

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 60 of 2020

STATE

V

SAIMONI RATU

Counsel : Ms. S. Naibe for the State.
: Mr. S. Nath for the Accused.

Dates of Hearing : 06 and 08 January, 2024

Closing Speeches : 12 January, 2024

Date of Judgment : 12 January, 2024

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 9th March, 2020:

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act 2009.

Particulars of Offence

SAIMONI RATU between the 1st day of August, 2017 and the 30th day of September, 2017 at Tavua, in the Western Division, unlawfully and indecently assaulted "A.M".

SECOND COUNT

REPRESENTATIVE COUNT

Statement of Offence

ATTEMPTED RAPE: Contrary to section 208 of the Crimes Act 2009.

Particulars of Offence

SAIMONI RATU between the 1st day of August, 2017 and the 30th day of September, 2017 at Tavua, in the Western Division, attempted to penetrate the vagina of "A.M" with his penis, without her consent.

THIRD COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

SAIMONI RATU between the 1st day of August, 2017 and the 30th day of September, 2017 at Tavua, in the Western Division, penetrated the mouth of "A.M" with his penis, without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for all the offences 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.
4. The accused is charged with more than one offence, the evidence in respect of each offence will be considered separately from the other if the accused is guilty of one offence, it does not mean that he is guilty of the other as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

INDECENT ASSAULT

5. To prove count one the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by kissing her lips.
6. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.

7. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
8. Assault is the unlawful use of force on the complainant by kissing her lips.
9. The accused has denied committing this offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by kissing her lips.
10. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court must find the accused guilty. However, if there is a reasonable doubt with respect to any elements of the offence of indecent assault then this court must find the accused not guilty.

ATTEMPTED RAPE

11. To prove the second count the prosecution must prove the following elements of the offence of attempted rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Attempted to penetrate the vagina of the complainant with his penis.
12. The accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the vagina of the complainant with his penis.

13. 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.
14. The second element is the attempt to penetrate the complainant's vagina by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental.
15. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
16. This court will have to look at the conduct of the complainant and the accused at the time and the surrounding circumstances to decide this issue.
17. Before the accused can be found guilty this court must be satisfied beyond reasonable doubt of two things:-
 - (a) Firstly that the accused intended to penetrate the vagina of the complainant with his penis;
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.

18. In this case, the prosecution is alleging that the accused intended to penetrate the vagina of the complainant with his penis. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. This court will have to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
19. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's vagina with his penis and with that intention he did something which was more than merely preparatory.
20. The prosecution says the accused against the will of the complainant drove her to a secluded timber yard during night time. After stopping his car he told the complainant to get out of the car, when outside the accused told her that he wanted to have sex. When the complainant refused he grabbed the complainant and pushed her onto a heap of gravel pushed down his track pants took out his penis and leaned towards her with his knee on the gravel.
21. If the above is accepted by this court that the accused did this, then it is for the court to decide whether what the accused did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.

22. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then the accused is guilty of attempt to commit rape.
23. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempt to commit rape.

RAPE

24. To prove count three the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the mouth 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.
25. 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 mouth 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.
26. 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.
27. The second element is the act of penetration of the complainant's mouth by the penis.

28. 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.
29. If this court is satisfied that the accused had penetrated the mouth 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.
30. 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.
31. 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 mouth without her consent then this court must find the accused guilty as charged.
32. 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.
33. The slightest of penetration of the complainant's mouth by the accused penis is sufficient to satisfy the act of penetration.

34. 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

35. 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.
36. 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

37. The complainant informed the court that she is a Corporal in the Fiji Police Force having joined in the year 2005, since her recruitment she has always been based at the Tavua Police Station.
38. In 2017 the complainant was working in the CID Unit under the supervision of the accused who was the Crime Officer. She joined the CID unit in 2008. When questioned about her relationship with the accused after she came to know him the complainant said *"he was my workmate,*

work colleague and most of the time we work together in the investigation department."

