

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

Criminal Case No. HAC 358 of 2023

BETWEEN : STATE

AND : MANASA SAQANACEVA

Counsel : Mr J Singh for the State
Mr E Veibataki for the Accused

Hearing : 6 February 2025

Closing addresses : 26 February 2025

Judgment : 4 April 2025

JUDGMENT

[1] The complainant has been granted name suppression. Therefore, any public record of these proceedings must not contain any information that may lead to the identity of the complainant. She is referred to as ‘SY’ in this judgment. I have deliberately avoided identifying details that may lead to identifying the complainant.

[2] The accused is charged with the following offences:

Count 1

Statement of Offence

SEXUAL ASSAULT: *Contrary to Section 210(1)(a) of the Crimes Act 2009.*

Particulars of Offence

MANASA SAQANACEVA on the 21st day of November 2023, at Nasinu in the central Division, unlawfully and indecently assaulted SY, by hugging and kissing her cheeks and neck.

Count 2

Statement of Offence

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

Particulars of Offence

MANASA SAQANACEVA *on the 21st day of November 2023, at Nasinu in the central Division, penetrated the vagina of SY, with his fingers, without her consent.*

- [3] The accused denies having committed the offences.
- [4] The accused is alleged to have sexually assaulted the complainant on 21 November 2023 by hugging and kissing the cheeks and neck of the complainant. The accused is also alleged to have raped the complainant the same day by penetrating her vagina with his fingers without her consent.

Count 1 – Sexual Assault

- [5] Sexual assault is an offence contrary to s 210(1)(a) and (2) of the Crimes Act. To establish the offence of sexual assault, the prosecution must prove the following elements beyond a reasonable doubt:

1. On 21 November 2023, at Nasinu in the Central Division, the accused assaulted the complainant by hugging her and kissing her cheeks and neck.
2. The assault was unlawful and indecent.

- [6] The elements for the offence of indecent assault were discussed by the High Court in *Fareed v State* [2022] FJHC 718 (11 November 2022). Temo J (as he was then) stated:

12. Under the Crimes Act 2009, an offence must have a physical element and fault element (Section 13 (1), 15(1) and 18(1) of the Crimes Act 2009). For “indecent assault”, the physical element of the offence is the accused’s conduct of “assaulting the complainant”. The fault element of “indecent assault” is the accused’s “intention of assaulting the complainant unlawfully and indecently”.

Both the physical and mental elements of the offence must be satisfied by the prosecution, beyond reasonable doubt, before an accused can be found guilty of “indecent assault” (Section 14 of the Crimes Act 2009).

*13. It was often said that “the least touching of another in anger is an assault”. It is the unlawful application of force to the person of another. Although the touch may not be painful, nevertheless the touching is in law an application of mild force on the person of another. It is still unlawful, unless the person receiving the touch had given her or his consent, or alternatively, there are other justification in law for the conduct. **The touch or conduct becomes indecent if right thinking members of society considers the same to be indecent, given the surrounding circumstances. It was the court that will have to decide the issue of “indecenty”, taking into account as a guide the views of “right thinking members of society”** (State v Isoa Rainima, Criminal Case No. HAC 064 of 2017S, High Court; Suva, Archbold, Pleading, Evidence & Practice in Criminal Cases, 42 ed., 1985; Peter Gillies, Criminal Law, 4th ed, 1997, pages 604 to 612).¹*

Count 2 – Rape

[7] The offence of rape has three elements: the penetration of a complainant’s vagina, anus or mouth by an accused with their penis, finger or an object, the complainant not consenting to sexual penetration, and the knowledge of the accused that the complainant was not consenting.² The slightest penetration is sufficient to establish the element of penetration.

[8] According to s 206 of the Crimes Act, the term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation, will not be considered as consent freely and voluntarily given. Consent or the absence of consent can be communicated by the words or acts of the complainant. The

¹ My emphasis.

² Section 207(2).

knowledge of the accused that the complainant did not consent is a matter for inference from all the proven facts.

[9] To establish the offence of rape in the present case, the prosecution must prove the following elements beyond a reasonable doubt:

1. On 21 November 2023, at Nasinu in the Central Division, the accused penetrated the complainant's vagina with his fingers.
2. The complainant did not freely and voluntarily consent to the penetration.
3. The accused knew that the complainant was not consenting.

Burden of proof and assessment of the evidence

[10] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.

[11] The accused chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond a reasonable doubt.

[12] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.

