IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 107 OF 2013

STATE

v

TUTUNISAU CAUCAU

Counsel:	:	**Ms. R. Uce for the State**
	:	**Ms. S. Dunn for Accused**
Date of Summing Up	:	**28th June, 2017**
Date of Judgment	:	**07th July, 2017**

JUDGMENT

1. The Accused was charged with the following counts and tried before three assessors.

COUNT 1

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 27th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

COUNT 3

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, unlawfully and indecently touched the vagina of **THERESE MARI CHARLENE,** without her consent.

COUNT 4

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree, 2009.

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, unlawfully and indecently kissed the breast of **THERESE MARI CHARLENE**, without her consent.

COUNT 5

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, had unlawful carnal knowledge of **THERESE MARI CHARLENE**, without her consent.

COUNT 6

Statement of Offence

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

Particulars of Offence

TUTUNISAU CAUCAU, on the 28th day of March 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **THERESE MARI CHARLENE**, without her consent.

2. Assessors unanimously found the Accused guilty on all counts.

3. I direct myself in accordance with my own Summing Up and review evidence led in the trial. I adjourned for consideration of evidence. Accused's failure to appear on the day fixed for judgment gave me more time to write a lengthy judgment although I am not supposed to do so when I have agreed with assessors' opinion. Having concurred with the opinion of Assessors, I pronounce my judgment as follows.

4. Identity of the Accused is not in dispute in this case. Accused admitted that he visited Complainant's house on 27th and 28th March, 2013, dates alleged in the Information and massaged the Complainant and her mother Judith. Both Prosecution witnesses identified the Accused in Court.

5. Prosecution says that Accused was engaged in unlawful acts alleged in the Information and those acts were committed without Complainant's consent; namely that he committed those acts under the guise of massaging or medical therapy and Complainant gave consent only to massaging in the belief in his words that there is 'something' in her body which she thought Accused could eliminate.

6. Defence's case is based on complete denial and says that the Complaint made to police is a total fabrication. At the close of the Prosecution case, Accused adduced evidence and, in his evidence, while admitting that he massaged the Complainant in a closed room on both occasions, denied any of the acts alleged, namely, kissing of Complainant's breasts, touching of her vagina, and penetration of her vagina with his penis and finger.

7. Prosecution called two witnesses, the Complainant and her mother Judith, and based its case substantially on the evidence of the Complainant.

8. Complainant maintained consistency in her evidence. She made a complaint to police on the 30th March 2013, three days after the first incident and two days after the second incident. There is no material contradiction between her evidence and her previous statement to police.

9. Complainant and her mother, in their previous statements to Police, had not mentioned the fact that the Accused insisted that he massage the Complainant because he had seen 'something' in her. Having admitted the omission, Complainant said that she was in a state of shock and tears half the time when her statement was being recorded. Her mother Judith said that police questioning did not give her an opportunity to mention that particular fact.

10. It is not surprising for a woman, in the aftermath of shocking rape experience, not to have given a photographic and detailed account to a police officer of what had happened. The trauma of a rape victim at that particular point of time is quite understandable. It is also possible that such an omission to have been created by the involvement of the police officer who had recorded the statement. Police officers cannot be expected to question a rape victim to get a detailed account in the way a counsel would do in cross examination. Complainant's evidence on that particular point was supported by her mother's evidence although she too had omitted to mention that particular fact to police. Therefore, the so called omission did not damage the credibility of the Complainant's evidence.

11. Defence argues that Complainant did not make any 'hue and cry' about the alleged incident and complain to her mother or anybody at the first available opportunity until her mother questioned her and the complaint she ultimately made to police is a fabrication.

12. When Complainant was asked why she didn't tell her mother what had happened during the massage on the first day, Complainant said that she was ashamed of what had happened and didn't know how to tell her mother that somebody had come to massage her and put his hand in her vagina. This explanation is reasonable and acceptable in the circumstances of this case.

