

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 118 of 2021

STATE

V

HARVIND MANI NAIKAR

Counsel : Ms. S. Prakash for the State.
: Ms. C. Kumar for the Accused.

Dates of Hearing : 04, 05, 06 March, 2024
Closing Speeches : 08 March, 2024
Date of Judgment : 08 March, 2024

JUDGMENT

(The name of complainant is suppressed she will be referred to as "A.R")

1. The Director of Public Prosecutions charged the accused by filing the following information dated 28th January, 2022:

Statement of Offence

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

Particulars of Offence

HARVIND MANI NAIKAR on the 25th day of January, 2021 at Matalevu, Tavua, in the Western Division, had carnal knowledge of “A.R” without her consent.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for the offence of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

RAPE

4. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the penis.
8. The third element of consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his

penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

15. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
16. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

17. The complainant informed the court that on 19th January, 2021 she got married to the accused. This was an arranged marriage, from her previous two marriages the complainant has two sons. Before marriage the complainant and the accused were talking to each other for about 2 or 3 times in a week for 3 weeks. Two days before the legal marriage the complainant met the accused for the first time at his house on the 17th.
18. According to the complainant before marriage, the accused agreed to her two conditions firstly, the accused is to look after her two children and give them fatherly love secondly, she does not want to get pregnant until her younger son who was 5 years at the time attends primary school in year 2 or 3.
19. After the legal marriage the complainant with her two children moved into the house of the accused who was living with his mother. At this time she was having her menstruation. For the first week everything went well the complainant was sleeping in one bedroom with her two children and the accused in his bedroom in the three bedroom house. The accused mother also occupied one bedroom as well.
20. On 25th January, 2021 in the night the complainant was getting her younger son to sleep when the accused came into her bedroom. In front of her child he started touching her on her front and back. The complainant told the accused to go into his bedroom and she will come.
21. After the complainant's son went to sleep she went into the bedroom of the accused. She saw the accused naked on the bed, the accused started pulling down her skirt. The complainant got angry and she told the

accused *"I will take out my clothes by myself slowly."* After saying this, the complainant removed her clothes and she also told the accused to go and close the bedroom door.

22. After closing the door the accused pushed the complainant on the bed, she fell face down but turned around to face upwards. At this time the accused placed his knee on her left thigh two times and placed his other knee on her right thigh gripping her and making her spread her thighs with his knees. The complainant also stated that when the accused had his knees on her thighs she was trying to push him because her thighs were paining.
23. The complainant tried to stop the accused and she wanted to talk to him but she could not because the accused at this time got hold of her right hand and started having sexual intercourse in a fast manner. The accused also asked her to kiss him. While the accused was having sexual intercourse she was trying to stop him and at the same time told him *"we cannot make this relationship forceful."*
24. The complainant did not like when the accused penetrated her vagina with his penis. After ejaculating, the accused continued to be on top of the complainant and after his body relaxed she was able to push him on the bed.
25. Upon further questioning the complainant said she did not want the accused to ejaculate inside her so she pushed him away. The complainant got up wore her clothes and had her shower. After shower she met the accused at the bathroom door who asked her *"how was it?"* The complainant went into her bedroom locked the door and slept with her children. When asked why she was not sleeping with the accused after marriage the complainant said *"I was feeling scared because I have two*

children.” When asked to explain why she was scared of the accused the complainant said *“I did not know him very well.”*

26. Next day in the morning the complainant woke up did the household chores and made a video call to her sister Sujata and told her everything was okay but her sister asked her why she was crying. It was at this time she showed her sister the injuries she had received. She told her sister *“I am stuck with him and all these things happen forcefully.”* After three or four days her sister came to the accused house with her husband and husband’s sister.
27. At the accused house there was a discussion about the complainant not sleeping in the bedroom of the accused. During the day the complainant informed her sister that the accused was forcing her to have sex with him and she did not like it.
28. The complainant showed her injuries to her sister and the accused family, the accused denied doing anything to her. The complainant did not want to stay at the accused house and the accused also did not want her so she left with her sister.
29. Next day 2nd February, the complainant reported the matter to the police. When questioned that the incident happened on 25th January, 2021 why did she not report the same day or the next morning. The complainant said *“I did not have money, they did not take me anywhere and also they don’t let me go out of the house.”*
30. The complainant could not report the matter at the police station on the day she left the accused house because the weather was bad and curfew was imposed. According to the complainant the reason she did not want

to get pregnant early in the marriage was because she wanted both her children to get fatherly love from the accused. When questioned why not a child from the accused when they had just got married the complainant's response was *"my son was really small and without me he cannot stay."* The complainant recognized the accused in court.