Approach to the assessment of the evidence

[13] I approach the evidence dispassionately, without sympathy or value-laden rules regarding how men and women should conduct themselves. It is entirely a matter for

me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

[14] The prosecution's case is dependent upon the complainant's evidence. She is 18 years old. Her evidence does not require corroboration. If her account of the alleged incidents is true, then the accused is guilty of the charges. However, if her account is false or may be false then the accused is not guilty.

[15] The identity of the accused is not an issue in this case. The defence case is of denial. The defence submits that the allegation of sexual assault and rape is a fabrication.

Prosecution Case

Agreed Facts

[16] The accused admits that he and the complainant know each other and, therefore, there is no issue as to identity. The accused runs his own grass cutting business and prior to the alleged offences cut the grass at the complainant's compound once a month. He also cut grass for other people living in Tacirua.

[17] The complainant's parents live overseas. The accused admits that on 21 November 2023 he went to the complainant's house, that after arriving at the house he called out to the complainant and she opened the door. The accused admits that after the door was opened he hugged the complainant. The accused also gave the complainant money that day.

[18] The accused was arrested and interviewed by the police on 27 November 2023.

Prosecution evidence

[19] The prosecution called two witnesses being:

- PW1 - the complainant.

- PW2 - a friend of the complainant's mother.

[20] The complainant, SY, gave the following evidence in examination in chief:

- i. SY is currently 18 years old. She has two younger teenage brothers.
- ii. She was 17 years old at the time of the alleged offending. She was living with her brothers in Tacirua. All three were going to school. The complainant's parents are separated and were living overseas. The complainant looked after her brothers and cooked. The complainant's mother paid for the bills but her mother's friend, PW2, physically organized payment of the bills as well as checked on the 3 siblings two or three times a week.
- iii. The complainant has a close relationship with her mother and her brothers.
- iv. The accused cut the grass in their compound. The complainant's mother would call the accused to arrange the grass cutting and would pay him. He had been doing this for about two years at the time of the alleged offending.
- v. She called the accused 'Tau' due to his familial relationship with her mother. The complainant described her relationship with the accused as not good. In explanation, SY stated that sometimes when she was walking home from school she would see the accused and he would ask questions about her and her schoolwork which did not make her feel good.
- vi. On 21 November 2023, the complainant stayed home from school because her uniform was wet. She was also studying for exams. At about 2.30pm that day, she heard the accused outside calling out her name. He wished to use the bathroom and, therefore, she let him into the house through the back door; the bathroom is situated at the back of the house. The complainant then went back to the living room. After the accused came out of the bathroom he called to her. She went to the back of the house. Whilst he was talking to her, he moved towards her and then hugged her. She stated that she did not say anything or do anything because she was scared. She was scared because he

was hugging her tightly. She also stated that she felt uncomfortable. The accused then released her and began kissing her cheeks and neck which made SY feel more frightened and uncomfortable. She tried to push him away but could not. When she tried to do so he became angry – she could see he was angry by the expression on his face.

- vii. The accused then lifted her up from her legs and placed her on the floor in a lying position. As she was lying down the accused then removed his pants and his underwear – his underwear was pulled back to his thighs. SY was wearing a long skirt and panties. He told the complainant to take off her skirt which she did. He removed her panties and started to touch her vagina with his fingers, placing his fingers in and out of her vagina. She stated that it was painful. She stated that he did not do it for long. He did not say anything at this time. She then pushed him away and told him *'that was enough'*. He then put on his pants and went to the front door.
- viii. She put on her skirt and followed him. They did not speak at this time. At the door, the accused gave SY \$30 and told her *'not to tell anyone what had happened'*. SY stated that she took the money because she was scared. The accused then left.
- ix. The complainant stated that after he left, she was crying and wanted to call her mother but her mother was not online. Therefore, she called her father and told him what had happened. Her father called PW2 who then came to the complainant's house. SY told PW2 what the accused had done to her. PW2 then took SY to the Police Station to report the matter to the police.

[21] In cross-examination, the complainant stated:

- i. Her parents had been overseas for about two to three years and that sometimes she ran out of food and money. She denied that she asked relatives for money when this happened.

