain your absence from home the night before?

A. Yes.

Q. And that is when out of fear being beaten up that you said that Emoni raped you?

A. Yes. Later when the question was repeated the witness asked: "Is it after the incident when they questioned me – after the medical examination?"

Q. You said you were taken for medical examination and the Doctor wrote a paper?

A. Yes.

Q. And you were questioned after that by your parents?

A. Yes.

Q. And it is out of fear of your parents that you told that Emoni raped you?

A. Yes.

Q. *I put it to you that in fact Emoni did not rape you?*
A. *There was no answer given by the witness to this question. Court observed that the witness was seen smiling/laughing. Thus, this question was put again (Court insisted that the witness has to answer the question). The witness says as follows: "what should be my answer yes, or no or should I lie?" Finally, the witness answered no.*

Q. *Did Emoni rape you or not?*
A. *Yes. Emoni raped me.*

Q. *I put it to you that Emoni did not have sex with you?*
A. *We had sex.*

Q. *I put it to you that you have been lying to this Honourable Court and at no time did my client Emoni take you to the river and have sex with you?*
A. *I am not lying.*

(xxxix) The Defence highlighted the following inconsistencies in the testimony given in Court by the complainant, vis a vis the statement made by her to the police on 7 December 2019:

i. In her testimony in Court, the witness said that she had told Emoni that her father had beaten her up.

However, in her statement made to the Police, it is recorded as follows:

"I lied to him saying that mother beat me".

ii. In her testimony in Court, the witness said that she had not gone to Rohit's house the night prior to the incident.

However, in her statement made to the Police, it is recorded as follows:

"He told me to go with him to Rohit's house and I agreed to it. At Rohit's house I went and got inside an old car which was parked in the compound".

iii. In her testimony in Court, the witness said that she couldn't remember why her parents were angry with her that night.

However, in her statement made to the Police, it is recorded as follows:

"I can recall that on 05/12/19 at about 9.00 to 10.00 p.m. my parents questioned me regards to rumours that I was seen with a boy at our neighbour's compound".

- iv. In her testimony in Court, the witness said that she did not know the name of the accused prior to this day and that she got to know his name from her parents.*

However, in her statement made to the Police, it is recorded as follows:

"I was sitting beside the road when one Moni came and asked me what I was doing outside".

- v. In her testimony in Court, the witness said that Emoni remained with her in the forest the entire time.*

However, in her statement made to the Police, it is recorded as follows:

"He then took me inside the nearby bushes, whilst there he told to wait as he is going to get some food for us. When he left me I slept alone inside the bush as I was tired. After sometimes he returned back with pancakes, rice, lemon, and water for us to have".

- vi. In her testimony in Court, the witness said that Emoni took her to the forest because she was told by Emoni's parents that the police were looking for her.*

However, in her statement made to the Police, it is recorded as follows:

"When we were coming home Moni said to me that he was scared of the prison inmates who were harvesting sugarcane beside the road to our house".

- (xl) In re-examination, the witness was asked certain clarifications regarding the evidence she gave during cross-examination.*

[23] Evidence of Anaseini Marama

- (i) The witness testified that she is 45 years old and currently residing at Keolaiya, Sabeto. She is doing domestic duties. She resides at Keolaiya with her family – her husband and four children (3 female and 1 male). Her husband's name is Simione Cagilivalu. The complainant is her third child.
- (ii) The witness testified that even in December 2019 she was residing in Keolaiya, Sabeto with her family. At the time she had been living in Keolaiya for 4 years.
- (iii) The witness testified to the events which took place in the evening of 5 December 2019. She said she was preparing dinner for her family. After that she and her husband had spoken to the complainant. When asked what they had spoken to the complainant about, the witness said that they had been telling complainant what to do and what not to do. Teaching her what is right from wrong and to be obedient towards her parents. This conversation with the complainant had taken place around 7.00 p.m.
- (iv) The witness said that the complainant did not like what her parents were telling her and had got angry. She did not sit still at home to listen to what they were telling her. Thereafter, the complainant had left the house and gone down to the road. The witness said she had followed her down the road but couldn't see her. Thereafter, the witness had returned home and gone to sleep.
- (v) Since the complainant had not returned home in the night, (the next day) they had lodged a report at the Police Station. Thereafter, the Police had come to her house. She had accompanied the Police in looking for the complainant. However, the complainant could not be found. So she had returned home.
- (vi) While they were at home, around 2.00 p.m., the accused's parents had brought the complainant home. At that time, she had seen blood on the white skirt that the complainant was wearing. She had asked the complainant what happened. The complainant had said that Emoni did something to her.
- (vii) Thereafter, the matter was reported to the Police. Later in the evening (on 6 December 2019), the complainant had been taken by the Police to the hospital for medical examination. The witness had accompanied the complainant.
- (viii) In cross-examination, the witness agreed that in the evening of 5 December 2019, she and her husband had been questioning the complainant about being seen with a boy in the village. She agreed that that was the topic of the discussion. The witness also admitted that her husband had beaten up the complainant that day. Thereafter, the complainant had left home.

