

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 166 of 2022

STATE

vs.

VILIMONI VESI

Counsel: Ms. P. Ram for the State
Ms. L. Ratidara & Ms. L. Tavaiqia for the Accused

Date of Hearing: 18th to 19th May 2023

Date of Closing Submission W/S: 30th May & 15th June 2023

Date of Judgment: 16th June 2023

JUDGMENT

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 13 June 2022;

COUNT ONE

Statement of Offence

RAPE: contrary to Section 207 (1) and (2) (b) of the Crimes Act, 2009.

Particulars of Offence

VILIMONI VESI on the 19th day of February 2022 at Tokou Village, in Ovalau, in the Eastern Division, penetrated the vagina of **SEKOLATIKI JULIANA KIVI**, with his fingers, without her consent.

2. **The Following Facts are Admitted**

1. **THAT** the Accused in this matter is **VILIMONI VESI**, [hereinafter referred to as “the Accused”] he was 27 years at the time of the offending.
2. **THAT** the complainant in this case is **SEKOLATIKA JULIANA KIVI** [hereinafter referred as “the complainant”] and she was 26 years at the time of the offending.
3. **THAT** the Accused and the complainant are related; the Accused is the complainant’s father’s sister’s son.
4. **THAT** the complainant normally resides in Suva with her family but they have a home too in Tokou Village, Ovalau.
5. **THAT** the complainant had come to Tokou Village to spend Christmas in December 2021 and remained there till after this alleged in February 2022.
6. **THAT** the complainant had been drinking alcohol and kava on the night of the 18th of February 2022 up until the early hours of the next morning, 19th of February 2022.

3. **The Following are Issues for Trial:**

1. Whether the Accused penetrated the victim’s vagina with his finger.
2. Whether the victim consented to the penetration, if the Accused penetrated her.
3. Upon the Accused pleading not guilty the trial commenced on 16th May, 2023 with voire dire inquiry and the caution interview was found to be voluntary and admissible. The trial proper commenced on 18th May, 2023 and the prosecution led 5 witnesses and closed its case. The defence was called for and the Accused gave evidence on his behalf. Both parties were heard and written submission were filed on 30th May and 15th June 2023 respectively and now it is for Judgment.
4. For the Accused to be found guilty of the count of Rape in the present case based on sub sections 1 and 2(b) of Section 207 that in addition to the date stated in the count the prosecution must prove beyond reasonable doubt, the following elements, that;
 - i) The identity of the Accused,
 - ii) Penetrated the vagina of the Complainant with his with his fingers,
 - iii) The Complainant did not consent to the Accused to penetrate her vagina with the with his fingers,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his finger in that manner.

The slightest penetration of the complainant's vagina by the Accused's finger is sufficient to satisfy penetration.

5. If I may elaborate the said count of rape is based on sub sections 2(b) of Section 207 of the Crimes Act. Under this section, the offence of Rape is constituted when a person penetrates the finger in to the vagina without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term '*consent*' means consent freely and voluntarily given by a person with the necessary mental capacity to give such consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
6. The accused is presumed to be innocent until he is proved guilty. 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 or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. As the Accused has given evidence in this case if this court accepts his evidence or is unable to reject or accept his evidence or if such evidence creates a doubt then too the accused is entitled to finding in his favour.

The Prosecution Case

7. The prosecution led in evidence five witnesses. They are:
 - PW1: DC 4503 Vonevate Vateitei
 - PW2: WPC Mere Mokua
 - PW3: Sekolatika Juliana Kivi (victim)
 - PW4: Losena Tuisevu Tuinaceva
 - PW5: Mareta Kivi
8. This allegation depends totally on the evidence of the victim Sekola and that of the caution interview which contains admissions as to the alleged act. Apart from the

victim her cousin Losena and her mother Mareta did bring in evidence as to certain circumstances before and after the incident. I will now summarize the prosecution evidence.

