

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO : HAC 126 OF 2019

STATE

V

JAMES GOVIND SWAMY

Counsel : Ms S. Prakash for Prosecution
Mr. P. Heritage for Defence

Dates of Hearing : 5,6, 20 September 2023

Date of Judgment: 27 September 2023

(The name of the complainant is suppressed. She is referred to as AR)

JUDGMENT

- I. The accused is charged with one count of Rape contrary to Section 207(1) and (2) (a) of the Crimes Act 2009. The information reads as follows:

Statement of Offence

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

Particulars of Offence

JAMES GOVIND SWAMY on the 30th day of May, 2019 at Lautoka in the Western Division, penetrated the vagina of AR, with his penis, without her consent.

2. The accused pleaded not guilty to the charge. At the ensuing trial, Prosecution presented the evidence of the complainant and four other witnesses and closed its case. The accused was put to his defence when the Court found that the Defence has a case to answer. The accused and two other witnesses presented evidence for the Defence. The counsel from both sides tendered written submissions. Having carefully considered the evidence presented at the trial and the submissions made by the counsel, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence and that burden must be discharged beyond reasonable doubt. That burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt. The accused is under no obligation to prove his innocence or prove anything at all.
4. The Defence took up an *alibi* as a defence. But the accused is under no obligation to prove his *alibi*. It is for the Prosecution to disprove the *alibi* and prove beyond reasonable doubt that it was the accused James Govind Swamy and no one else that had penetrated the vagina of the complainant with his penis on 30 May 2019.
5. Section 207(2)(a) of the Crimes Act defines the offence of Rape as follows: a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slightest penetration is sufficient to prove the element of penetration.
6. 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 the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or

intimidation etc. will not be considered as consent freely and voluntarily given. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.

7. I shall now summarise the salient parts of evidence led in this trial.

PW1: AR (the Complainant)

8. AR is now 20 years old. She stopped schooling in 2020 when she had completed Form 6. In 2019, she was residing in Lovu hart, with her mother Iivema Lakasamai and her four siblings.
9. On 29 May 2019, after returning from school she was on Facebook. She received a friend request from one James Swamy which was under the name 'Mesa Swamy'. She accepted the request although she had not known this person before. Then they started a conversation (messaging) which lasted for an hour. He asked about her whereabouts and the school. She gave him all the information he required. He told her that he was working at the Lautoka City Council and residing at Field 40.
10. This conversation took place at around 7 p.m. After that, he asked if they could meet up. She refused to go to town because it was nighttime. Then he suggested that he could come to Lovu to see her. He asked her to wait for him at B.S. Charan Store which is situated just about 3 minutes' walk from her home. She gave her phone number to Swamy when it was asked for.
11. He called her phone on his way and informed her that he was coming in his car to B.C Charan. She went to meet him because he wanted to meet her. He came in his car to B.C Charan shop. He asked her to sit in the back seat of the car. When she sat in the back seat, he drove the car to an isolated place and stopped.
12. He got out of the car and came and sat in the back seat. He then started touching her. She told him to stop. He told her that he had locked the doors. She saw him taking off

his trousers. When he turned on the lights in the car she saw his face. It was the same face that was on Swamy's Facebook profile picture. The light was not that bright, but it was just enough to see his face clearly. The profile photo was clear.

13. He wanted to have sex with her. She told him 'no'. Then he forced her to take her pants off and told her to hurry up because he was about to return. He reminded her that all the doors were locked, so she couldn't go anywhere. Then he pulled her shirt to take it off. He took off her clothes and started touching her breasts. He then put his penis in her vagina for about 20 minutes. When he told him to stop, he stopped after a while. When he finished, he told her to go home.
14. Two days after this incident (2 June 2019). James was calling her again. She did not want to receive his call. Then she took out the SIM from the phone and gave it to her brother. Her brother took the SIM and inserted it into his phone. James had called her brother when she was sleeping. She woke up after James was punched. But she did not see James being punched. When she went to the police station, she came to know that Mesa Swamy's real name is James Swamy. The police officers told her that James Swamy is an ex- police officer.
15. He saw James only once. That was on 29 May 2019. The 2nd time he wanted to meet her, he was assaulted. When the car was parked near the shop, the light came from the shop and from the car. She could see his face clearly. When he came and sat in the back seat, she saw his face again. Nothing was obstructing her view. When he came and sat at the back, he turned on the light again and turned it he off.
16. She made a complaint to police. After she had reported the matter to the police, she would see this person in town and, when she came back from school, she saw his photo on Facebook. It was the same person who was there with her that night. She went to the police station the night (at around 1a.m.) James was punched. That was the day he had tried to call her again.