- ii. She denied that she saw the accused at night or that he organized a taxi for her on an occasion after church. She did accept that the accused gave her money from time to time to buy snacks.
- iii. She accepted that on 21 November 2023, when the accused came into the house, the accused spoke to her about her boyfriend, who is the son of a pastor, and the accused told her not to follow the boyfriend. SY accepted that she did not like being told this.
- iv. SY denied that she had hugged the accused and denied that he had kissed her on her forehead. She also denied that she fell to the floor.
- v. It was put to SY that there were inconsistencies between her evidence in court and the content of her written police statement. She had stated in court that she removed her skirt whereas in the police statement SY stated that the accused had forcibly removed the skirt. Further, she told the police that the accused had forced her to stay lying down and would not let her stand up but she had informed the court that she stood up to remove her skirt.
- vi. The complainant was referred to a medical report dated 21 November 2023 prepared after she had been examined by a medical practitioner. The findings from the medical practitioner were that there was no obvious bruises or injuries to SY's genitalia. The medical report was marked for identification but not produced as the medical practitioner was not called to produce the document. The complainant accepted that the medical practitioner had made those findings. She stated that she did not see the accused's fingers go into her vagina. It was put to SY that the absence of any injuries means that the finger penetration did not happen. She stated it did happen '*because what I felt was pain*'.
- vii. It was put to her that each of her allegations did not happen. She appears to have accepted during these questions that the accused kissed her forehead (contrary to her earlier denial) but was adamant that he put his fingers in her vagina. Also, while she accepted that the accused gave her

\$30 cash, she denied that she asked for the money, her evidence being, *'he told me not to tell anyone'*. She also accepted that he had come back with the money and that *'he gave the money through the shutters'* to the house.

[22] In re-examination:

- i. SY was asked about her conversation with the accused regarding her boyfriend. SY explained that she did not like talking about her boyfriend *'Because at that time I was still with my boyfriend and I didn't like why he told me to leave my boyfriend'*. She stated that she did not mention this conversation in her examination in chief because *'I didn't understand and I was confused with the questions'*.
- ii. SY did not know how much of the accused's finger was placed into her vagina.

[23] PW2's evidence in examination in chief was as follows:

- i. SY is the daughter of her friend. SY's parents were overseas and that when the complainant's mother left, the complainant and her siblings were alone, and so, therefore, PW2 would usually go over to their house two or three times a week to keep an eye on them and buy groceries, clean their house and wash their clothes.
- ii. On 21 November 2023, at about 4 p.m., she received a call from the complainant's father informing her that the complainant had been sexually assaulted and requested PW2 take the complainant to the police station.
- iii. PW2 arrived at the complainant's house at about 4:30 p.m. When she arrived, she spoke to the complainant. She said that PW2 had tears in her eyes and looked scared. PW2 asked SY what happened. SY was quiet, and after asking several times SY responded with the following description of what had allegedly happened to her:

The complainant did not attend school that day because her uniform was wet. At about 2:30 p.m., the grass-cutter man came to the house and asked to use the washroom. He then called her from the washroom, and as he was standing in the passageway, he hugged her and kissed her on the neck, chest, and shoulder. He told her to pull her pants down and lie down. He then touched her vagina.

- iv. PW2 stated that the complainant was very scared as she was relaying the story. PW2 then called the complainant's mother on her phone and the complainant's mother spoke to the complainant. The complainant's mother asked PW2 to take the complainant to the police station, which she did the same day.

[24] In cross-examination, PW2 stated:

- i. SY did not tell PW2 about SY's conversation with the accused about her boyfriend.
- ii. PW2 went with the complainant to the medical examination on 21 November 2023.

Defence Case

[25] I informed the accused that I was satisfied that there was some evidence of each of the elements of the two counts, and, therefore, there was a case to answer. I advised the accused of his three options; to provide sworn evidence, to remain silent, and to call witnesses in support. The accused chose to provide evidence.

[26] The accused provided the following evidence in examination in chief:

- i. The accused is 49 years old and has a grass-cutting business. He lives in Tacirua and cuts grass for people around Tacirua.

- ii. He knows the complainant. He stated that sometimes the complainant did not have any food at home and he helped her out.
- iii. On 21 November 2023, the accused went to the complainant's home. He went to ask for payment for cutting the grass. Only the complainant was at the house. They went into the living room and talked. He told her that she is like a daughter to him. He talked about her parents, how they were separated, and how they depended on the complainant. He asked why she was not going to school, and also told her not to go to church at night. She told him that she went because her boyfriend was the son of the pastor. He told her to think of her two brothers and her mother.
- iv. He then asked the complainant for the outstanding grass-cutting money. The complainant told the accused that PW2 had the money.
- v. After the conversation, he hugged SY, kissed her on her forehead, '*and she pulled me*'.³ She told the accused that she was hungry. He stated that he would get \$30 for her. He went to the local shop, which was about 400 meters from the house, to obtain the money and came back with \$30 cash, which he gave to her, and then left the house.
- vi. The accused was asked why the complainant had made the allegations against him. He stated '*I think she did that because I had told her off/scolded her and teaching her*' (I take the last part to mean that he had lectured her). He stated that he knew nothing about putting his fingers in the complainant's vagina.