9. According to **PW3 Sekola**, she was around 20 years in age and lived in Raiwaqa, Suva with her parents and siblings. Her village is in Levuka and she used to visit her village during Christmas and stay there for few months. In December 2008 he had visited her village and stayed up until February 2021. On the 18th of February she has gone out with her niece Losana, her sister-in-law Niumai and some cousins and they were drinking kava as well as alcohol during entire night until she returned home on the 19th of February well after day break.
10. Towards the early hours of the 19th she had been in a state of intoxication and appears to have got into arguments and fights even with Losana. May be around 8am she had returned home and her mother had been at home. Next she remembers that she was in her mother's room sleeping on the bed when she heard her mother calling. As she woke up she had felt pain in her vagina and felt something penetrating as she sat up on her bed she had seen the accused Vilimoni on the bed seated somewhere on her leg and then he moved out of the bed to the floor.
11. Vilimoni had been bare bodied except for a black sulu. She was only in a towel which she said was covering her upper body but was not wearing anything else. Sekola has got off the bed, gone up to the door which was ajar. She had prevented her mother from coming in and held the door. Her mother had asked if Vilimoni is in the room, she had said no.
12. When asked why she uttered falsehood she explained that she felt embarrassed and was worried that her mother might think something bad about them if she came in and saw her in a towel in that manner, as she was scared she had lied so.
13. Then she had asked Vilimoni why he did that to her to which the accused had responded "why she was wearing that and lying on bed in that manner". Then she had got dressed and left the house to Losana's, around 10am when she left she had seen her mother hanging clothes.

14. Sekola, Losana and Niumai have walked towards the river when Losana observed love bites on her neck. She said that she was not aware as to how love bites got on to her neck and that she certainly did not have any such marks the previous night. She believes it was Vilimoni who had done this.
15. She had not felt like returning home and wanted to leave the village she says. She had slept over at Losana's place. She said that she did not want to sleep in her own house because of what happen. She had told Losana of what happen and on the 22nd of February she had left Levuka and returned to Suva. In this scenario she had been reluctant to tell her mother because she feared that aunt Maria will be chased out of the house if her father got to know of this. She had returned to Suva but not told anyone except Losana.
16. Vilimoni is her father's sister's son, her cousin. Vilimoni's mother Maria was living in their house with Sekola's mother and Vilimoni also appears to reside there. She said aunty Maria was like her second mother and she considered Vilimoni her own sibling.
17. After she returned to Suva she had received several messages from Vilimoni on her phone. These were messenger communications between her and Vilimoni. Screenshots of these messages received and sent on the 22nd of February and 5th of March were produced in court. Sekola said that these are screenshots from her phone which she handed over to the police. They were produced as PE 3 and the translation was produced as PE 4.
18. The said messages are as follows.

Feb, 22 9.15pm

Vilimoni Vesi: *Isa Se. I know that you hate me. Please forgive me because of what happened. Probably because I was drunk that day and I wish for our relationship strength as relatives not to be affected.*

10.16pm

Vilimoni Vesi: *I know that you are at Mari's place and I am pleading you not to tell her.*

10.27pm

Vilimoni Vesi: *Reggie please forgive me.*

10.43pm

Sekola Kivi: *Why didn't you ask for forgiveness when I was in the village? Big ass.*

Vilimoni Vesi: *You are not at home most the time. I went to the bush and you were still asleep and when I return you are at home.*

Sekola Kivi: *You were not that drunk like me. You know very well what you did and don't blame being drunk.*

Sekola Kivi: *Because of Aunty Maria, I will forgive you.*

Vilimoni Vesi: *Reggie please forgive me.*

Vilimoni Vesi: *Have you told those in Raiwai?*

Sekola Kivi: *No.*

Vilimoni Vesi: *Are you going for good?*

Vilimoni Vesi: *Just tell Mari not to tell anyone else.*

Vilimoni Vesi: *oeee*

Sekola Kivi: *It will broadcasted in the news*

Vilimoni Vesi: *Oeee face of an ass*

Sekola Kivi: *Why don't you tell her yourself?*

Vilimoni Vesi: *Aeeee, why can't you?*

Vilimoni Vesi: *Please se*

Sekola Kivi: *What, you are more afraid of them than the police?*

Vilimoni Vesi: *Osoboo*

Sekola Kivi: *Go and sleep. Do your confession and change yourself.*

Vilimoni Vesi: *Ok byeee*

Vilimoni Vesi: *Everyone here is asleep*

Vilimoni Vesi: *And they are snoring*

Vilimoni Vesi: *Byee*

March 5 1.23am

Sekola Kivi: *When you want to take the lead then you wait for the police there.*