39. Between August and September, 2017 on one afternoon after work the complainant and a colleague Salata Radinibau went to the Tavua Club to have a few drinks. After sometime the accused joined the two and the drinking continued. At around 8 to 9 pm the club closed so the group went to a Wine and Dine Restaurant to drink some more.
40. After the drinks finished Salata left, the accused offered a lift to the complainant since he was going towards Ba in his car and on the way he would drop the complainant at her house. The complainant sat in the front passenger seat, on the way the accused said that they should go to a private place the complainant told the accused that she had to go home. The accused did not listen but drove into a timber yard which had heaps of gravel and sand. By this time it was around 10 to 11 pm.
41. After stopping the car the accused left the driver's seat and asked the complainant to come outside as well. When outside the car, the complainant again told the accused that she cannot do anything with him because she was married and she should not be doing those things.
42. Upon hearing this, the accused forcefully grabbed her and pulled her towards him and then he kissed her on her lips. When asked what happened after this, the complainant said *"I pushed him away and then I told him I should be doing that only to my husband."* The accused did not say anything both got into the car and the accused dropped the complainant at her house.

43. According to the complainant she did not want to be kissed by the accused and she did not like what he had done. She did not tell anyone about what the accused had done. When asked why she did not tell anyone the complainant said *"I was thinking that maybe I will lose my job if people will find out or if my husband find out I might be in a big problem"*.
44. The complainant further stated that the second incident happened on a Wednesday, after sports the complainant was drinking beer with Salata and the accused at the children's park. The drinking started around 3 to 4pm after the drinks finished the complainant walked to town to look for transport to go home.
45. In town the complainant met PC Joji Naliva and then both went to the club to have few more drinks. Whilst drinking the accused joined them, after the club closed at 9pm the accused offered to drop the complainant on his way to his home. At this time Joji left, the complainant sat in the front passenger seat of the accused car.
46. When the car was near the same timber yard, the accused suggested that they should go there. The complainant told the accused that she has to go home and she did not want to engage in what the accused wanted to do. However, the accused drove the car into the timber yard. After stopping the car the accused got off and he told the complainant to come outside as well. The complainant obliged, when outside the accused told her that he wanted to have sex. The complainant refused but the accused kept insisting and then he grabbed the complainant and pushed her onto a heap of gravel. Whilst sitting on the gravel the complainant was continuously refusing but the accused kept insisting. The complainant further stated that the accused pushed down his track pants took out his penis and leaned towards her with his knee on the gravel.

47. The complainant struggled with the accused because she did not want to do anything with him and she was able to push him away. After this, the accused said he will drop her home when she sat in the front passenger seat she told the accused to drop her to town so that she can find a transport to go home.
48. The accused drove the car and stopped at a Catholic Church in town he quickly left the driver's seat and opened the door of the front passenger seat where the complainant was sitting. The accused told her to suck his penis the complainant refused to do so, when questioned about the response of the accused the complainant said *"he was just standing near the door where I was sitting he put out his penis and he forced it into my mouth."* The complainant said she was helpless so she sucked the accused penis till he ejaculated.
49. The complainant stated that she did not like what the accused had done. After this the complainant walked away when asked why she did not shout or push the accused the complainant said the accused was standing in front of her with his penis into her mouth so how could she shout and she did not push him away because she was helpless since the accused was standing in front of her. By this time it was 10 to 11 pm, the complainant did not tell anyone about what the accused had done because the accused was her superior, she was thinking of her work, her family and husband particularly if her husband came to know there would be bigger problem.
50. According to the complainant after the last incident the accused started to control her and became possessive. She was the sole bread winner of the family and she was unable to decide whether to report the matter or not. The complainant further stated that the accused threatened her if she reports him he will chase her and the officer in charge of the police station

away. It was during the Divisional Crime Officer's (DCO) inspection she told her husband about what the accused used to do to her.

51. On the same day her husband went to the police station and informed the officer in charge Rajneel Ram. The complainant was brought to the police station her police statement was taken and she was sent on leave. The complainant stated the incidents took place in 2017 (between August and September) but she reported about two years later in 2019 because the accused was threatening her all along, controlling her and everything she did and was abusive to her.
52. In cross examination the complainant stated that in the year 2017 she was an Actg Sergeant working at the CID handling sexual offence cases. The complainant agreed the officer in charge was in a much higher rank than the accused. The complainant also agreed that after the incidents she could have complained to the officer in charge but she did not and also between 2017 and 2019 she had visited DCO West on numerous occasions but she did not report the incidents to him.
53. The complainant agreed that she had given two police statements, first one on 29th May, 2019 and the second one about three months later on 15th August, 2019. She also agreed that in her first police statement she had not stated anything about indecent assault, attempted rape or rape by the accused. She also did not report against the accused for about two years from 2017 but she could have and she could have also reported to any other officer at the police station but she did not.
54. The complainant was referred to her first police statement dated 29th May, 2019 to paragraph 2, line 3 on page 1 as follows:

"I got involved in a drinking party where I was approached by him into a relationship. It was going on and there was a stage when he started to control everything I do."