31. In cross examination the complainant stated that before getting legally married to the accused her conditions were for the accused to take care of her two children give them fatherly love and not to force her to have children. According to the complainant she did not inform the accused that she will not be having sexual intercourse with him but she had informed him that she will be staying in a separate bedroom. The accused had not forced her to have sex with him when she was having her menses.
32. The complainant stated that when she was in her bedroom trying to get her children to sleep the accused came in the room sat beside her and was touching her. She then told the accused to go in his bedroom and she will come. When questioned why she went into the accused bedroom the complainant said *"when he came to the children's room he forced me in the room which I did not like. Then I went to his room."*
33. The complainant agreed when she went into the accused bedroom he was naked on the bed and when he saw her he stood up to hold her. At this time she had the chance to walk out of the bedroom. The only reason she went to the accused bedroom was to tell him not to touch her in front of her children.
34. When questioned why she had removed her clothes the complainant said *"he was doing too much in front of the children so I just wanted to see what he wanted to do."* After the accused had started to touch her in her

bedroom in front of her young son the complainant knew the accused wanted to have sex.

35. The complainant did not scream because her son was awake and he would have got scared. The complainant did not call the police the same night because there was no network in the bedroom and she would have had to go to the kitchen to make the call. The complainant did not think of calling the police instead of her sister the next day.
36. The complainant did not agree that the accused had not done anything to her or had not touched her, she maintained that he had raped her. When it was put to the complainant that the reason she reported the accused was that she was told to leave the complainant stated, *“I did not even think that he will send me and I did not even think that my sister will come and take me. No one told me, my children were calling him Papa.”* The complainant denied she had raised a false complaint against the accused.
37. In re-examination the complainant said she reported the matter to the police because she felt that she will get pregnant and the accused could have stopped her from leaving the house and said that he will not force her for sex. The complainant also stated that the accused had forceful sexual intercourse with her.
38. The elder sister of the complainant Sujata Raj informed the court that she had received a video call from the complainant who had shown her injuries on her legs. The witness went to her sister’s place on 1st February, 2021 because the mother in law of her sister had called her to come over.
39. At her sister’s house there was a family discussion, the complainant called the witness in her bedroom and showed her injuries. She saw two injuries

on the left thigh and one on the right thigh. The witness was told the injuries were as a result of the accused forcing her to have sex.

40. After this, the complainant said that she does not want to stay at the accused house but wanted to go home. During the phone conversation the complainant told her that her husband was forcing her and that is how she got those injuries.
41. When asked to elaborate about what the complainant exactly told her the witness said the accused had raped and scratched her sister.
42. In cross examination the witness stated that when the complainant made the video call she did not say much but only informed her about the injuries she had received. The witness also stated that the complainant had not told her that the accused had penetrated her vagina with his penis. It was after one week of the video call the witness visited the complainant.
43. In re-examination the witness stated that she was told by the complainant that the injuries were as a result of the accused forcing her for sex.

RECENT COMPLAINT DIRECTION

44. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

45. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told her sister Sujata the next day of the alleged incident via video call that she had received injuries and when Sujata had gone to the accused house the complainant had told Sujata the accused had forceful sexual intercourse with her and in the process had caused injuries on both her thighs.
46. This is commonly known as recent complaint evidence. The evidence given by Sujata is not evidence of what actually happened between the complainant and the accused since she was not present and she did not see what had happened.
47. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant in the morning after the alleged incident had informed her sister Sujata about what the accused had done to her the previous night. The complainant during the video call had expressed herself clearly that the accused had caused injuries to her thighs later when they met in person the complainant told Sujata the accused had forceful sexual intercourse with her and as a result she had sustained those injuries.
48. To confirm her consistency the complainant once again showed Sujata in her bedroom her injuries and also reaffirmed her earlier complaint that it was the accused who had caused her those injuries when forcing her to have sexual intercourse.
49. The prosecution is also asking this court to consider the fact that the complainant had relayed relevant and important information about the

conduct of the accused to Sujata which shows she is more likely to be truthful.