[27] In cross-examination, the accused stated:

- i. He had an agreement with SY's mother to cut the grass every three weeks. The mother would pay for the grass-cutting, and the money would be physically given to him by PW2. Either PW2 or SY's mother would call the accused to tell him the money is with PW2.

³ It is not clear what the accused meant by the statement that SY pulled him.

- ii. On this occasion, in November 2023, PW2 had not paid the money three weeks after cutting the grass. He, therefore, went to the complainant's house on 21 November 2023 to ask for the money. He thought that PW2 would be there. When asked whether the best person to ask about the money was PW2 or PW1's mother, he stated that it was difficult to call the mother overseas, so he just wanted to ask PW2. The accused stated that he did not expect the complainant to be at the house, because he expected her to be at school that day.
- iii. He accepted that when he arrived at the house he wanted to use the bathroom, and did use the bathroom. When he came out of the bathroom SY was in the living room. He told SY not to date the boyfriend. The accused stated that he had told the police about this conversation with SY regarding the boyfriend. The accused was referred to his police interview and informed that there was nothing in the interview record about this conversation. The accused was adamant that he told the police. It was also put to the accused that he had told the police that SY had feelings for him. He denied saying this. The police interview was admitted in evidence – there being no objection from the defence.
- iv. The allegations by SY were put to the accused and he denied them. He did hug SY but not tightly. He did not kiss her cheeks and neck and did not put his fingers inside her vagina.

[28] In re-examination, the accused was adamant that he had told the police about the conversation he had had with the complainant regarding her boyfriend but this had not been recorded in the written interview record. He also stated that the questions from the police were unclear.

[29] In answer to questions from the Court, the accused stated that his relationship with the complainant, before 21 November 2023, was 'good'. She was happy to see him and would hug him. He had known her for about 3 years by November 2023. He saw her at the house occasionally when he cut the grass and sometimes saw her by the side of

the road. She had been to his house to meet his family and had meals with them. I asked the accused why the complainant would make up a false allegation against him and he replied:

Because that day I was scolding her and I used strong words on her, and I was talking to her about family, her life and her education. And I also told her not to have boyfriends because she is still young. And sometimes after 7 or 8 in the night I meet her on the road and I put her in the taxi to go to church because I care about her.

[30] He stated that on the day of the alleged offending, after he had given her \$30 cash, the complainant was happy.

Analysis of the evidence

[31] There is much common ground between the parties. The complainant and accused had known each other for two to three years prior to 21 November 2023. The accused is related to the complainant through the complainant's mother, but the main interaction between the complainant and the accused arose from the fact that he cut the grass around her compound. He did so about once a month. PW2 would physically make the payment on behalf the complainant's mother. The accused would also occasionally see SY walking along the pavement.

[32] Also not in dispute, is the fact that the accused went to the complainant's house on 21 November 2023, that SY was home alone and that the accused went inside the house and used the bathroom. He also accepts that he hugged and kissed SY but the context and details of the kissing are disputed. SY says he kissed her cheeks and neck while the accused says he simply kissed her forehead in a fatherly manner.

[33] They also disagree over other events that allegedly occurred in the house. SY says that the accused picked her up forcibly near the back portion of the house placing her on the floor before removing his pants and telling her to remove her skirt. He then allegedly penetrated her vagina with his fingers. The accused denies this happened and says they talked in the living room about her parents and her boyfriend. She

accepted in cross-examination that they did talk about her boyfriend and that he told her not to see the boyfriend which she did not like.

[34] The accused and the complainant also agree that the accused gave her \$30 cash before he left the house although disagree about the reason for doing so. She says he gave the money to her to keep her quiet. The accused says that she told him she was hungry and the money was for food –he had given her money on previous occasions to help out.

[35] There are, then, two competing versions of the key events on 21 November 2023. If SY’s version is accepted then the accused committed the sexual assaults described in counts 1 and 2 and SY consented to neither. The accused will have known that SY did not consent but was indifferent to what she wanted. If the accused’s version is accepted, however, then he did not commit the sexual assaults – and consent does not arise.