13. Accused came to Complainant's house on the 27th March 2013 as a masseur or physiotherapist to massage Complainant's mother, Judith, who was suffering from arthritis. He massaged Judith and then suggested that Complainant too needs to be massaged because he had seen 'something' in her. Judith believed Accused and asked Complainant to change into a *sulu* so that Accused could massage her. Accused wanted her to be massaged in a room, so they went to her mother's room which was not fully closed when the massaging was in progress.

14. Accused also admitted that he massaged the Complainant (on a request made by Complainant) because she was also sick and 'something' was running on her stomach. He told Complainant to pull the *sulu* up and then he massaged her stomach. Accused admitted that he moved his hand a little bit on her vagina and touched part of it.

15. Complainant, in her evidence, did not disclose whether she was in fact suffering from any illness. Prosecutor also failed to get any clarification from either of Prosecution witnesses or Accused as to what illness Complainant was suffering from that needed a therapy around her abdomen. It could however be inferred that Complainant had some illness or 'something' in her stomach or abdomen that needed to be eliminated by the therapy that, in her belief, Accused was capable of.

16. Complainant's mother for the first time, under cross examination, disclosed that Complainant was carrying or pregnant at that time. Complainant made a point to keep this fact a secret throughout her evidence. Complainant had become pregnant at a time when she was separated from her husband. It was not clear whether their intended purpose of this 'therapy' was to eliminate an unwanted fetus Complainant was carrying.

17. If this mysterious 'something' in her was a fetus and the intended purpose of this 'therapy' was to secure an abortion (therapeutic abortion), which is illegal

and also obnoxious to teachings of church, then it is possible for a mother and daughter to conceal these facts and refrain from making any 'hue and cry' or complaining to police. In such an eventuality, it is also possible that Accused knew of their vulnerable position that could be exploited to satisfy his prurient demands.

18. Even if this possibility were to be rejected by assessors and court, it is not disputed that the intended purpose of this whole exercise was therapeutic. Even the Accused admitted that fact in his evidence. That's why Judith insisted that Accused massage her daughter in a closed room. That's why Complainant herself submitted, albeit reluctantly, to this therapy knowing that Accused was going to touch her stomach and that her upper body would be naked during the massage.

19. It should be acknowledged that Fiji is known for therapeutic witch crafting and therapeutic abortions and it is not impossible to convince somebody to undergo such a 'healing" process. Not very long ago this Court convicted a person camouflaged as a prayer warrior of New Methodist Denomination when it was proved that he digitally penetrated the Complainant's vagina under the guise of such witchcraft (*vacacilime*- traditional Fijian witchcraft intended to make a woman conceive) after making false and fraudulent misrepresentation as to the purpose of his act.

20. If the Complainant was made to believe that her illness or something that was in her abdomen could be eliminated by this therapy, and that insertion of finger into her vagina was part of that therapy, and that it had to be continued (as was suggested by Accused) for the second day, then Complainant had nothing to complain about it to her mother or anybody after the first day's incident.

21. Complainant has also provided an acceptable explanation of her muteness after the first day's incident. When she was asked as to why she didn't refuse to go to a room with Accused on the second day, after what had happened on the first day, she said that she didn't want to get massaged but her mum insisted that she get massaged by Accused. She said that she was ashamed to tell her mum what he did and she didn't expect him to do what he did. Therefore, the Complainant has given a reasonable explanation for her failure to complain after the first incident and as to why she agreed to succumb to his therapy on the second day.

22. Complainant has also given a reasonable explanation as to why she did not complain to her mother or to anybody at the first available opportunity after the 2nd day's incident and why she eventually decided to complain.

23. According to Complainant's evidence, she didn't relay the incident to her mother till she came back from church that night. She eventually relayed it to her mother because Accused wanted to go to Suva and massage her sister as well.