50. On the other hand, the defence says the complainant did not tell her sister anything during the video call specifically against the accused that he had caused those injuries or about forceful sexual intercourse by the accused. The complainant had only showed the injuries and there was no mention of forceful sexual intercourse by the accused. What the complainant told her sister was that she had some injuries on her thighs and everything was fine. In cross examination Sujata had also told the court that her sister had not told her anything about forceful sexual intercourse and therefore the complainant should not be believed.
51. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
52. The final prosecution witness Dr. Vasiti Sauwa informed the court that she graduated with an MBBS degree in the year 2013. She is currently a Senior Medical Officer based at the Rakiraki Hospital. She has 11 years of experience as a medical practitioner.
53. On 3rd February, 2021 the witness had medically examined the complainant at the Rakiraki Hospital. The specific medical findings of the witness were:
 - a) Vaginal examination – no bruises, tears or active bleeds;

- b) Perineal which is the area between the vagina and the anus was intact;
 - c) Two blackish blue bruises seen on the inner left thigh near the knee;
 - d) One fading bruise seen on the same spot on the right thigh near the knee on the inner part;
 - e) No marks or strangulation noted near the neck.
54. The witness had illustrated her findings in appendix one as well. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
55. In cross examination the witness stated that she did not see any bruises or tears in the vaginal area because there would have been a gentle penetration and probably by consent or the male genitalia was small.
56. The witness was not sure whether there had been a vaginal penetration in this case. In respect of the injuries seen on the complainant the witness said it was at a very unlikely area to have any injury.

DIRECTION ON EXPERT EVIDENCE

57. This court has heard the evidence of Dr. Sauwa who was called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in her evidence as a whole is to assist this court.

58. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.
59. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
60. This was the prosecution case.

DEFENCE CASE

61. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. The accused also called one witness, this court must also consider the evidence of the accused and his witness and give such weight as is appropriate.
62. The accused informed the court that he is married to the complainant and they got married on 19th January, 2021. It was an arranged marriage and from the day he got married the complainant has been sleeping in one bedroom with her children. The complainant had also told him that she will not sleep with him in his bedroom. She was at his house to raise her children so she will stay in one bedroom with her children. The complainant used to cook for herself and her children and his mother

cooked for him. There was nothing common between him and the complainant and she was also not talking to him.

63. On 25th January, 2021 after watching TV and having his dinner at 9pm the accused went to sleep in his bedroom. The complainant had locked herself in her bedroom his mother was in her bedroom sleeping. Nothing happened between him and the complainant as alleged.
64. In cross examination the accused agreed that the complainant was sleeping in another bedroom and she had told him this before marriage. However, the accused denied that the complainant had told him that she did not want any physical relationship with him. The accused before marriage had met the complainant with his family and she knew that he was a Farmer.
65. Upon further questioning about his relationship with the complainant the accused said *“she took one room separately that’s her own room. She never came to my room and I never went in her room. I had nothing to do with her.”* The accused denied that he married the complainant to have children and he also denied that he wanted to have sex with her. He did not want any children because the complainant already brought with her two children. The accused denied the allegation raised against him by the complainant.
66. In re-examination the accused stated that on 25th January, 2021 the complainant had not entered his room and he had not even touched her.
67. The mother of the accused Amra Wati informed the court that the complainant on the day of her son’s marriage had told her that she was having her menses so the complainant slept in the separate bedroom.

68. The witness said from her bedroom she can see the other rooms. The complainant never cooked for her and her son. The complainant used to sleep with her children before 6pm after locking the door. On 25th January at 9pm she went to sleep in her bedroom and the accused went to his room.
69. In cross examination the witness agreed she did not know what happened after 9pm.
70. This was the defence case.