- (ix) *The witness agreed that her family and the accused family knew each other prior to the alleged incident. She said the families were related through her paternal old grandparents.*
- (x) *She also agreed that after Emoni's parents had brought the complainant home, that she and her husband and Emoni's parents had a grog session.*
- (xi) *The witness agreed that after Emoni's parents had left their house that is when she had started questioning the complainant of her whereabouts the previous night. She also agreed that that is when she saw blood on the complainant's skirt and had called the Police.*
- (xii) *The witness agreed that thereafter, the complainant had been taken for medical examination. She further agreed that after the doctor had given the report she had questioned the complainant again about her whereabouts the previous night. The witness agreed that this is when the complainant had said that the accused had raped her.*

[24] Evidence of PC 4199 Jolame Tuidroto

- (i) *The witness testified that he is currently serving at the Sabeto Police Station. He has been in the Fiji Police Force for the past 17 years. He had started working in Sabeto Police Station in 2018. He is currently attached with the Criminal Investigations Department of the Sabeto Police.*
- (ii) *The witness said that he is the Investigating Officer in this matter. He attended to the report, recorded statements and followed up information in regards to this case.*
- (iii) *The initial report was in relation to the complainant missing from home throughout the night until the next morning. This information had been received from the complainant's mother on 6 December 2019.*
- (iv) *Since the complainant was missing from home, the Police had conducted a house to house check to ascertain whether anyone had seen the complainant. This was between 10.00 to 11.00 in the morning.*
- (v) *While conducting this check, the Police got to know that the complainant had been seen with the accused Emoni Saukiwere. Therefore, the Police had proceeded to the accused's house. Upon arriving at the accused's house, they had been informed by the accused's parents that they (the accused's parents) had informed the accused to take the complainant to her house.*
- (vi) *The Police had advised the accused's parents, that a report had been lodged at the Police Station (that the complainant is missing from home) and that the accused had to be questioned.*
- (vii) *The witness testified that thereafter, the complainant had been brought to the Police Station where her statement had been recorded.*
- (viii) *The witness had visited the alleged crime scene which was beside the Korobebe River. The witness testified to the investigations he had conducted at the crime scene.*

- (ix) *In cross-examination, the witness confirmed that during his investigations it was revealed that the complainant was at one Rohit's house watching rugby (the Dubai 7's) that night.*
- (x) *He also confirmed that the complainant had said that she was taken by the accused to the Nadole Settlement to buy a recharge.*

[25] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[26] The accused exercised his right to remain silent. However, he called one witness, Apenisa Nalagi, in support of his case.

Case for the Defence

[27] Evidence of Apenisa Nalagi

- (i) *The witness testified that he is 42 years old and currently residing at Nagado Village, Sabeto. He resides at Nagado with his wife and 4 kids. He has been staying at Nagado for the past 8 years.*
- (ii) *He is an Army Officer (Soldier) by occupation.*
- (iii) *The witness testified to the events which took place on the night of 5 December 2019. The witness said that on that day he was cutting cane at Rohit's farm until 5.30 in the afternoon. Thereafter, they had come directly to the barrack at Rohit's house. After having a shower, they had gone to drink grog. They had been drinking grog at one Harish's house until 4.00 in the morning. He said he was drinking grog with his cane cutters group-Emoni, Tabua, Viliame, Tuivuna, Peniasi and Apenisa Qarita.*
- (iv) *He testified that thereafter, they had come to Rohit's house to watch the Dubai 7's - the Fiji game. Whilst watching TV, he had seen the complainant outside. She was standing outside with Apenisa Qarita. Then the witness had called the complainant to come into the house. The complainant had come and sat beside him.*
- (v) *He had then asked the complainant why she was there so early in the morning. He said: "She told me that her parents beat her up and they want to send her to her original village. She was running away from home and she was waiting for her sister who was coming from Ba to pick her up". The time was between 5.00 and 6.00 in the morning.*