Sekola Kivi: *I have already forgiven you but that you did this to me again, I will report you.*

Sekola Kivi: *I will not mind our relationship as relatives.*

Sekola Kivi: *What did you tell Breheret? They will think that I consented to what you did to me. Your mother's vagina. I passed out. You embarrassed me and my family.*

19. Sekola had received these messages after she returned to Suva on the 22nd. Upon returning she said that the accused through the messages did apologize to her and that she continued with the messaging to find out why he did that. She had not complaint on her own. It was the village headman who wanted her to complain and informed the police and she thereafter gave her report to the Totogo Police.
20. She was extensively cross examined. It was suggested that the accused being her cousin used to tease each other and that on previous years they have been drinking together. It was also suggested that on such an occasion she had insisted that he kiss her on her lips. She denied these suggestions.
21. It was suggested that on the 19th morning after she came home, she was chatting with the accused and also was teasing about "Wakolo" a girl from another village and it was

also suggested that she told him in a suggestive manner that he was “all talk and no action”. Then both of them went into the room after closing the doors of the house and with consent kissed and cuddled each other on the bed and he was touching her stomach when her mother called out. Sekola denied all these suggestions and said that she was in a state of black out and did not know what happen until she was awoken when her mother called.

22. It was suggested that the accused did not penetrate his finger into her vagina which was also denied. She admitted that she complained because the village headman advised her. However, she said that in view of her aunt she did not want to complain.
23. In re-examination she said that she was not worried about the rumours but she only wanted some advice as to how she should proceed. Aunt Maria had called her and requested her not to complain. She denied consenting to this act.
24. **PW4 Losana** said that on the 18th night up until the 19th morning she was drinking with Sekola and other cousins of hers and towards the early hours they consumed Whisky and Joskees near the beach at the mangrove. She said that around 5am Sekola got into several fights. She was extremely drunk at that time. After day break Sekola had left the others and gone back home.
25. Losana has later on visited Sekola’s house and she was asleep. Sekola’s mother was at home. She returned home, and Sekola had come to her place shortly thereafter. She was visibly confused when she came. Losana had observed love bites on her neck and told her. Sekola had then said that she cannot remember except she taking a bath and then she remembered waking up. She had told her that the accused was then seated on the bed and when asked what he was doing, he had said, *I was doing what you ask for*. Sekola at this time being emotional, disturbed and appeared to be shocked. Losana had also observed that she was in a different mood, depressed and not herself. She had not greeted her on that day as usual.
26. Sekola had stayed over at Losana’s house for the next two days. She had come to her house because Vilimoni was still sleeping in her house. During the two days she had returned to her house only to collect and change her clothes and has come back. She had not wanted to return to her house and then left for Suva.

27. In cross-examination she told that Sekola was not fully conscious that morning and did fight with several and had a fight with Kitu as who was showing an interest in her and trying to touch her but Aunty Sekola did not like it. Losana admitted making a statement to the police on the 15th of May 2023. She said that she also made a statement on an earlier occasion.
28. **PW5 Mareta Kivi** the mother of Sekola in her evidence said that after her nine children grew up and left for Suva she continued to live in Levuka. Vilimoni's mother came to live with her as she was in dispute with Vilimoni's father. Vilimoni also lives and stays in their house. On the 19th of February 2022, Sekola had gone to a mataqali gatherings with Losana and returned home that morning after 8 had a bath and gone to sleep. Vilimoni also has come home from another village. She has seen him arrived around half past 8 and was in the sitting room.
29. Then when she later on she realised that Vilimoni was not in the sitting room and also found that the room in which Sekola was sleeping was locked from inside. She had knocked on the door. She said that she wanted to look for some cake wrappers. She said that Sekola usually does not lock the door then gone back, when returned shortly she found that the door was open and Vilimone was lying on the floor. Sekola had been sitting on the bed but she was not looking at her.
30. She said that Sekola was drunk when she came home that morning and her eyes were red. That afternoon she had attended a birthday party however, Sekola did not come but was with Losana. This incident she said happened last year after Christmas and that Sekola left on a Tuesday next.