[36] Accordingly, the Court is required to assess the veracity and reliability of the competing accounts from the accused and the complainant. I keep 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, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomon Qurai* (HC Criminal - HAC 14 of 2022)). In *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 Brennan J 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”.*⁴

[37] In *State of UP v M K Anthony* (1985) 1 SCC 505, the Court stated:

*While appreciating the evidence of a witness, **the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinize the evidence more particularly to find out whether deficiencies, drawbacks, and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and a refined lawyer.***⁵

[38] In *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217, the Court stated:

*A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen ... **The powers of observation differ from person to person.** What one may notice, another may not. An object or movement might emboss its image on one person's mind,*

⁴ My emphasis.

⁵ My emphasis.

whereas it might go unnoticed on the part of another It is unrealistic to expect a witness to be a human tape recorder..... In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals, which varies from person to person.... Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on...⁶

- [39] I have carefully considered the evidence of the two key witnesses – being the complainant and the accused. This includes their demeanour, their reactions to questions, any internal inconsistencies as well as inconsistencies with the other witnesses. I have also carefully read the written transcript of the evidence provided at trial.
- [40] I will deal first with the complainant’s evidence. The defence argue that she was not truthful and cannot be believed. Reference is made by the defence to parts of her evidence being implausible. For example, SY’s evidence that the accused lifted her up by the legs – the defence say that if this had occurred she would have fallen to the ground. Further, the defence say that it is unclear from SY’s evidence whether she was standing or lying down when the accused allegedly penetrated her vagina with his fingers. Also, the defence point to the fact that no injuries were found on medical examination the same day.
- [41] I found SY’s evidence to be believable and truthful. She gave her evidence in a straightforward manner. It was apparent that the complainant was uncomfortable at times giving evidence, particularly when talking about the sexual assaults – which is understandable. In cross-examination, she listened carefully and thoughtfully to the questions. SY made a number of concessions yet also clearly stated where she did not

⁶ My emphasis.

agree with the propositions put to her by defence counsel. SY accepted that she had a discussion with the accused about her boyfriend and that she was angry that he told her not to see him. However, the complainant also remained adamant that the accused put his fingers in her vagina. The fact that no injuries were found on medical examination does not prove otherwise or create a reasonable doubt in my mind. The mere fact of digital penetration does not mean that injuries will be sustained in every case – whether injuries are suffered will depend on the extent of the penetration and the level of violence used when penetrating the vagina and surrounding tissues.

[42] There were certainly inconsistencies with SY's evidence. Her account in court was, in part, at odds with her account to the police when the matter was first reported. She told the police that the accused removed her skirt and forced her to remain on the floor. She told the Court that she removed her skirt when told by the accused to do so and that she stood up to remove it. She also initially denied in cross-examination that the accused kissed her forehead but later accepted that he kissed her forehead. The Court is permitted to take into account inconsistencies in order to consider whether the witnesses are believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency 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. If there is an acceptable explanation for the change, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. As the Court of Appeal observed in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [16]:

[16] *The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):*

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;

[43] In my view, the inconsistencies are minor and do not go to the core of her evidence. While SY contradicted herself with respect to being kissed on her forehead, she did not retract her evidence that the accused kissed her cheeks and neck. SY also remained unshaken as to the fact that the accused penetrated her vagina with his fingers. The fact that she told her father the same afternoon of the accused's alleged acts is consistent with her allegations as was her description of the alleged offending to PW2 and the reporting of the matter to the police, again on the same day.

[44] The importance of PW2's evidence pertains to the recent complaint rule – she was one of the first persons that SY complained to about the accused's conduct. This evidence does not corroborate SY's evidence but the consistency of the timing of the complaint lends weight to the complainant's credibility. As the Court of Appeal noted in *Kumar v State* [2018] FJCA 65:

[9] *It was the evidence of PW2, Madhur Lata who gave evidence relating to recent complaint. Regarding recent complaint the Respondent referred to the decision in Senikarawa v. State [2006] FJCA 25; AAU0005.2004S (24 March 2006) where it was stated:*

[14] *Evidence of recent complaint may be adduced to show the consistency of the conduct of the complainant and to negative consent. Kory White v. R [1999] AC 210 requires that both the complainant and the named person to whom the complaint was made must testify as to the terms of the complaint. If the evidence of recent complaint is admitted then the jury should be directed that such complaint is not evidence of the facts complained of and cannot be regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial.*