- (vi) *The witness said that he had asked the complainant whether he can drop her home to her parents. However, the complainant had rejected the offer. Thereafter, he had told the complainant that since Emoni is going up to his house that Emoni can take her and drop her at her house.*
- (vii) *When asked what happened after that, the witness testified: "It was early morning daylight. The sun was out. They went out. I asked Emoni, you drop her to her place then you go straight up to your mum and dad."*
- (viii) *The witness said that he knows the complainant for the past 8 years. He has been cutting cane with her father. That's how he knows her. He said that Emoni is his nephew.*
- (ix) *The witness further confirmed that at the time he was coming from Harish's house to Rohit's house that he had seen the complainant on the main Keolaiya Road. She was standing on the road covering her head with a piece of cloth.*
- (x) *The witness was cross examined by the State Counsel. The prosecution's version of the events were put to the witness during his cross-examination.*
- (xi) *The witness confirmed that he doesn't know where the complainant and the accused went after they left Rohit's house or as to what happened thereafter.*

Analysis

- [28]** The prosecution in support of their case, called the complainant, MN, her mother, Anaseini Marama, and PC 4199 Jolame Tuidroto. The accused exercised his right to remain silent. However, he called witness Apenisa Nalagi, in support of his case.
- [29]** The burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the charge beyond reasonable doubt.
- [30]** Accordingly, the prosecution has to prove beyond reasonable doubt that the accused, between 6 December 2019 and 7 December 2019, at Nadi, penetrated the vagina of the complainant MN, with his penis, without the consent of the complainant and that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting. I have already made reference to the said elements that the prosecution has to prove in paragraph 10 of this judgment.
- [31]** As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to

prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

- [32] Based on the said admitted facts it is admitted that the complainant, MN, was 14 years old and the accused was 24 years of age, at the time of the alleged incident. It is also admitted that the accused is also known as Moni.
- [33] I have summarized the evidence of all witnesses led during the trial.
- [34] At the time of the incident the complainant was only 14 years of age and as such a child. At the time she testified in Court she had turned 17. The complainant testified as to how the accused, on 6 December 2019, had taken her to a forest area near the Korobebe River and had forcibly inserted his penis into her vagina.
- [35] The accused totally denies the incident.
- [36] The defence attempted to impeach the complainant's credibility by highlighting certain inconsistencies in her statements made to the police on 7 December 2019, in comparison to the testimony given by her in Court. I have identified and made reference to the said inconsistencies when summarizing the complainant's evidence.
- [37] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions. His Lordship Justice Gamalath held as follows:

[9] When a court is dealing with the issues arising out of "contradictions", "omissions", it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of Appabhai v. State of Gujarat, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).

"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of

their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

*In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).*

"A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential."

[10] More often contradictions and omissions become the main tool used in courts to evaluate the testimonial trustworthiness of a witness's' evidence. As defined in the Oxford Dictionary "contradictions" means 'to offer the contrary'. On the other hand, if a witness has testified in the examination-in-chief on a certain thing which he has omitted to state in his statement to the police, it is called "omission". If the said omission is on minor points, it is not contradiction and court will not take cognizance of those omissions. Court will take cognizance of those omissions which are on material points and they are called "contradictions by way of omissions". In order to prove the omissions, it is necessary to find out as to what the witness has deposed before the court in the examination-in-chief.

[11] Any statement of a witness made to an investigating police officer does not form part of the evidence in trial. Court would not be looking into police statements of witnesses to find out the truth involved in a case. However, if any party to a law suit is depending on 'contradictions' or 'omissions' to assail the trustworthiness of the evidence of any witness, it is necessary not only to highlight the 'contradictions' or 'omissions', but also to prove them at trial, so that the court could consider the effect of them according to the criterion laid down in the decided decisions referred above.