24. When asked why she did not complain promptly to her mother, Complainant said:

> *"what does a person do in a state of shock? I would have told her earlier, Yes. We have waited for a while to come to the court house today had it happened back then if we came to court back then everything would have been fresh in my mind, Yes. But everything that I have sworn by this Bible everything that I have said has and did happened".*

25. Explanation given by the Complainant is reasonable and acceptable. In Peter Campbell v Regina (SCCA No 17/2006 – delivered 16 May 2008) court quoted from Valentine [1996] 2 Cr App R 213 at 224 the following:

> *"account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members."*

In D [2007] EWCA Crim 2556 Latham LJ said:

> *"Experience shows that people react differently to the trauma of a serious sexual assault. There is no classic response.... some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint".*

26. After the summation, the Defence Counsel made an application for a redirection on the basis that summing up lacked 'recent complaint direction'. Court dismissed this application.

27. 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 (1991) 1AC 210 at p 251H; Anand Abhaya Raj v The State Spl. Leave to Appeal No. CAV 0003 of 2014. This was not done in this case. Although the Complainant said that, upon her return home from church that night, she relayed the incident to her mother; Complainant in her

so called complaint had not elaborated any sexual conduct on the part of the Accused. According to Judith who had received the so called complaint, Complainant had only said that *'he didn't only massage but he went further than that'*. Judith just presumed what had happened because the door was locked. Complainant did not elaborate or say anything exactly what was done to her. Judith could see the anger in her daughter but she (Complainant) didn't want to say anything.

28. For a recent complaint to be admissible the complaint need not disclose all of the ingredients of the offence but it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the sexual conduct, provided it is capable of supporting the credibility of the complainant 's evidence. ***Raj v The State*** *(supra)*

29. Furthermore, the so called complaint was received by her mother in reply to a question of a suggestive or leading character. She asked Complainant, 'what was wrong? Did the man do something to you? She said, 'yes'.

30. In ***Rex v Osborne*** [1905] 1 KB 551 at 561 Ridley J in giving the decision on a case submitted to the Court for the Consideration of Crown Cases Reserved, said:

> *"We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgment rests apply; and our judgment also is to them restricted. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, ..."*

In ***Peter Campbell v Regina*** (SCCA No 17/2006 – delivered 16 May 2008), paragraph 30 reads:

> *"We have examined a number of authorities on recent complaints and have extracted the following principles from the cases:*
> *... Questions of a suggestive or leading character such as 'did so and so (naming accused) assault you' or 'did he do this and do that to you' will have that effect; but not natural questions put by a person in charge such as 'what*

is the matter' or 'why are you crying'. In each case the decision on the character of the question put as well as other circumstances, such as the relationship of the questioner to the complainant must be left to the discretion of the judge ..."

31. It is obvious that there was no need to give such direction in this case and, if given, it would have been misdirection.

32. Defence also argues that Complainant had not raised any alarm, screamed, thrown a fuss and allowed the Accused to massage her because nothing had happened on the first day. I am unable to agree with this contention.

33. On the 1st day, accused massaged Complainant's abdomen, stomach, and then he started massaging her thighs and finally put his finger inside her vagina. She started to feel uncomfortable because he was moving his fingers around inside. He kept on asking her about how often she had had sex with her husband. It is possible that she would have been confused or unable to understand the sexual nature of the act of the Accused. If the Complainant had believed, under aforementioned circumstances, what Accused was doing formed part of his therapy to which she had already consented, she cannot be expected to protest or raise any alarm.

34. According to Complainant's evidence, events took a dramatic turn on the second day (28th March, 2013), which included kissing of breasts, licking and penile penetration of vagina, acts, necessarily having sexual connotations. Complainant had by that time realized that she had been betrayed. She said that she was ashamed of what had happened and didn't know how to tell her mother that somebody had come to massage her and put his hand in her vagina.

35. Accused had introduced himself as a former police officer. Complainant said that she was scared because there was no male in the house to call for help. She also said that she had told Accused about the facial surgery she had undergone a year ago and was scared that Accused would blow on her face. I am satisfied that Complainant's submissive passivity and muteness have been explained by evidence led in the trial. There is no classic reaction or manner that a woman would respond to an unwelcome sexual aggression.