[15] *The principle on which the evidence is admitted is to support and enhance the credibility of the complainant. The jury, in assessing the truth of the complainant's evidence, may take into account evidence as to the consistency between that evidence and evidence of her contemporaneous complaint. It can be aid to her credit (Spooner v. R [2004] EWCA Crim. 1320, Eng. Court of Appeal.*

[10] *In State v. Likunitoga [2018] FJCA 18; AAU0019.2014 (8 March 2018), the Court of Appeal stated:*

[56] *The legal position on recent complaint evidence was stated in Raj v. State CAV0003 of 2014: 20 August 2014] FJSC 12*

In any case evidence of recent complaint was never capable of corroborating the complainant's account: R v. Whitehead (1929) 1 KB 99. At most it was relevant to the question of consistency, or inconsistency, in the complainant's conduct, and as such was a matter going to her credibility and reliability as a witness: Basant Singh & Others v. The State Crim. App.12 of 1989; Jones v The Queen [1997] HCA 12; (1997) 191 CLR 439; Vasu v. The State Crim. App. AAU0011/2006S. 24th November 2006.

Procedurally for the evidence of recent complaint to be admissible, both the complainant and the witness complained to, must testify as to the terms of the complaint. Kory White v. The Queen [1999] 1 AC 210 at p215H.K."

The complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.

[11] *In Anand Abhay Raj v. State [2104] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court referring to recent complaint stated:*

[38] *The complaint is not evidence of facts complained of, nor is corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.*

[45] It is for this Court to decide whether the recent complaint evidence assists in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. I am satisfied that the complaint to PW2 is consistent with the complainant's evidence. In addition to the timing of the complaint, PW2 stated that the complainant was teary and appeared very frightened. This behavior is consistent with SY having been through a recent traumatic event.

[46] The defence has raised a motive on the part of the complainant. I have, therefore, directed my mind to the Jovanovic direction to remind myself that an accused has no burden to prove a motive or prove a reason for a complainant to lie. The Court of Appeal in *Rokocika v State* [2023] FJCA 251 (29 November 2023) stated at 32 to 34:

In R v Jovanovic (1997) 42 NSWLR 520 Spering 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].

[47] The accused stated that he believes SY had made a false allegation because SY was angry at him for telling her not to see her boyfriend and was lecturing her. I am satisfied that there is nothing to this. SY acknowledged that she was angry with the accused for telling her not to see the boyfriend. It is difficult to accept, having observed SY's evidence and carefully considered this proposition, that SY made serious and false allegations, which have severe consequences for the accused, in reaction to the accused scolding and lecturing SY.

[48] This then brings me to the accused's evidence. The accused provided sworn evidence. He denies the offences. He states that he did not kiss SY as alleged and did not penetrate her vagina with his fingers. I did not find his evidence to be believable or truthful. He stated that his relationship with the complainant was good and that when he left the house on 21 November 2023, having given her \$30, SY was happy. That cannot be reconciled with PW2's evidence that only a short later SY was teary and looked frightened. The accused's explanation for going to the house also lacks credibility. He stated that he went to the house to speak to PW2 about the outstanding money for cutting the grass. However, PW2 did not live at the house and only visited 2 or 3 times a week. The accused accepted in cross-examination that normally the accused would communicate with PW2 or SY's mother when the money was ready to be collected.

Conclusion

[49] Despite the fact that I do not accept the accused's evidence does not mean that the accused is guilty. The prosecution is not relieved of its burden to prove beyond a reasonable doubt that the offences were committed by the accused. Having listened to all the evidence carefully I am sure that SY's evidence correctly sets out what

happened to her on 21 November 2023. Her description to PW2, and her appearance, that same day is consistent with her evidence.

[50] I accept the evidence of the complainant as truthful and reliable. She gave a clear account of what the accused had done to her. The complainant was not discredited as to the core description of her allegations. I have no doubt in my mind that she told the truth.

[51] The Court is satisfied beyond a reasonable doubt that the accused on 21 November 2023 unlawfully and indecently assaulted the complainant by hugging her tightly and kissing her on the cheeks and neck. These acts have some element of indecency in that any right-minded person would consider such conduct sexual and indecent in nature.

[52] The Court is also satisfied beyond a reasonable doubt that the accused penetrated the vagina of the complainant with his fingers.

[53] In view of the above, I find the accused guilty as charged of count 1 of sexual assault contrary to s 210(1)(a) of the Crimes Act, and guilty of count 2 of rape contrary to s 207(1) and (2)(b) and (3) of the Crimes Act, and he is, accordingly, convicted.




D.K.L Tuigereqere
JUDGE

Solicitors:

Office of Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the Accused