55. When asked to explain the above the complainant said *"the incident that happened in 2017 that was when the relationship started just because of what he did in 2017 that's where he started to control everything just because of what he did back in August and September."*

56. Again the complainant was referred to the last paragraph and last line which was read as:

"I know that it was my fault in the first place but I feel that no one should be treated like what I have gone through."

57. When asked to tell the court about the words *"my fault"* the complainant said *"because I did not report I kept it to myself I did not even tell anyone because I was thinking of myself, my family and my work."*

58. The complainant denied that she had made up the allegations because she was scared of losing her job, since investigation would have revealed about her ongoing relationship with the accused as mentioned by her in her police statement. The complainant maintained that the incidents had happened.

59. The complainant agreed that in her police statement she had not mentioned anything about telling her husband about the incidents because she was asked to give her statement in a rush. At the time she was in such a state of mind that she did not put everything in her first police statement.

60. The complainant also agreed that she was not forced by the accused to get in the vehicle and also there were no lights at the timber yard. In respect of the first incident the complainant agreed that she could have run to the highway from the timber yard and she could have also called her husband and colleague Salata.
61. In respect of the second incident the complainant stated that it was a Wednesday after 9pm the accused drove her in his car to the timber yard and she had voluntarily boarded the accused vehicle despite the earlier incident.
62. From the timber yard she again boarded the car and she was driven to the town in front of the Catholic Church. The complainant agreed that the place where the car was parked was well lit and she was not restrained by the accused while sitting in the front passenger seat, however, as she was about to open the door to come out the accused was standing in front of her. Her hands were free but she was not able to push the accused since he was strong.
63. When questioned that she was able to push the accused earlier in the night the complainant said at the timber yard she was "free" and it was "free" space. The complainant maintained that what she told the court had happened but she did not report this incident to anyone.
64. The complainant denied that she gave her second police statement to avoid being interdicted after she had mentioned having a relationship with the accused in her first police statement. The complainant stated that she was not able to mention everything in her first police statement because she was not given much time to do so. The complainant agreed that she had a professional relationship with the accused.

65. The final witness Sevuloni Rauqe Sadrani the husband of the complainant informed the court that on 29th May, 2019 his wife the complainant told him about what the accused her superior had done to her at the timber yard. The witness noticed that his wife was scared when she was telling him about what had happened. The witness became angry and he went to see the officer in charge Rajneel Ram at the Tavua Police Station and informed him about what his wife told him.
66. In cross examination the witness agreed that he did not inform the police anything about his wife being sexually abused by the accused. His police statement also does not state anything about his wife being raped or of attempted rape or of sexual abuse on her by the accused when he gave his police statement on 1st June, 2019.

PREVIOUS INCONSISTENT STATEMENT

67. This court directs its mind to the fact that the defence counsel during cross examination of Sevuloni had questioned this witness about some inconsistencies in his police statement he had given to the police when facts were fresh in his mind with his evidence in court.
68. This court is allowed to take into consideration the inconsistencies between what this witness told the court and his police statement when considering whether this witness is believable and credible. However, the police statement is not evidence of the truth of its contents.
69. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.

70. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
71. In re-examination the witness stated that he told the police that his wife was abused and raped by the accused and he had complained on the same day he came to know about this.

RECENT COMPLAINT DIRECTION

72. 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.
73. 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 husband Sevuloni after nearly 2 years of the alleged incidents about what the accused had done to her at the timber yard.

74. This is commonly known as recent complaint evidence. The evidence given by Sevuloni is not evidence of what actually happened between the complainant and the accused since he was not present and he did not see what had happened.
75. 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 delayed telling her husband since she was in a dilemma of what she should do considering the fact that she would be complaining against her immediate supervisor including family considerations.
76. The complainant was the sole breadwinner of the family so she had to weigh her risks if she loses her employment and the risk of losing her family once her husband comes to know about what she had been through. The prosecution is asking this court to look at the pressing circumstances of the complainant objectively. The delay of nearly 2 years should not be regarded as substantial after the above factors and circumstances of the complainant are taken into account.
77. Moreover, when the complainant was able to muster enough courage to speak out she did so without any hesitation by telling her husband about what the accused had done. Thereafter the matter was immediately reported to the officer in charge by Sevuloni which resulted in police investigation.
78. 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 Sevuloni which shows she is more likely to be truthful.