Police Evidence

31. **DC 4503 Vateitei** in his evidence said that on the 2nd of May 2022, he recorded the interview under caution of the accused and it was in i-Taukei language this was recorded at the Levuka Police Station. The said caution interview was produced as Exhibit PE1 and the English translation as PE1(a).

32. As the voluntariness was upheld at the voir dire inquiry the prosecution was permitted to lead in evidence the caution interview. The witness identified the accused and said that this interview was recorded voluntarily and the accused said was recorded in that form. The prosecution read in evidence the following questions and answers:

Q39: What happened after you had your breakfast?

Ans: We were just talking.

Q40: What was the conversation about?

Ans: We were just sharing jokes.

Q41: What was the joke about?

Ans: She was spoiling me to one 'wakolo' and I said for her to be 'wakolo'.

Q42: Then what happened?

Ans: Sekola told me up to you, you just have a big mouth.

Q45: What was Sekola doing when you followed her into the bedroom?

Ans: She was lying on the bed.

Q46: What was she wearing?

Ans: She wore a t-shirt and a towel around her.

Q48: What happened?

Ans: I pulled her legs when she was on the bed.

Q49: What did Sekola do when you pulled her legs?

Ans: She was just laughing and asked her and she said it is up to me.

Q50: What did you do when she said those words?

Ans: I went on top of her and hugged her and she returned my hug.

Q51: Then what happened?

Ans: Her mother called.

Q53: What was the purpose of that call?

Ans: To have lunch.

Q54: Who to have lunch?

Ans: Sekola Tika.

Q55: Did she go and have lunch?

Ans: After her mother left out she went and had a lunch.

Q56: What happened after Mareta left?

Ans: I slept and Sekola Tika went to have her lunch.

Q57: When did you had sex?

Ans: The time when I pulled her legs.

Q58: Do you admit having sex with Sekola Tika?

Ans: Yes.

Q59: How did you penetrate Sekola Tika's vagina?

Ans: My finger.

Q60: Can you recall which finger did you use?

Ans: My left pointed finger.

33. It was suggested that the accused did not admit putting his finger into the vagina and that he admitted only touching and kissing the victim. The witness denied these suggestions and said that he did admit penetrating his finger to the victim's vagina.
34. **PW2 WPC Mere** was the investigating officer as well as the witnessing officer to the caution interview. She had also translated the caution interview into English. In the course of her evidence as it transpired that there were some typographical errors she submitted of fresh corrected translation. This was produced in evidence without objection.
35. She had accompanied the accused for the reconstruction and also made photographs of the scene which booklet was produced as Exhibit PE2.
36. The complaint of this matter had been lodged in Suva by a person other than the victim. Sekola the complainant's statement had been recorded by another police station. She had arrested the accused on the 2nd of May 2022. She confirmed uplifting the screenshots of the messenger communication and tendered the same as PE3. The translation was tendered as Exhibit PE4. She identified the accused in open court.
37. In cross examination she admitted that Levuka was a close knit community and news travels fast through the community. She admitted that people were talking about this incident but denied being influenced by it. She said that she was witnessing the caution interview and admitted that the accused telling that he kissed and hugged the complainant and also that he admitted inserting his finger into the complainant's vagina.

Defence Case

38. Upon the defence being called the accused opted to give evidence. According to his evidence, Tokou in Levuka is his village and he visits there during Christmas. Sekola he said is his cousin and "tavale". He used to play with her, tease each other and swear at each other. On previous occasions he had gone out drinking with her. In 2017 he said that when she was serving drinks she wanted him to kiss her.