ANALYSIS

71. The prosecution submits that the complainant and the accused got married about a week before the alleged incident were living under one roof but in separate bedrooms. The reason for this separation was temporary as part of the settling down period since the complainant had brought two young children with her. The younger one was 5 years of age at the time and was very much attached to the complainant.
72. Furthermore, the complainant had not known the accused well hence she needed more time to do so. The complainant also wanted the accused to get close to her two children and give them fatherly love. The accused had also agreed to the wish of the complainant not to get pregnant early in the marriage.
73. The first week of the marriage went well the complainant was having her menses and the accused was informed of this. However, in the night of 25th January, 2021 the accused had forceful sexual intercourse with the

- complainant in his bedroom after the complainant went into his bedroom to tell him not to touch her again in front of her children.
74. The accused was naked in his bedroom after closing the door he pushed the complainant on the bed got on top of her put his knees on her thighs to force her to spread her legs and then he had forceful sexual intercourse. The complainant had resisted the accused throughout telling him to stop and that the relationship between them cannot be by force.
75. After the accused ejaculated the complainant left the bedroom had her shower and went into her bedroom locked the door and went to sleep. The next morning the complainant via video call told her sister Sujata about what the accused had done to her. She even showed her sister injuries on her thighs. When Sujata came to the complainant's house the complainant once again showed Sujata the bruises she had received as a result of the forceful sexual intercourse by the accused.
76. The complainant left the house of the accused with Sujata and the matter was reported to the police on 2nd February, 2021. The reason why the complainant did not report the matter to the police earlier was because she did not have any money to go to the police station and also the accused did not let her leave the house.
77. The prosecution also submits that the doctor who had examined the complainant had confirmed that the injuries were a week old and bruises were seen on the inner thighs of the complainant slightly above the knees. The prosecution states that the bruises were a clear indication that force was used on the complainant which eventually led to forceful sexual intercourse by the accused. The complainant did not consent for the accused to do what he had done.

78. On the other hand, the defence says the allegation is a false story by the complainant with a motive. The motivation comes from the fact that the accused did not stop her from leaving his house which got the complainant to make up a story to frame the accused for something he had not done.
79. Although the complainant said she did not want to stay with the accused she would have stayed had the accused asked her. The accused from the outset had an open mind to the extent that after marriage he had no objections for the complainant to sleep in the separate bedroom. The accused also did not say anything when the complainant refused to cook for him.
80. The complainant is spiteful that she was not stopped by the accused from leaving his house hence she brought about this baseless and unfounded allegation against him. The accused did not do anything to the complainant he did not even touch her for the short period she was at his house.
81. The defence is asking this court not to believe the complainant and her sister Sujata. The complainant did not even know that Sujata will come to her house because the complainant had not told her sister about any forceful sexual intercourse on her by the accused. The complainant was taken by surprise when Sujata turned up unexpectedly. Moreover, there is no evidence before the court that the accused had threatened the complainant during her stay at his house.
82. The medical report of the complainant does not show any injuries in the vaginal area if what the complainant told the court is to be believed then there ought to have been some injuries seen. The doctor told the court that there is a probability of a consensual sexual intercourse and the bruises

seen on the inner thighs of the complainant were at an unlikely area to have any injury.

83. The defence further submits that the evidence of the recent complaint witness is clearly inconsistent with the evidence of the complainant about the incident. Sujata said one thing in her evidence and then made a complete turnaround during cross examination. The complainant is raising the allegation against the accused to falsely implicate him.
84. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The defence is asking this court not to believe the complainant since nothing happened as alleged.

DETERMINATION

85. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
86. In this case, there are two different versions, therefore this court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offence alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
87. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omis

ions, interestedness/disinterestedness/bias, the demeanour and deportment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).

88. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

89. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court at paragraph 45 as follows:

The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

90. The defence brought about a motive on the part of the complainant against the accused for not stopping her from leaving his house. The complainant was so overwhelmed by the response of the accused that he did not want her falsely implicated him for the offence of rape. In respect of the above contention I have directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.

91. The Court of Appeal in *Rokocika’s* case (supra) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

[33] *The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:*

'If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] *NSW Criminal Trial Courts Bench Book also states that:*

'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].'

92. There is no dispute that the complainant and the accused were known to each other and neither the complainant nor the accused told the court about any force or pressure in entering into this marriage. This case has unique and peculiar facts between two matured adults. After carefully considering the evidence adduced by the prosecution and the defence, I do not believe the evidence of the complainant as truthful and reliable. The narration by the complainant about the forceful sexual intercourse is not

plausible on the totality of the evidence in fact what she told the court is not probable as well.