17. She took part in an identification parade (ID parade). She was able to identify the person who raped her. She positively identified the accused in the dock as the person who forcefully had sex with her.
18. Under cross-examination by Mr Heritage, the complainant denied that she had complained against the wrong person. She said that her Facebook account was under the profile name FJ Nolle Christopher. She could clearly see the profile picture of Mesa James. She admitted that the day the incident happened, her mother and her brother had checked for her at her friend's house, as she was not home. When she came home after the incident, her mother was not home, she had gone to work. Her mother did not question her about anything until the incident had been reported to police and what had happened to James. She agreed that she was taken to the police station on the night Mesa was assaulted and her mum and her brother were arrested for assaulting James. She saw Mesa sitting at the police station, with his face swollen. That was the first time she met him after the incident.
19. She agreed that her mother and her brother were charged with assaulting the accused. She does not know what happened in that case. She saw this person in town after the incident. She attended the ID parade and identified the accused who was standing with the other people in the parade. AR denied that she positively identified this person because she had met him prior to the ID parade. She had come from the village just to attend the ID parade. She got out of the car and went straight to the identity parade. She managed to identify the accused because she had met him the night when she was raped in the car and because he was a friend on her Facebook.
20. She denied that she made up the allegation of Rape to take revenge on the accused who had lodged a report against her mother and her brother for assaulting him.
21. Under re-examination, the complainant said that she came to know that the accused was assaulted by her mother and her brother and about the telephone conversation they had had only when her brother relayed the same when she got up.

PW 2: Iivema Marama Nawaqabuli

22. Iivema has six children and AR is one of them. After the incident, she sent AR to her brother in Suva to stay with him for a while because the people at Lovu had started looking at her in a different way. Prior to July 2019, AR was living with her at Lovu Hart home.
23. On 30 May 2019, (Sunday) evening, she was at home watching the games. AR did not have a phone herself, so asked for her phone saying that her friend was going to call her. When she started questioning AR to know who her friend was, without using her phone, AR, had gone to use her neighbor's phone. AR used to steal her phone to make calls. She scolded her about using someone else's phone.
24. She remembers being charged with assaulting the accused. It was because of the phone call that was made to AR. When she received the call, she pretended to be AR because she just wanted to know who the person who was calling her daughter was. The person who was calling her daughter told her to meet him at B.S. Charan Road. This person said that he was on his way to the shop, so she went there with two other ladies to wait for him. When she was waiting at B.S. Charan, a black car arrived. She stopped the car and asked the driver, *-Are you the one that has been calling my daughter?* and the driver said, 'no'. The driver said that he was going to finish a job. Then she showed him her phone and said that this is the number that was calling her earlier. Then the driver was surprised and told her that she probably mistook the person, that was not him.
25. She thought that the driver was lying, so she opened the door of the car and punched him. She was so sure that he was the person who called her, because, when she was pretending to be AR over the phone, he was the one who had parked beside the shop where they were supposed to meet. He then told her that his name was James and that he was formally employed with the police force and that what she was doing was against the law. That was how she knew his name was James.
26. The assault case was later withdrawn when she had reconciled with James. She had asked for forgiveness because she knew she was wrong. She thought about her two kids if she were to be put in prison, nobody was going to take care of her kids. She identified the accused in Court as the person whom she had punched.

27. Under cross-examination by the Defense Counsel, the witness agreed that on 30 May 2019, AR was not home after dinner, so she started looking for AR around Lovu area, but she couldn't locate her. AR returned home after 9.30 p.m. when she was found sitting near the drain. She saw some grass stuck on AR's back and she suspected that AR had been lying on the grass.
28. The witness agreed that on 02 June 2019, at about 10 p.m., a report was lodged by the accused against her for assaulting the accused. She agreed having said to police that the person in contact with her daughter was a bus driver and not one who worked at the Lautoka City Council. She sought forgiveness because she had wrongly identified the accused that night. In 2019, she was a student at USP. She was home the day the alleged incident happened.
29. AR did not have a phone or a SIM. She changed her voice and pretended to be AR when she received the call on her phone. She agreed that she lodged the report against the accused after the accused had lodged his report against her. She agreed that it was out of suspicion that she had blamed the accused that he had raped her daughter. On the day of the assault, AR did not come to the police station.
30. Under re-examination by the State Counsel, the witness said that AR later clarified and told her "Mum you had hit the wrong person". That's what made her change her mind that she was mistaken and realized that she had punched the wrong person. However, AR never saw the accused after the punching to clarify the identity of the person she had punched. AR's clarification was based on the description she gave of the person she had punched. When AR was lying down, she noticed grass on AR's back and AR was bleeding. As soon after she had punched the accused, a police vehicle came, and she and the accused were taken to the police station. AR did not go with them to the police station that night. AR later came to the police station and said to her that one man had touched her.