39. As on the day of the incident the Accused has been himself drinking the whole night and then returned on the 19th morning to Sekola's house around 7 o'clock. He was in the sitting area when he had seen Sekola coming in. According to him both sat at the table and have joked about 'wakolo' and she had swore back at him. Then he had told her "you just be 'wakolo'", when she had responded "up to you". The Accused claims to have kissed when she had walked into her room. Then he locked the front and the rear doors and he himself have gone in the room. He said that there was no one else at home and he locked the door for privacy Sekola was seen lying face up in the bed and when he went in she had smiled at him and she opened her eyes and he said, "What's up?" she had smiled then they have kissed and hugged willingly and with consent. He admits making the love bites at that time. He had bit her neck and she had been reciprocating. When he was touching her stomach her mother had called out. At that moment he got off the bed and Sekola had gone up to the door and prevented the mother from coming in. After a short while she had opened the door and gone out.
40. He denies penetrating her vagina. He admits sending the messages. He said that these messages were sent because he heard some rumours.
41. In cross-examination he said that he did not see Sekola's mother at home that morning and the house was empty when he came. It was suggested that he went into the room when Sekola was sleeping and saw her in a towel and then made love bites and penetrated her vagina with his finger without her consent. He denied inserting the finger into her vagina. He admitted that nothing about a rumour is said in the messages. He said that he sought forgiveness from her because he did not want her parents to know.
42. The Accused admits the exchange of the messages in PE3.
43. Under cross-examination he said that he did not see Sekola's, mother when he arrived. He in evidence said that he arrived at 7am but in his police statement he had said it was 10 o'clock.

Evaluation

44. The Accused took up the position that no one was at home when he came however, this was not suggested to Sekola's mother Mere as she specifically said that she was at

home and she saw the Accused coming. It was not suggested to Sekola of having a conversation before going into the room or being alone at home with the Accused or the locking of doors. To that extent the Accused's evidence is inconsistent.

45. He tried to explain the Messenger communication between them [the English translation is at PE3]. He admitted that nothing is mentioned about a rumour however, in his evidence he attempted to take up the position the complaint was made due to rumours. When he was asked why he was seeking forgiveness and pleading with Sekola if this was consensual his explanation was that as this was sex before marriage he sought forgiveness and he did not want her parents to know. If it was consensual seeking forgiveness in this manner and pleading is extremely normal. Considering the contents of these messages it is absolutely clear and apparent that he is seeking forgiveness from her. Therefore, his explanation that forgiveness was sought of general and a temporal nature is highly improbable and false. Therefore he is clearly lying on a material issue.
46. I observed his demeanour especially when he was confronted with the messages he became extremely evasive; did not answer directly. This to my mind was consistent with the demeanour of an untruthful witness.
47. The Accused takes up the position that the complaint was prompted due to rumours. It is admitted that Sekola and the Accused were first cousins; they have been in good terms with each other and there has not been any issue between them or their families. In fact the Accused says that he was the favourite nephew of Sekola's father. That being so even if there was some rumour it is highly improbable for Sekola to have made a false allegation of this nature and more so if something happened with consent in the secrecy of and privacy of their house.
48. According to the Accused's messenger communications he admits and starts by seeking forgiveness for what happened and says that he knows she hates him. For a person to hate another there has to be a rational reason. There was a cordial relationship between them. If whatever happened was with consent one would not hate the other. Thereafter, Sekola tells him that though she was drunk he was not. Later on Sekola tells him "that they will think that I consented to what you did to me.... I was pissed out."

You embarrassed me and my family”. The Accused had not denied or responded to this allegation. If what happened was consensual, one would expect in the normal course of event for the Accused to have spontaneously rebutted and denied this.

49. The accused says that he only kissed and hugged the victim and did not insert his finger. According to him all these happened with consent. If that be so, why should he message to the victim and seek forgiveness. In the messages at 9.15pm, 10.27pm and 10.43pm of the 22nd he repeatedly seeks forgiveness. This clearly leads to the inference that the accused had done something against or without her consent. In the course of the messages she had told him that “*they will think I consented to what you did to me ... I was passed out, you embarrassed me and my family*”. The accused had not denied this in the messages. This clearly proves that whatever the accused is alleged to have done requires seeking forgiveness as it was done without her consent and when she was in a knocked out condition. These exchange of messages contradict the position taken up by the accused. Therefore his evidence is contradicted by his own contemporaneous messages.
50. In the above circumstances the evidence of the Accused is inconsistent, highly improbable and contradictory and in all probabilities false. Accordingly, I totally reject the Accused’s evidence as being untruthful and false.
51. I do not believe Accused’s evidence, but this by itself does not lead to a finding of guilt, because to do so would be to forget who has to prove the case. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused’s guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused as innocent until the State has proved his guilt. The presumption of innocence means that Vilimoni Vesi does not have to establish his innocence. The State must prove that Accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused is probably guilty or even that he is very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to