[12] Whenever it appears in the proceedings of a trial that the witness's evidence is tainted with certain contradictions and/or omissions, opportunity should be given to such witness to explain the basis for such infirmities. If the explanation is plausible that would have a direct impact on the credibility issue.

*[13] In the case of **Sri Cruz Pedro Pacheco v. State of Maharashtra**, 1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision)*

"Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself."

- [38] I am of the opinion that none of the inconsistencies highlighted in this case are in relation to the primary incident which the complainant has testified to, which is the allegation of Rape against the accused. Therefore, in my view, they are not significant and also not fundamental to the issues Court has to consider in determining the charge of Rape. As such, I am of the opinion that the reliability and credibility of the complainant's evidence is unaffected, at least with regard to the main allegation.
- [39] That said, I found however that the complainant was very evasive in answering certain questions put to her in relation to the events which took place on the night of 5 December 2019. She said her parents had been angry with her that night and that her father had even beaten her that night. However, when asked for the reason they were angry with her, she said she cannot recall.
- [40] The defence position is that the reason her parents had been angry with her that night and the reason her father had beaten her with a stick was because she had been seen with a boy in the village. The witness said she cannot recall even this.
- [41] The complainant's testimony is that she spent that night at the accused Emoni's house. However, it has not been elicited in evidence as to where exactly in the house she slept that night. The fact the complainant says she spent the night at the accused's house is quite strange, because she said she did not know Emoni prior to that day. The position of the defence is that the complainant followed Emoni to Rohit's house where she had been till morning the next day.
- [42] The above evidence is corroborated by defence witness Apenisa Nalagi. This witness further testified that in the morning of 6 December 2019, he had requested the accused to drop the complainant at her place on his way home.
- [43] However, though the complainant's testimony with regard to the events which took place the night prior to the incident may have its deficiencies or infirmities, Court is satisfied with the evidence given by her with regard to the incident which took place at the Korobebe river.
- [44] The accused's denial of the incident in its entirety cannot be believed. Considering the evidence in its totality, this Court is of the opinion that the accused had on 6 December 2019, penetrated the vagina of the complainant with his penis. However, considering all factors, specially the conduct of the complainant after the incident, I am not

entirely convinced that this had taken place without the consent of the complainant or that the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[45] The complainant has testified that even after the accused had penetrated her vagina with his penis she had spent several hours with the accused. She said she went with the accused back to his house. When asked why she did not go to her house, the witness said because she was told by Emoni's parents that the Police were looking for her and she was frightened. This was around 10.00 in the morning while at the accused's house. Thereafter, she had gone with the accused to the forest and fallen asleep in the forest. She does not recall what time she had woken up. After waking up the accused had taken her back to his house. At this point, his parents had told her that the Police had left. They had told the accused to drop her off at her house. However, the accused had refused. That is when his parents had taken the complainant back to her house. According to the complainant's mother, this was around 2.00 in the afternoon.

[46] Therefore, considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has failed to prove the charge of Rape beyond reasonable doubt. Accordingly, in the light of this evidence the accused cannot be found guilty for the charge of Rape.

[47] However, in terms of Section 162 of the Criminal Procedure Act, I am of the opinion that the accused has committed the lesser offence of Defilement of a Young Person between 13 and 16 Years of Age.

[48] In terms of Section 215(1) of the Crimes Act: "*A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years*".

[49] As I have mentioned before, in layman's terms, having carnal knowledge with or of any person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[50] Therefore, for the prosecution to prove the offence of Defilement of a Young Person between 13 and 16 Years of Age, the prosecution must establish beyond reasonable doubt that the accused, between 6 December 2019 and 7 December 2019, at Nadi,

penetrated the vagina of the complainant, who is between the age of 13 and 16 years, with his penis.

[51] No issue of consent comes into play under Section 215(1) of the Crimes Act, as it is said it is no defence to any charge under this Section to prove that the person consented to the act.

[52] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Defilement of a Young Person between 13 and 16 Years of Age.

[53] In the circumstances, I find the accused guilty of the offence of Defilement of a Young Person between 13 and 16 Years of Age, in terms of Section 215 (1) of the Crimes Act.

[54] Accordingly, I convict the accused of the offence of Defilement of a Young Person between 13 and 16 Years of Age.



AT LAUTOKA

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Dated this 23rd Day of August 2022

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused:

Office of the Legal Aid Commission, Lautoka.