PW 3 Sgt. Asenaca Taufu

31. On 26 July 2019, when she was based at the Lautoka Police Station Sexual Offences Unit, she conducted the caution interview of the suspect, James Swamy. The suspect did not make any admissions at the interview and denied knowing the complainant. She asked the suspect if he was willing to participate in an identification parade. The suspect agreed. After the suspect consented, an identification parade was organized the next day and it was conducted on the 27 July 2019. She did not participate in the identification parade.
32. Under cross-examination by Mr. Heritage, the witness said that she had gone through the statements of the witnesses before conducting the interview. ID parade is conducted when the victim is not sure of the identity of the suspect. The victim had confronted that it was him, but the suspect was still denying so that's the reason for the identification parade. She denied that the ID parade was not fair because the complainant had seen the suspect prior to the ID parade.

PW 4 WPC Emily Bainivalu

33. On 27 July 2019, when Emily was based at the Lautoka Police Station, she received instructions to escort the complainant AR from the charge room to the training room where the ID parade was held. The charge room is located on the ground floor and the training room is on the second floor of Lautoka Police Station. When she entered the charge room the complainant was already there. She escorted the complainant and handed her over to the parade officer, inspector Silio, who briefed the complainant. She saw about 10 men of similar height as the suspect and of his complexion being lined up. All of them were of Indian descent. The complainant positively identified James, the accused. She knew the accused as they were working together at the Lautoka Police Station. But there was no coaching done to the complainant to point him out.
34. Under cross-examination, the witness said that, when the members of public enter the police station, they must enter through the charge room. Everybody at the police station knew that the suspect in the rape case was James and that he had worked at the Lautoka Police Station.

35. Under re-examination, the witness said that, when she went to the charge room to escort the complainant, the accused was not present in the charge room. Neither was the accused escorted through the charge room.

PW 5- ASP Silio Finau

36. Silio is an Assistant Superintendent of Police based at Sigatoka Police Station. When he was based at the Lautoka Police Station as an inspector, he, on 27 July 2019, conducted the ID parade in the training room at the Lautoka Police Station. He followed the proper procedure, and the ID parade was conducted fairly with the consent of the suspect who had denied the allegation at the caution interview.
37. Nine men with similar characteristics and ethnicity as the suspect were lined up with the suspect James Swamy. The suspect had no objections to the persons selected. Prior to the ID parade, the suspect was kept at the training room and the complainant was kept in the charge room down below.
38. PC Amit escorted the suspect into the training room. He informed the suspect to feel free to stand in whatever place he wanted to stand. The suspect chose to stand between No.7 and No.8 in the lineup. Straight after that, he called the witness who was escorted into that parade by WPC Emily. He briefed the complainant AR and informed her to move around and touch the person who had raped her, if he was present there. Without any hesitation, she straight away pointed and positively identified the suspect James. He asked the suspect if he had any objections to the manner the ID parade was conducted. The suspect was satisfied as to the fairness. James left the police force in 2016.
39. Under cross-examination, the witness said that he knew that the suspect was an ex-police officer. The suspect was present at the parade when he briefed the complainant. He was not involved in the investigation with CID personnel. He denied that he was not an independent person to conduct the ID parade because the suspect was a former police officer.

Defence Case

40. DW1: James Govin Swami
41. James currently is a Litter Prevention and Tobacco Control Officer. He is divorced and staying with his *de-facto* partner Faga Kijiana. He is residing at Field 40, Lautoka. In 2019, he was working at Lautoka City Council.
42. On 2 June 2019, he was assaulted by unknown I-Taukei people at B.S. Charan Road, while he was seated in his car. When he was being assaulted a police vehicle arrived, and a police officer intervened to stop punching. He was advised to lodge a report. The police officer took all of them to the Lautoka Police Station where he lodged a complaint.
43. He happened to be at B.S. Charan Road on 2 June 2019 because he received a call for him to pick one job from that place at around 10 p.m. A few days later, he was informed that the people who assaulted him were charged. He came to know that the persons charged were Iivema Marama and one Nemani.
44. When the court proceeding was pending at the Lautoka Magistrates Court, Iivema Marama kept coming to his workplace seeking forgiveness saying that her son made a mistake in identifying the wrong person when they assaulted him. He felt sorry for Marama and forgave her in court. He forgave them sometime in 2019 after he came back from remand for this matter. When that incident happened, he was living with his ex-wife Vinita Devi and his three children.
45. On 26 July 2019, he was arrested by police from his office. At the caution interview, he was told that a report has been lodged against him on 03 June 2019, the day after the assault incident, for raping the complainant on 30 May 2019 after 8.30 p.m.
46. On 30 May 2019, he was knocked off from work at 5 p.m. and after 8.30 p.m., he left home at Field 40 Rifle Range to drop his ex-wife and the children at the prayer meeting at Galba Street. The prayer meeting was held in memory of his ex-wife's aunt who had passed away a few days ago. It was a drive of 3– 5 minutes. After dropping them off at Galba Street, he went to his girlfriend Faga's place at Link Road.