all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused is guilty is when I can find him guilty. On the other hand, if I am not sure that he is guilty, I cannot find him guilty. Now let's evaluate the prosecution evidence.

Evaluation of the Prosecution Evidence

52. On a consideration of the totality of the evidence both the prosecution and the defence, it is common ground that the accused met the victim at her house on the morning of the 19th of February 2021. It is also not in dispute that the accused was on her bed when the complainant's mother called out. The fact that the victim was only having a towel around her as well as the accused wearing only a sulu. What is in dispute in context is the fact of inserting the finger into her vagina and consent.
53. I will now consider and evaluate the credibility and reliability of the complainant's evidence. The prosecution case relies on the oral testimony of the victim Sekola. To start with the complainant is belated. She had complained almost two months after the incident. A belated complaint by itself does not invalidate such evidence if there is a reasonable explanation. In assessing the issues of delay of reporting, in *State v Serelevu* [2018] FJCA 163; AAU141.2014 (4 October 2018) at paragraph 24 – 27; held as follows

[24] *In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in Tuyford 186, N.W. 2d at 548 it was decided that:-*

"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."

54. What are the reasons the complainant has advanced for her delay? To start with she says that she was afraid and embarrassed to tell her mother as the accused was her cousin and also his mother lived with the complainant's mother in their house. Due to this familial connection and the circumstances she had been reluctant to complain to her mother fearing that her father may throw out the accused and his mother.

55. The complainant however, has told her niece Losana of this incident almost immediately when she met her. If she was afraid to tell her mother why did she tell her niece within an hour of the incident? When she left the house after the incident, Losana has observed some bite marks on the neck and then the complainant has immediately told her of what happen. According to Losana the complainant looked depressed and different and was reluctant to go back home so much so, she had remain at Losana's house for two days and then left for Suva.
56. As for the belated complaint she does not on her own complain. It is only upon the village headman informing the police that she reports the matter. It is in evidence that accused's mother her aunt has requested her not to complain. It is confirmed by the messenger communications that she was willing to forgive the accused due to the familial background and circumstances, it is quite natural for a victim of an incident of this nature to be kept it a secret to avoid unnecessary family issues.
57. The complainant's demeanour and the state of depression clearly proves that she had faced some embarrassing and uncomfortable situation. If she with consent engaged in sexual activities she would not be depressed, afraid and upset as observed by Losana. Even if Losana inquired about the bite marks, she would not narrate the insertion of the finger into her vagina by the accused. It is clearly shows that she had spontaneously uttered what happen to her within one hour.
58. Considering the observations of Losana and the utterance made by the complainant in the position that some act took place against her consent is confirm.
59. The accused was almost her family whom she considered here own sibling. The accused had messaged to her seeking forgiveness. The mother of the Accused too had requested her not to report. In these circumstances the complainant, not rushing into lodge a report is extremely possible and probable. That is exactly what has happened in this instance.
60. A few months thereafter it is the village headman's intervention that compelled her to complain. Therefore I am satisfied that the explanation for the delay is reasonable and acceptable.

61. Let me now consider the probability of the victim's narration. She claims to have come home that morning drunk and intoxicated. She says that she was blackout and remembers coming home and then waking up when her mother called. According to Losana, the complainant had been consuming kava as well as other liquor throughout the night and by about 3am she had been fighting with others and behaving in an irrational manner. This clearly proves that the complainant was in an extreme state of intoxication. When she came home on the 19th morning may be between 7 and 8, victim's mother Mareta confirms that she looked drunk and her eyes were red, Mareta herself was annoyed and angry about the state of the complainant. She also confirms that the complainant after the wash went to bed straight away. In the normal course of human conduct when a person had been lavishly and without restraint being consuming a cocktail of substances and alcohol she being unaware as to the happenings is highly probable. This is exactly what had happened to the victim which is also confirmed by Losana and Mareta. Therefore she getting into a state of mental blankness or being pissed off as she says is possible and probable.