79. On the other hand, the defence says the complainant did not tell her husband anything about the allegations she raised in court. The delay of nearly two years is a considerable lapse and when she did open up to her husband there was no mention about any of the incidents the complainant told the court. Sevuloni agreed that he went to the officer in charge the same day his wife told him the story and he gave a police statement to this effect as well.
80. Sevuloni also agreed that in his police statement there is no mention that the complainant had told him about the incidents and that he had not informed the police about his wife being sexually abused by the accused. The defence is asking this court to consider the fact that Sevuloni told the police everything the complainant had told him and at that time the facts were fresh in his mind which did not include the three incidents and therefore the complainant should not be believed.
81. 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.
82. This was the prosecution case.

DEFENCE CASE

83. 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. This court must also consider his evidence and give such weight as is appropriate.

84. The accused informed the court that in 2019 he was stationed at the Tavua Police Station as the Crime Officer. The complainant was working under his supervision in the sexual offence unit. The rank of the complainant at the time was Acting Sergeant and he had a good relationship with the complainant.
85. On 29th May, 2019 he was at work and he was given a letter by the officer in charge Rajneel Ram to go on leave since there was a report received that he was having an affair with the complainant.
86. As part of the police investigation the accused was interviewed in respect of the allegations raised by the complainant. The accused stated that he told the police officers he did not agree with the allegations raised against him since he did not do it.
87. The accused said that he was a very strict person and he had chased the complainant to complete her work for the DCO's inspection. The inspection was done every 4 months.
88. In respect of the first allegation the accused said that Salata and the complainant were drinking at the Tavua Club with Joji and he joined them. The accused drank only two mugs of beer and he left for his home alone. The accused said the allegation was a lie.
89. In respect of the second and third allegations the accused stated that there was a carnival in Tavua Town. In the afternoon the accused went to Tavua

Club where the complainant and Salata were drinking he also joined them. The accused had two mugs of beer and before the club closed at 9pm he left alone.

90. The accused stated that both the allegations one at the timber yard and the other outside the Catholic Church were lies.
91. Furthermore, the accused stated that Sevuloni the husband of the complainant after lodging the report had called him. During the conversation the accused told Sevuloni that he did not have any relationship with the complainant.
92. The accused stated if it was found that there is an affair between police officers both officers would be either suspended or laid off.
93. In cross examination the accused agreed that he was very strict with the officers working with him including the complainant. The accused denied that the complainant and other officers were scared of him. He also denied that he often threatened the complainant. The accused disagreed that a report about him having an affair with the complainant was never put to the complainant in cross examination.
94. The accused also disagreed that it was never put to Sevuloni in cross examination that the reason why Sevuloni came to the police station was to report about an affair between the accused and the complainant. The accused agreed that Sevuloni was not questioned about the phone conversation he had with Sevuloni.
95. The accused denied that he was lying in court when he said that a report was lodged that there was an affair between him and the complainant. The

accused denied committing all the incidents as alleged by the complainant. He maintained that on all occasions he had left the complainant with others and she did not go with him. The complainant had lied in court about the allegations.

96. This was the defence case.

ANALYSIS

97. The prosecution submits that the complainant and the accused were work colleagues with the accused being the immediate supervisor of the complainant since he was the Crime Officer. By virtue of his rank and position the accused started to misuse his authority over the complainant to the extent that he sexually abused her.
98. Between the 1st day of August, 2017 and the 30th day of September, 2017 the complainant was subjected to three separate incidents of abuse by the accused. In respect of the first incident the accused after a few drinks with the complainant offered to drop her in his car to her house. On the way the accused drove to an isolated timber yard which had heaps of gravel and sand. By this time it was around 10 to 11 pm and it was here the accused forcefully grabbed the complainant, pulled her towards him and then forcefully kissed her on her lips despite her refusal.
99. The second incident happened on a Wednesday, after sports the complainant had a few drinks with the accused, when the club closed at 9pm the accused offered to drop the complainant home. When the car was near the same timber yard the accused again drove his car to the timber yard. At the timber yard the accused told the complainant that he wanted to have sex with her when the complainant refused the accused

pushed her onto a heap of gravel. While the complainant was seated on the gravel the accused pushed down his track pants took out his penis and leaned towards the complainant with his knee on the gravel.