93. From the evidence of the complainant it is obvious to me that she had gone into the bedroom of the accused on her own, removed her clothes and asked the accused to close the door. I do not accept that the accused had pushed the complainant on the bed and with his knees on the thighs of the complainant forcefully got the complainant to spread her legs and thereafter had forceful sexual intercourse is far-fetched and unbelievable.
94. It is important to note that the accused and the complainant got married about one week before the allegation and the only reservation the complainant had was not to get pregnant other than for the accused to look after her children and give them fatherly love. The complainant told the court that the accused and her children were getting known to each other and the children were calling the accused “papa” shows things were good between the couple and the children.
95. The doctor in cross examination stated that the bruises seen on the inner thighs of the complainant were at a very unlikely area to have any injury because of the way our bodies are built. On the evidence of the complainant that she had removed her clothes meant there was no reason for any aggression by the accused hence I am unable to accept that the accused had put his knees on the thighs of the complainant to make her submit to him.
96. In respect of the lack of any signs indicating forceful vaginal penetration I accept the evidence of the doctor that there was no sign of forceful penetration of the vagina. According to the doctor the accused may have penetrated the complainant gently as part of consensual sexual intercourse.

97. There is no evidence of any threat or force or pressure on the complainant by the accused to come into his bedroom and/or for the complainant to remove her clothes.
98. Moving on, Sujata the complainant's sister firstly told the court the complainant had showed her injuries on her thighs via video call there was no mention of the complainant telling Sujata how the complainant got the injuries and by whom. Then upon further questioning by the state counsel the witness said when she went into the complainant's bedroom the complainant showed her the injuries and told her the injuries were as a result of the accused forcing her to have sex.
99. In cross examination Sujata told the court when the complainant made the video call the complainant had not said much but only informed her about the injuries she had received. Sujata also stated that the complainant had not told her that the accused had penetrated her vagina with his penis. In addition to the above, the complainant said when she was talking to Sujata via video call Sujata had asked why she was crying but Sujata in her evidence did not say anything about the distressed state of the complainant.
100. There was also a significant inconsistency between what Sujata told the court in her evidence and her cross examination. When the evidence of Sujata is taken into account the complainant was inconsistent about what she had supposedly told Sujata. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial which goes to the credibility of the complainant.

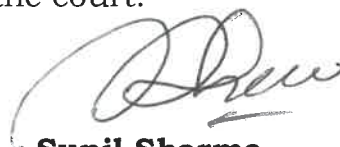
101. Although Sujata through the state counsel tried to correct her stance in re-examination I am unable to give any weight to the evidence of Sujata when she told the court that the complainant had told her the injuries were as a result of the accused having forceful sexual intercourse.
102. Sujata's evidence in totality does not support the evidence of the complainant that she had told Sujata about being raped by the accused. I have also taken into account the fact that it is not expected of anyone who has had an unexpected sexual encounter to give every detail of the accused unlawful sexual conduct to the person the complaint is relayed to. However, considering the age and maturity of the complainant it is my considered judgment that she was in a position to tell the complete story to Sujata if indeed the accused had forced the complainant to have sexual intercourse with him.
103. I do not give any weight to the evidence of the complainant and the recent complaint witness in respect of the allegation. The complainant did not give an honest account of what had happened what she told the court is not believable and her demeanour was not consistent with her honesty. The evidence of the complainant brings into fore more questions than answers.
104. In view of the above it is unsafe to convict the accused and therefore the benefit of the doubt ought to be given to him. This court is not satisfied beyond reasonable doubt that the accused had committed the offence of rape as alleged.
105. The accused in his evidence maintained his denial throughout. I also did not find him to be a truthful witness. I do not believe that he was so accommodative that he did not touch the complainant or have sexual

intercourse with her is a lie. The accused did not tell the truth when he said he was in his bedroom sleeping at the time and the complainant did not come into his bedroom that night is not believable. During cross examination the accused was not forthright and revealing and it was obvious to me that he was choosing his words carefully to avoid incriminating himself. The evidence of Amra Wati is irrelevant to the charge and therefore I do not wish to mention anything about her evidence.

106. Since the prosecution has the burden to prove the accused guilt beyond a reasonable doubt the lack of reliability and credibility of the accused evidence does not affect the outcome of this case.

107. There is a reasonable doubt in the prosecution case which this court cannot ignore. This court is not satisfied beyond reasonable doubt that the accused is guilty as charged and therefore this court has no option but to acquit him.

108. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

08 March, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Raikanakoda Lawyers, Tavua for the Accused.