62. The complainant in her evidence does not directly say that she saw the accused finger being inserted into her vagina. To that matter she actually does not say that she saw a finger being inserted. What she says is, that when she woke up she felt pain in her vagina and something being inserted into her vagina. When she sits up she sees the accused seated on her leg and immediately moving out of the bed. If the complainant wanted to falsely and maliciously implicate or foist a false allegation one would expect her to say that she saw the accused inserting his finger into her vagina. She had not done so. Thus to my mind this is clearly consistent with the fact of she's being a truthful witness and testifying exactly what she saw and remembers. If she was in a state of intoxication she would certainly be in a deep sleep. She was virtually up the whole night. In these circumstances most certainly she can fall into a deep sleep and a person could without her realising and knowing touch, kiss and hug and violate her body.

63. The victim has had love bites on her neck. Is it possible for her not to know this happening? A person in the normal senses and presence of mind will naturally wake up if there is some physical contact and bodily violation. As explained above in the

circumstances and the conditions of intoxication someone taking advantage and violating her body without her knowledge and consent is possible.

64. Further the accused and the victim are cousins and there is no apparent or probable reason for her to make a false complaint against him.
65. In the above circumstances I am satisfied that Sekola is a reliable and a truthful witness.

Considering the Totality of the Evidence

66. I have rejected the Accused evidence as being untruthful. Now I will consider the totality of the evidence and consider if the prosecution has proved the charges beyond reasonable doubt. The identity of the Accused, the date of the incident and the fact that the Accused was in the room and on the bed are common ground and not in dispute.

Penetration

67. The alleged act of penetrating the finger into Sekola's vagina is denied by the Accused. Sekola herself was not in a very alert state of mind after a full night of drinking and at that moment she was a sleep or falling asleep. She is awakened by her mother calling and then suddenly finds the Accused on her bed. She does not claim to have seen the Accused inserting his finger into her vagina or to that matter not even seen the Accused pulling his hand out either. As she woke up she had felt pain in her vagina and felt something penetrating. The only person who was there was the Accused and was seated on her leg. According to the position explained by Sekola Accused was in a position and within breach of her vagina. Therefore, the evidence of Sekola as to penetration by the Accused's fingers is circumstantial. Certainly, she had not known or felt the presence of the Accused prior to being awakened. In her state of intoxication and sleep it is highly probable that she was in a deep sleep and that a third party could have violated her body without she knowing. When this was happening with a sudden noise called by the mother she awakening is also possible. According to her evidence she felt pain and something penetrating her vagina but has not seen anything. When a person suddenly awakes in these circumstances if something was penetrating her vagina she will certainly feel the pain in this manner. Correspondingly, if the Accused was inserting his finger he would immediately withdraw and pull his fingers out. In

these circumstances when the victim wakes up and sits up the Accused's fingers would have been withdrawn and she would not see the actual penetration.

68. Therefore, on these circumstances the only irresistible inferences that arises is that the Accused was penetrating his finger into her vagina. According to the caution interview the Accused admits penetrating Sekola's vagina with his finger question 59 as is follows Q59..how did you penetrate Sekola's vagina? Ans:...my finger. Q60; Can you recall which finger did you use? Ans.. My left pointed finger. Q61..Can you recall how many times did you penetrate her vagina with your finger? Ans..Only once. By these answers in the caution interview the Accused admits penetrating the vagina and also penetrating with his finger. Therefore, this evidence proves that the Accused did penetrate his finger in to the victim's vagina.