at around 8.40 p.m. He picked Faga up and went to Marine Drive. After spending time there till 10 p.m., he took Faga to his father's place where they stayed till about 5.30 a.m. the next day (31 May 2019). Whilst coming out of that place, he got tangled in a cable and injured his right leg. He drove from there to drop Faga at her house and went to Kamikamica Health Center to get his injuries checked. After getting the sick sheet he went back to Field 40.

47. At the caution interview, he heard that one AR had made a complaint against him. He had never met AR before. He was also asked about one FJ Christopher Nollen B. He admitted that he had a Facebook account under the profile name 'Mesa Swamy'. He was using the photo that he took for the American Visa Green Card as his profile picture on Facebook. He was never a Facebook friend of AR. He was not aware if AR was using another name on her Facebook.
48. He admitted accepting a friend request that was sent to him by one FJ Christopher Nollen B. He accepted this request believing that it was from a boy as the profile picture showed a boy in a student list of Natabua. He conversed (messed) with this FJ Nollen. Nollen inquired about his name, employment, and what he was doing at Lautoka City Council (LCC). Nollen also asked for his phone number as he wanted to come and do some research on LCC cleaning program for schools.
49. It was at the caution interview that he came to know that AR was using the profile name FJ Christopher Nollen B. He was surprised when the interviewer was putting so many questions about the alleged rape incident at which he was never present. When he saw the complainant at the ID parade, he recalled that she was present with her mother and brother at the Lautoka Police Station after the assault incident on the night of 2 June 2019.
50. No call history was shown to him at the interview. A false allegation has been laid against him after the assault incident on 2 June 2019. Not only on 30 May 2019, but he stayed every night with his *de-facto* partner until he went to remand.
51. Under cross-examination, James admitted that, in the year 2019, he was 37 years old and was working for the LCC after being terminated from the Fiji Police Force in

October 2015. He was married to Vinita Devi from 2004 to 2022 with three children. Until Vinita moved to her family house in 2021, he was living with Vinita and the children at Field 40. At the same time, he has had a relationship with Faga since 2014 which blossomed into a *de facto* relationship in 2018.

52. James admitted telling the police at the interview that he was on bereavement leave for 3 days from 28 May 2019 and was home during the daytime on 30 May 2019. He apologized for forgetting that in his evidence-in-chief.
53. In 2019, he was driving an old black Toyota Succeed belonging to a friend. He denied that AR's mother came to know of his address because he had told AR of his address. He admitted to messaging with Christopher Nollen on 30 May 2019. He admitted that he had a good relationship with ASP Silio and WPC Emily all the time.
54. In re-examination, James admitted to stating to police that he was home at Field 40 at 8:30 p.m. on 30 May 2019.

DW 2 - Sergeant Livai Bulisolevu

55. In 2019 Sgt. Livai was based at the Lautoka Police Station Uniform Branch. On 2 June 2019, whilst doing the night shift, he received a report of assault and of an alleged rape. The assault was reported against an iTaukei lady from Lovu hart. They were brought to the station. The victim of the assault case was an Indo-Fijian.

DW 3- Vinita Devi

56. From the year 2021, she has been staying in M N Naidu. Before that, she was with her former husband James Govind Swamy at Mutla Street. On 30 May 2019, she was home till 8.30 p.m. and left home with James and her three kids for a prayer meeting held at her dad's place at M N Naidu Road. James just dropped them at her dad's place and left. At around 12 midnight she returned home. James did not return home that night.

57. Under cross-examination, Devi said she had some issues with her ex-husband but stayed together for the sake of the children with a mutual understanding. The daughter was asthmatic, and she needed his support to look after the three kids. They stayed together but in separate ways. When James returned home on 31 May 2019, she saw James limping and James said that he was with his girlfriend. But she was not sure where he was. When the rape charge was laid against James, she felt bad because she couldn't believe that James raped someone. She came to know about the rape allegation the day James was arrested. The police recorded her statement on 26 June 2020.