36. Although the Complainant had not complained, she was in a distressful condition. Judith could see anger in her. She was moody. On the 28th, Therese looked as if she was about to cry, she looked fugitive. Her distressful condition is consistent with that of a rape victim.

37. Complainant frankly admitted that, on the second day, she went with Accused to her room for massaging upon Accused's request, and that she disclosed the information to the Accused that, when the door is locked from inside, it can't be opened from outside. Complainant said that she did not know what was really going to happen behind the door that day. Accused said that it was upon a request of Complainant that they went to the room. He further said that the Complainant had a son and she did not want the son to see her naked waist up being massaged that is the reason why they went to the room. He also said that she was the one who asked him to lock the door so that the son could not come in when he is massaging the Complainant.

38. It is not surprising for a woman to take precautions to ensure that the door is locked before being exposed to a masseur, especially when she had a son around.

39. Evidence of the Complainant is consistent with her mother's evidence. There is no reason or motive for the Complainant to make up a story against the Accused.

40. Complainant was straightforward and not evasive. She frankly admitted that she had allowed the Accused to massage her in a closed room and even informed him that, when the door is locked from inside, it can't be opened from outside. That shows her honesty as a witness.

41. I considered overall evidence of Prosecution witnesses, their demeanor, the way they faced questions. They are straightforward and not evasive. I find the Prosecution version to be plausible and believable.

42. Accused in his evidence having admitted massaging the Complainant flatly denied having done any of the unlawful acts. Accused was not straight forward. His evidence was not consistent and not appealing to me. It failed to create any doubt in Prosecution version. I reject the version of the Defence.

Lack of Consent

False and fraudulent representation as to the nature of the act

43. Accused proved himself to be a capable masseur or therapist when he massaged Complainant's mother Judith. He had indicated to Judith that Complainant had 'something' with her and she needs to be massaged. Accused was able to convince Judith that his therapy could eliminate her daughter's sickness or whatever was 'inside her'. Judith thereupon insisted that Complainant get massaged by the Accused. Complainant, albeit with

reluctance, agreed to it. Her agreement was however limited to a massage or therapy. Accused knew it very well.

44. On the first day, Accused, in the process of his massaging, suddenly inserted his finger into Complainant's vagina. She was taken by surprise. Events that took place inside the room are far removed from the notion of massaging. The circumstances were, to say the least, unusual and nothing to do with massaging. They consisted of an act of digital penetration of her vagina. The nature of the act is completely different from what she had agreed for him to do.

45. Accused had not informed that his therapy would involve an act of vaginal penetration. His representation was false when he inserted his finger into her vagina under the guise of massaging. It was fraudulent because he knew that his act was not therapeutic but prurient. She could not understand the sexual nature of his act but he could. There is no agreement for this particular act. Her consent was not an informed one. It had been obtained by giving a false and fraudulent misrepresentation as to the nature of the act and therefore vitiated.

46. It is not difficult to draw certain inferences from proved facts to conclude that on the first day, Complainant, at the time she gave consent to the Accused, she was not aware that his therapy would include digital penetration. She felt uncomfortable and was afraid. However, she still believed his words and, amid her mother's insistence, decided to submit herself to the continuation of his therapy on the second day.

47. English decisions of *R v Williams* [1922] All ER 433 and *R v Flattery* [1877] 2QBD 410 illustrate the types of situations that fall within this category. The former case concerned a singing teacher who had sexual intercourse with a student, having represented the act as an operation to improve her breathing. In the latter case, a quack doctor had sex with a patient, while representing that he was carrying out surgery. Since the fraud related to the 'nature' of the act (*ie*, the girl believed she was having medical treatment whereas in fact she was submitting to sexual intercourse) consent has vitiated and the man was guilty of Rape.

False and fraudulent representation as to the purpose of the act

48. On the second day, when Complainant went into the room with the Accused, she would have had an idea about the nature of his act. However, she believed his act to be part of the therapy to which she agreed.