Consent

69. The position of the Accused is that whatever that happened was with consent. Sekola denies it and according to the evidence she was asleep in a state of intoxication when the penetration had taken place. She certainly could not have consciously consented in this condition. In any event she denies consenting and said that she was asleep.
70. If she was not consenting why did she prevent her mother from coming in and why did she not complain on her own? Accused and the victim are first cousins living in the same house whilst in the village and the Accused's mother was living with the victim's mother. In these circumstances she treated the Accused as her own sibling and when she suddenly finds herself in a compromising situation. It is natural in these circumstances to hide it from the rest of the family. If such a thing was committed by a stranger you would expect a victim to immediately make a hue and cry. Therefore, her spontaneous reaction was natural and probable. However, she immediately leaves the house for the next few days she does not return home and stays with Losana and then leaves Levuka. This conduct is clearly consistent with something being done to her without her consent and having faced an unpleasant incident. She keeps away because the Accused who was in the same house. Losana clearly observed that the victim was in a depressed and a disturbed state of mind and was not her usual self. Sekola has also

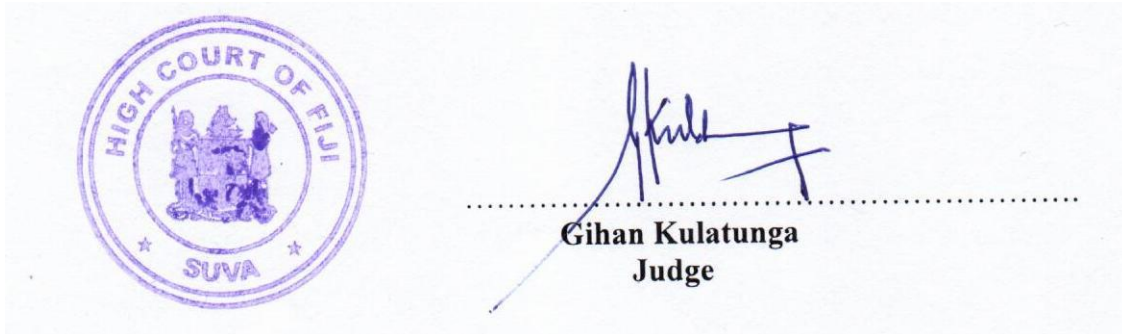
immediately told Losana. The subsequent conduct and her demeanour are clearly consistent with she having faced with something of an unpleasant nature without her consent.

71. The messenger communication further confirm that Sekola has not consented. She tells the Accused that others might think she consented. Then the Accused from the very outset is profoundly apologetic and seeks forgiveness. This is extremely consistent with the subsequent conduct of a person who has committed something against the will and without the consent of the victim. Accordingly, on the evaluation of the totality of the evidence it is proved that the Accused did penetrate Sekola's vagina with his finger and the same was done without her consent.
72. Further, I observe that Sekola was in a state of intoxication and of a poor state of mind and alertness. The Accused having observed this has taken advantage when Sekola was in a state of semi sleepiness in bed to kiss her and also to penetrate her vagina with his finger. Thus, she was certainly not in a proper state of mental alertness to consent which the Accused certainly knew and was aware. Accordingly, this further confirms the lack of consent as aforesaid.
73. The Accused says that she consented to whatever he did. In his caution interview he does say so. When there are mixed statements in a caution interview what is in favour of the Accused should also be considered. Let me consider if this could cause any reasonable doubt. The Accused admittedly sent the messenger messages on 22nd February just after the incident. The content and tenor of which in its context is only consistent with something having been done without the consent. In fact when Sekola tells *that others may think she consented* it means that she had not consented. The Accused does not respond to this. The Accused keeps on apologizing and expressing his regret. Therefore, subsequently in his caution interview has taken up a contrary position. Therefore, it is more probable that he is lying to save himself. Therefore, this does not cause any doubt in the prosecution's case.

Conclusion

74. In the above circumstances I am satisfied that the prosecution has proved beyond reasonable doubt that the Accused himself did penetrate the victim's vagina with his finger. The victim did not consent to this and that the Accused knew that she was not

consenting or atleast he did not care if she consented or not. Accordingly, I hold that the prosecution has proved the count of rape as charged beyond reasonable doubt. Accordingly, I find the Accused guilty and convict the Accused for the said count of rape.



At Suva

16th June 2023

Solicitors

Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the Accused