DW 4 - Faga Kitiana Prasad

58. Faga is in a *de-facto* relationship with James. Before moving to Mutla Place in 2021, Faga was staying at 15 Link Road, Kashmir. She started dating James in 2018. She recalls 30 May 2019, because on that day, James got his leg injured when it got tangled with a barbed wire. James used to come and pick her up every day between 8.30 p.m. to 8.45 p.m. and hang out and then go to the father's flat.
59. On 30 May 2019, James came after 8.30 p.m. She recalls the exact time because, after 8 p.m. to 8.45 p.m., she was watching *Ulu ni Tukutuku* on TV. James picked her up and went to Marine Drive where they hung out till 11 p.m. From there they went to James's father's flat in Vitogo and stayed there till 5.30 a.m. After leaving his dad's place, they had a conversation about the injuries and James said he was going to see a doctor.
60. Under cross-examination, Faga said that James used to come to her place every night between 8:30 p.m.-8-45 p.m. ever since they started dating in 2018. Therefore, she used to miss her favourite TV program *Ulu ni Tukutuku*. She said that her statement was recorded by police 3 to 4 months after James got injured at his father's place. When her statement was shown, she admitted that it was recorded on 11 June 2020, more than a year after the said incident.

Evaluation / Analysis

61. The Prosecution alleges that the accused penetrated the vagina of the complainant with his penis without her consent. The only dispute relates to the identity of the accused. The accused completely denies the allegation. He says that the complainant has mistakenly identified him as the culprit. In support of his defence, he raised a defence of *alibi*. The accused says that he was elsewhere at the time of the alleged incident. At the same time, he takes up the position that the complainant and her mother Marama made up the allegation after the accused was assaulted by Marama as a result of a mistaken identity.
62. The Prosecution called five witnesses and it substantially relied on the evidence of the complainant. Firstly, I shall test the reliability of her evidence in regard to the identity of the accused. Then I would test her credibility and honesty for me to be satisfied if she told the truth in Court.
63. The alleged offence has taken place at night after 8 p.m. According to the complainant, she had met the accused for the first time on Facebook. She received a friend request from a person whose profile page had been under the name 'Mesa Swamy'. There is no dispute that the accused was on Facebook and that the Facebook account under the profile name 'Mesa Swamy' belonged to the accused. The accused in his evidence admitted all these.
64. The complainant said that she could clearly see the profile picture of 'Mesa Swamy' on Facebook. This fact is also not disputed. The accused in his evidence admitted that the profile picture posted on his Facebook page under the profile name 'Mesa Swamy', clearly portrayed his face. Furthermore, according to the accused, the profile photo posted on his Facebook page had been taken by a professional photographer for the purpose of applying for the American Green Card Lottery. Then the profile photo should be crystal clear.
65. It is the evidence of the complainant that the profile name FJ Nollen Christopher was being used by her. The accused admits accepting a friend request from FJ Nollen Christopher and that this person was in his friends list on Facebook. Therefore, I

accept that the photograph posted on the accused's Facebook account provides a proper foundation for the identification of the accused.

66. There is no dispute that a conversation (by way of messaging) took place between the accused and FJ Nollen Christopher upon accepting the friend request. In that conversation, information such as the names, places of residence, employment/student status of both Mesa Swamy and FJ Nollen Christopher had been exchanged. The complainant said, in that conversation, she came to know that Messa Swamy worked at the Lautoka City Council (LCC) and that he was residing at Field 40.
67. This information matched perfectly with that of the accused. The accused admits that he conversed (messed) with FJ Nollen Christopher and in that conversation, Nollen inquired about his name, employment, and what he was doing at LCC and also asked for his phone number. The accused confirmed in his evidence that he was residing at Field 40 and that he was employed at LCC. Therefore, it can safely be assumed that the complainant acquired personal information of the accused from the accused himself during the said conversation. This conversation also provides a proper foundation for the identification of the accused.
68. Then I move on to the circumstances associated with the alleged incident of rape as far as they relate to identification. The complainant said that, during the said conversation, she gave her phone number to Mesa Swamy when it was asked for. The meeting place suggested by Swamy was B.S. Charan Store. Swamy called her phone and informed her that he is coming in his car and was on his way heading to B.S. Charan Store. Shortly, a black car arrived at the store and stopped. She went to the car that stopped. She sat in the back seat when she was asked to. The complainant had all the reason to believe that the man who had stopped at the store was the Facebook friend she was expecting to meet at that place and time. She had a proper foundation to identify this person because she had already seen his face clearly on his Facebook profile page to confirm his identity.
69. Bearing Turnbull Guidelines on visual identification in mind, I shall now proceed to examine complainant's identification evidence. When the car was parked near the store, the light was shining from the store. The driver turned on the (car) light and

turned it off. The car light was not that bright, but it was just enough to see his face clearly. She could see the driver's face clearly at a close range. When he sat in the back seat, he turned on the (car) light again and turned it off. She saw his face again at a close range. Nothing was obstructing her view. On comparison, she was assured that it was the same face that she saw on Mesa Swamy's Facebook profile photo. It was not a fleeting glance identification. He spent a considerable time with her during the sexual encounter. The bitter encounter would have left an indelible picture in her mind of the assailant. With the foundation she had had, there was no way that she could have been mistaken.