100. The complainant struggled with the accused because she did not want to do anything with him and she was able to push him away. The accused did not do anything further and said he will drop her home, when she sat in the front passenger seat she told the accused to drop her to town so that she can find a transport to go home.
101. The accused stopped the car in front of a Catholic Church, here he quickly left the driver's seat and opened the door of the car where the complainant was sitting. The accused told her to suck his penis the complainant refused to do so but the accused forced his penis inside her mouth.
102. On all the occasions the complainant did not consent for the accused to do what he had done. The complainant did not tell anyone about what the accused had done because the accused had threatened her not to tell anyone and also she was thinking of her work, her family and husband. If her husband came to know she would be in problem.
103. It was during the DCO's inspection on 29th May, 2019 she told her husband about what the accused used to do to her. On the same day her husband went to the police station and informed the officer in charge Rajneel Ram. The complainant was brought to the police station and her police statement was recorded.
104. The prosecution submits that the incidents took place in 2017 (between August and September) but the complainant reported the same about two years later in 2019 because the accused was threatening her all along,

controlling her and everything she did and was abusive to her. Eventually she was able to muster enough courage to lodge an official complaint against the accused.

105. On the other hand, the defence says the allegations are a made up story by the complainant the accused did not do anything as alleged. What the complainant narrated in court was also not possible.
106. Both the complainant and her husband Sevuloni should not be believed the complainant was comfortable with the accused and on all occasions they had a good time drinking together. The complainant was never under any threat by the accused and after the drinking sessions the accused had left for his home alone.
107. The defence further submits that these are 2017 allegations reported in 2019 nearly two years later. The reasons for the delay does not make sense she was not living with the accused but was an independent matured individual and there is no evidence that the accused was anywhere around her 24/7 that she would have felt threatened not to report against him.
108. Sevuloni the husband of the complainant agreed in court that the complainant did not tell him about the allegations and therefore he had not mentioned about it in his police statement. Sevuloni should not be believed when he stated in court that the complainant had told him she was abused and raped by the accused because that is not what he told the police officer writing his police statement when the facts were fresh in Sevuloni's mind.
109. The defence further submits that the evidence of the recent complaint witness is clearly inconsistent with the evidence of the complainant about

the three incidents. The defence is also asking this court to consider the fact that the complainant did not mention anything about the allegations in her first police statement of 29th May, 2019. Sevuloni did not state anything about the incidents when he gave his police statement on 1st June, 2019 (when facts were fresh in his mind) reason being the complainant did not tell Sevuloni anything about the allegations.

110. The complainant had all the opportunity to inform someone other than her husband such as her colleagues or friends but she did not, speak volumes about the authenticity of the allegations.
111. The accused did not do anything as alleged the complainant is raising the allegations against the accused because in her first police statement she had mentioned that she was in a relationship with the accused so to avoid being interdicted she has embarked on an expedition to raise false allegations against the accused.
112. 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 who is falsely implicating the accused.

DETERMINATION

113. 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.

114. 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 offences alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
115. 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/omissions, 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).
116. 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.”

117. 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].

118. The defence brought about a motive on the part of the complainant by virtue of the fact that in her first police statement she had mentioned that she was in a relationship with the accused which was ongoing so to avoid an internal investigation she falsely implicated the accused. 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.

119. 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].’

120. There is no dispute that the complainant and the accused were known to each other and were work colleagues. 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 three incidents is not plausible on the totality of the evidence in fact what she told the court is not probable.
121. From the evidence of the complainant it is obvious to me that she was comfortable in the company of the accused. They used to drink together and the complainant had no hesitation in travelling with the accused on all the three occasions.
122. It is important to take a pause and think if the accused had indeed done something contrary to the wishes of the complainant on the first occasion then would the complainant have again drank with him and gone in his car to be dropped home in the middle of the night?
123. Furthermore, during cross examination the complainant confidently said that there were no lights at the timber yard. In the absence of any evidence of any other lighting including moon light it is difficult to accept that the complainant had seen the accused take out his penis.