70. The incidents that followed the alleged rape incident also provide a proper foundation for the identification of the accused. Two days after the incident, (2 June 2019) Mesa Swamy called her again on the phone. The complainant did not want to receive his call. She took out the SIM card from the phone and gave it to her brother. Her brother took the SIM card and inserted it into his phone. She had then gone to sleep. She did not know what happened thereafter. Her brother did not come to give evidence. However, her mother, Iivema Marama (Marama), was in Court to tell the story that followed.
71. Marama described the sequence of events, starting from the telephone call she had received that led her to punch the accused. Answering the call, Marama pretended to be the complainant because she wanted to know who the person who was calling her daughter was. The person who was calling told her to meet him at B.S. Charan Road. This person said that he was on his way to B.S. Charan Shop.
72. Marama went to B.S Charan to meet the person who had called her. When she was waiting at B.S. Charan, a black car arrived. She stopped the car and asked the driver, - *Are you the one that has been calling my daughter?* and the driver said, 'no'. The driver then told her that his name was James and that he was employed with the police force. Then Marama showed him her phone and said that this was the number that was calling her a short while ago. Then the driver was surprised and told her that she probably mistook the person; that was not him. Marama was sure that the driver was lying. She opened the door and punched the driver.

73. Marama punched because she was sure that it was this person that made the phone call a short while ago. When she was pretending to be the complainant over the phone, he was the one who parked the car beside the shop where they were supposed to meet. There is no dispute that the accused was punched by Marama on the night of 2 June 2019. This part of Marama's evidence is undisputed.
74. According to the testimony of the complainant, this is the same *modus operandi* and the place used by the alleged rapist to meet the complainant two days ago. The driver's denial is not surprising, because he expected the complainant to be there, not her mother. After this incident, all of them went to the Lautoka Police Station where the accused had to lodge a report against Marama as instructed by the police officer who intervened to save the accused.
75. The complainant was not aware of the punching incident until she was woken up by her brother. She said that she was at the police station the night (at around 1 a.m. on 3 June 2019) her mother and her brother were arrested for assaulting James. When she was at the police station, she saw James sitting there, with his face swollen. That was the first time the complainant had seen James after the alleged incident of rape. The accused confirmed the evidence of the complainant when he said that he saw the complainant and her mother at the police station that night.
76. However, Marama in her evidence denied that her daughter came to the police station that night although she said that her daughter came later to the police station. The fact remains however that the complainant had recorded her statement at 9 a.m. on 3 June 2019. It is not clear whether she, having come there the previous night, remained at the police station to record her statement. In any event, I must accept the evidence of the complainant on this issue as it was corroborated by none other than the accused himself.
77. Then I would turn to the ID parade which, according to Prosecution, laid another foundation for identification. The ID parade was held on 27 July 2019, approximately two months after the alleged rape incident. At the ID parade, the complainant had no difficulty in identifying the accused. The question is why the police needed to hold an ID parade at all in the circumstances under which the identification was made by the

complainant before and at the time of the rape incident where, as I have described earlier, a proper foundation for identification had been laid. This was the question the Defence Counsel was putting to the police interviewer. This question was quite relevant to the Defence case as it concerns the strength of the Prosecution case.

78. Sgt. Taufā, who conducted the interview of the accused, answered this question in her evidence. According to her, ID parades are generally conducted when the complainant is not sure of the identity of the suspect. Before conducting the interview of the accused, she had gone through the witness statements where she realised that the complainant had confirmed that it was the accused who had raped her. However, since the accused was strictly denying his involvement, she suspended the interview to allow an ID parade to be conducted in fairness to the accused.
79. If the complainant had seen the accused at the police station on 3 June 2019, prior to the ID parade, as stated by the complainant and the accused, there was no point in holding an ID parade. It is noteworthy that, by the time the ID parade was conducted, the accused had already been arrested. It suggests that the police have had a solid evidential foundation to arrest the accused even without an ID parade. In those circumstances, it was not appropriate for the police to hold an ID parade after two months which will only weaken their own case and the credibility of the investigation process. It must not be forgotten that the accused is an ex-police officer who had served admittedly with the police investigators. The police witnesses confirmed that they are in good relationship with the accused even today. The accused in his evidence did not raise any issue with the manner in which the ID parade was conducted and about its fairness although his Counsel did.
80. Finally, the complainant positively identified the accused in Court as the person who raped her. There was a proper foundation for dock identification as I described earlier. She maintained her stance right throughout her evidence. She never said she was mistaken. I find that the complainant is a reliable witness.
81. Let me now test her credibility. The crucial question is whether the complainant picked the accused at the ID parade because she had seen him at the police station as

his mother's victim (in the punching case) or because she properly identified him to be her rapist.