LATE REPORTING

124. There is also an issue of late reporting by the complainant. The delay is about 2 years from the date of the allegations (between August and September, 2017) till May, 2019. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue 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 made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay."

[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of *Thulia Kali v State of Tamil Naidu*; 1973 AIR.501; 1972 SCR (3) 622:

"A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained,

number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered."

125. On the evidence there was nothing compelling about the circumstances of the complainant that she could not speak out or lodge a complaint against the conduct of the accused in a timely manner. From my observations, the complainant struck me as a bold and strong willed person who could not be forced to do something against her belief and liking.
126. Moreover, I do not accept that the accused had threatened the complainant not to tell anyone or else he will chase her and the officer in charge away was forceful enough to instill fear in the mind of the complainant.
127. In respect of the reasons for late reporting the complainant also said that she was worried about losing her employment and about the reaction of her husband in addition to the threat by the accused all along, controlling her and everything she did and was abusive to her was not convincing.
128. I am at a loss to understand why the complainant said that she was worried about losing her employment if she lodged a complaint against the accused? In my judgment if the complainant had not done anything wrong there was nothing to worry about. This assertion by the complainant in my considered judgment gives credence to the defence contention that she had opened a likely investigation against her interest after she mentioned in her first police statement that she was in a relationship with the accused. Hence in order to exonerate herself she had no choice but to falsely implicate the accused.

129. The complainant was an independent person who was not living with the accused and there was no direct personal authority or control by the accused on her judging from the fact that the complainant was comfortable in drinking with the accused and had accepted the offer to be dropped home after the first incident.
130. The complainant was a free agent living her life distinct from the accused would have lodged a timely complaint if she wanted to. Despite all the opportunities available she did not complain early is quite odd. The complainant was leading a normal life attending to her daily chores and she had met the DCO/ West on many occasions after the incidents yet she did not complain is questionable.
131. I do not accept that the complainant was a victim of circumstances which resulted in delayed complaint of nearly two years and therefore she fails the totality of circumstances test.
132. Moving on, Sevuloni the husband of the complainant also did not tell the truth when he said the complainant had told him on 29th May, 2019 that the accused had raped and abused her. This was far from the truth the complainant agreed that in her first police statement of 29th May, she had not mentioned anything about the three incidents. Had the complainant told Sevuloni about the three incidents I am sure he would not have forgotten to tell the police officer writing his police statement about this very important information.
133. There was also a significant inconsistency between what Sevuloni told the court in his evidence and his cross examination. When the evidence of Sevuloni is taken into account the complainant was inconsistent about what she had supposedly told Sevuloni. 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.

134. Sevuloni's evidence in totality does not support the evidence of the complainant that she had told Sevuloni about being raped and abused by the accused. I have 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, in this case Sevuloni made it clear that since he was not told about any sexual abuse by the complainant he did not tell the police officer writing his police statement.
135. I do not attach any weight to the evidence of the complainant and the recent complaint witness in respect of the allegations. I also reject the evidence of the complainant that she was rushed by the police officers to write her first police statement is an afterthought.
136. In my considered judgment 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.
137. 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 offences alleged.
138. The accused in his evidence maintained his denial throughout. I also did not find him to be a truthful witness. I do not believe he left the

complainant after drinking two mugs of beer on both occasions. The fact that he joined the complainant midway in her drinking sessions gives me the reason to say that the accused purposely went late to be with the complainant hence I do not accept that he left early and without the complainant. The accused did not tell the truth when he said he was not with the complainant on the occasions mentioned by her. He was also not forthright and revealing as well.

139. 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.

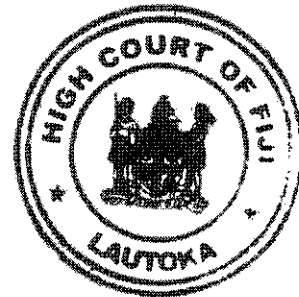
140. There is a reasonable doubt in the prosecution case which this court cannot ignore. This court is not satisfied beyond reasonable doubt that the accused is guilty as charged and therefore this court has no option but to acquit the accused of all the counts as mentioned in the information filed.

141. This is the judgment of the court.



Sunil Sharma

Judge



At Lautoka

12th February, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Nath Lawyers, Lautoka for the Accused.