82. The answer to this question will depend on how credible and honest the complainant has been in her evidence. The Defence Counsel argued that the complainant and her mother made up this allegation to take revenge on the accused. There is no logic in this argument. Why would Marama want to take revenge on a person whom she has already punched? Why would the complainant want to take revenge on a person who has already forgiven her mother for punching him?
83. The rational argument would have been that they made up this allegation to justify Marama's punching the accused because there was a strong case against Marama. Let me now see if this argument is tenable in the circumstances of this case.
84. There is no dispute that the complaint against the accused was lodged soon after the one made by the accused against Marama. The circumstances under which the complaint against the accused was made do not allow me to accept that the complainant and her mother made up this allegation.
85. The complaint against Marama was made because the accused had no option but to go to the police station in view that the police officer who intervened to save him had asked him to report the matter to police. The complainant was never present when the accused was punched by Marama. It can reasonably be assumed that Marama told the police what prompted her to assault the accused. The apparent reason why the complainant had to go to the police station that night was to clarify her mother's version as to what prompted her to punch the accused. When the complainant went to the police station that night she saw Mesa Swamy with his swollen face. She recognized the accused and her statement was recorded a few hours later (at 9 a.m. on 3 June 2019) implicating the accused in the rape. By that time, the complainant had never complained to Marama that she was raped.
86. There was inconsistency so far as the date of the charge is concerned. As per the information, the alleged rape was committed on 30 May 2019, whereas the complainant testified to an offence committed on 29 May 2019. However, this

inconsistency was never raised in cross-examination and there was no dispute that the date of the alleged incident was 30 May 2019. The complainant gave evidence approximately four years after the alleged incident and she may have forgotten the exact date of the incident. In her witness statement recorded two days after the incident, the complainant had told the police that she was raped on 30 May 2019. Therefore, this inconsistency does not affect the credibility of the complainant. The *alibi* evidence was led on the basis that the offence occurred on 30 May 2019. The inconsistency as to the date of the incident is not material in the circumstances as it did not mislead the accused nor was he prejudiced.

87. Marama in her evidence said that she sought forgiveness from the accused because she had wrongly identified the accused as the person who called her daughter. She agreed that it was out of suspicion that she had blamed the accused that he had raped her daughter. Under re-examination, Marama said that the complainant later clarified with her and told "*mum you had hit the wrong person*" and that's what made her change her mind that she was mistaken. Marama further said that her daughter did not see the accused after the punching but her daughter's clarification was based on the description she had given of the person she had punched.
88. The complainant never said that she was mistaken or that she had told her mother that she (Marama) had punched the wrong person. The complainant had seen the accused at the police station that night and if she had realized that her mother had punched the wrong person, she would not have proceeded to lodge a report against the accused. She would not have identified the accused as her rapist at the ID parade and also in Court, specially, when she knew that her mother had reconciled with the accused.
89. In any event, Marama was not in a position to confirm or dismiss the identity of the accused in the rape allegation as she was never present at the alleged crime scene. It appears that Marama was in a dilemma after being caught punching a former police officer in public, which incident was witnessed by a police officer. No doubt, there was a strong case against Marama hanging over her head. Marama said that she thought of her two kids and if she were to be put in prison, nobody was going to take care of her kids.

90. The complainant had never complained to Marama that she was raped. She had only told that she was touched and the rape complaint had been made by the complainant straightaway to the police. The reason appears to be that the complainant was scared of her mother who had already reprimanded her for using Marama's phone to chat with friends and for going missing from home that night without informing her mother. In this context, I believe Marama had a strong motive to reconcile with the accused by saying that she was mistaken when she punched the accused. Therefore, I am not inclined to accept Marama's evidence that she had punched the wrong person.
91. I observed the demeanour of the complainant. She was straightforward in her answers. Her demeanour is consistent with her honesty. I am sure the complainant told the truth in Court. I accept the version of events of the Prosecution case.
92. The accused said that he was never at the alleged crime scene on 30 May 2019. To support his *alibi* the accused called his ex-wife Devi and his *de-facto* partner Faga.
93. The evidence of the accused is not credible and reliable. According to his evidence-in-chief, he had been at his workplace, LCC, during the daytime on 30 May 2019. Under cross-examination, he admitted that he was on bereavement leave from 28 -30 May 2019 and apologized for forgetting to tell what had happened on 30 May 2019, during the daytime. If the accused is unable to recollect what had happened during the daytime, how could he to recollect and tell the Court what had happened after 8 p.m. on 30 May 2019 in such detail?
94. The accused said that after 8.30 p.m., he left home to drop his ex-wife and the children at the prayer meeting at Galba Street. However, his ex-wife, Devi said that she was dropped off at M.N. Naidu Road in Kashmir. During the cross-examination, Devi agreed that M.N.Naidu Road and Galba Street are two different places located in different areas.
95. The accused said that he accepted the friend request from FJ Nollen Christopher believing that it was from a boy as the profile picture showed a boy in a student list of Natabua. However, during the cross-examination of the complainant, this position

was never put by his Counsel to the complainant so that she could clarify on it. He had not given this explanation to the police at his caution interview either.

96. There should have been a specific reason for the accused to remember 30 May 2019 to say that he was never at the crime scene. He said that he got his leg injured on the following day and went to see a doctor to get a sick sheet. The sick sheet would have been the best evidence to support his evidence as to how he was able to recollect the events that took place on 30 May 2019. However, no such evidence was tendered in Court. It is reasonable to assume that the accused cooked up his *alibi* to save his skin.
97. Vinita Devi is accused's estranged wife. She said the accused was with her until 8.30 p.m. on 30 May 2019. Although, she had separated from the accused in 2021, she had lived with him on the date of the alleged incident despite knowing the accused was in a relationship with another woman. She stayed together for the sake of the children with a mutual understanding. Her daughter is asthmatic, and she needed accused's support to look after the three kids. Devi came to know about the rape allegation only when James was arrested on 26 July 2019. She felt bad and couldn't believe that her husband raped someone. Although Devi had a real interest in this matter, she had not recorded her statement until 26 June 2020. Therefore, it is reasonable to assume that she recorded a late statement and gave evidence to save her ex-ex-husband to ensure that she continues to get his support. In any event, she was not aware where the accused had been after dropping them off at the prayer house at around 8.30 p.m. Therefore, even if I accept that Devi told the truth in Court, her evidence is not capable of supporting the *alibi* mounted by the accused.
98. Faga said that the accused was with her from 8.40 p.m. on 30 May 2019. Faga is in a *de-facto* relationship with the accused and is not an independent witness. According to her, the accused used to come and pick her up every day between 8.30 p.m. to 8.45 p.m. It is hardly believable that the accused visited Faga every night when he was living with his wife and children at Field 40.
99. Faga specifically recalls 30 May 2019, because the accused got his leg injured on the following day. And she recalls the exact times because, after 8 p.m. to 8.45 p.m., she was watching *Ulu ni Tukutuku* on TV. She tried to say that she gave her statement 3 to

4 months after the accused got injured at his father's place. However, when her statement was shown, she admitted giving her statement on 11 June 2020, more than a year after the said incident. I do not believe that she was in a position to recollect and say after a year what exactly happened and where the accused was on 30 May 2019. It is reasonable to assume that Faga recorded a belated statement and gave evidence to support her *de-facto* partner.

100. I reject the version of the accused and his *alibi*. The unconvincing version of the Defence failed to create a reasonable doubt in the version of events of the Prosecution case. However, I bear in mind that the rejection of the Defence version does not mean that the accused should be guilty. Prosecution has to prove its case beyond reasonable doubt.
101. Having accepted the version of the Prosecution, I now proceed to see if all the elements of Rape have been established. As I have already said, the Prosecution established the identity of the accused, which was the main contention taken up by the Defence, beyond reasonable doubt. The accused forced the complainant to take her pants off and told her to hurry up. He reminded her that all the doors were locked, so she couldn't go anywhere. The complainant told the accused 'no' when he wanted to have sex with her. The complainant said that the accused forcefully penetrated the vagina of the complainant without her consent. She was only 16 years old, and the accused knew that his Facebook friend was still a student at Natabua. By the conduct of the complainant, the accused must have known that the complainant was not consenting to a sexual intercourse. Being an ex-police officer, the accused should have realized that acceptance of a friend request on social media is not an invitation for sex.
102. I am satisfied that the Prosecution proved all the elements of Rape as charged beyond reasonable doubt. I find the accused guilty and convict him accordingly.



A handwritten signature in black ink, appearing to read "Aruna Muthge".

Aruna Muthge
Judge

27 September 2023

Solicitors:

Office of the Director of Public Prosecutions for State
Naivalu Law for Defence