49. By Accused's false and fraudulent representation, Complainant was either misled or deceived into believing that the purpose of the act was therapeutic. But acts such as kissing of breasts, touching and digital and penile penetration of vagina had nothing to do with a therapy. All acts had sexual connotations.

50. In the Queensland case of *R v BAS* [2005] QCA 97 the appellant was convicted of multiple counts of rape and sexual assault committed on young women and minors during treatments represented as 'alternative therapy'. The appellant admitted that many of the so-called 'treatments' took place, but claimed he genuinely believed in their medical value; that claim was evidently rejected by the jury. There was no dispute that the complainants and their parents had consented to the treatments; however, there was clear evidence that they would not have done so if they had thought then, as they did later, that the sessions had no genuine therapeutic purpose. The Court of Appeal unanimously upheld the appellant's convictions. The judges appeared to accept without serious question that the scenario would fall within the meaning of the Section 348(2)(e) of Queensland Criminal Code similar to Section 206 (2) (e) of the Crimes Act.

51. When Complainant said to Judith that Accused didn't only massage but went further than that, both of them cried. Judith said she is really sorry for what happened. *'This is all her fault he came to massage her, please forgive for everything'* Judith said. It is clear that they would not have agreed if they had thought that the sessions had no genuine therapeutic purpose.

52. In the present case, the Accused has not admitted the act. However, *Bas* (supra) case is relevant to the present case as this Court has already found that physical act of the Accused had been proved by the Prosecution.

53. In the Victorian case of ***Mobilio*** [1991] VR 339, the defendant, a radiographer, carried out internal vaginal examinations on several female patients using ultrasound transducers. The examinations had no medical utility, being only for the defendant's sexual gratification. The defendant was convicted of rape, but the Victorian Court of Appeal overturned his conviction, based on the approach prescribed by the High Court. The women were not mistaken about the nature of the act being performed, but only as to its purpose. (At that time false and fraudulent representation as to the purpose of the act had not been included in the definition)

54. While the women in that case were not deceived as to the nature of the acts perpetrated on them, they were clearly misled as to their purpose. They thought the acts had a medical rationale, while, in reality, they were performed simply to gratify the desires of the defendant.

55. In this case, acts perpetrated by the Accused on the Complainant had only sexual connotations not associated with a therapy. Only inference that the Assessors could have drawn from evidence led in trial is that purpose of his acts was prurient.

56. I am satisfied that the consent was not freely and voluntarily given. It was obtained by false and fraudulent representations as to the nature and also purpose of the act. There was evidence on which the Assessors could properly find that the Complainant did not freely and voluntarily give her consent. Therefore, consent is vitiated.

Knowledge /Reasonable belief in consent

57. Counsel for Defence in her closing speech took up the position that Prosecution had failed to prove the fourth element of Rape beyond reasonable doubt. She stated that, according to the version of the Complainant, the Complainant did not throw a fuss, did not shout, didn't scream, and when a finger was inserted into Complainant's vagina on the first day, she did nothing, she just looked away and when he told that he will come again, she did not say 'no'; on the second day, she was the one who was leading to the room, showing the Accused which room to go to. In this context, the Counsel for Defence argued that, even if version of the Prosecution were to be believed, conduct of the Complainant did not indicate to the Accused that she was not consenting and therefore the 4th element of Rape had not been satisfied by the Prosecution. Counsel for Defence, having posed the question- '*did the Accused know at that time that she was not consenting?* , invited assessors to return with a not guilty opinion if they answered this question in the negative.

58. Although the Defence Counsel raised this point in her final remarks, so called fourth element of rape was never a part of the Defence case and the belief or awareness in consent were not argued at trial. The main issue in dispute was whether penetration had occurred at all. Although the *actus reus* and the *mens rea* are components of all crimes, the *mens rea* in a rape trial only becomes relevant when the conduct in question contains some level of ambiguity.

59. Even if the forth element of Rape as is recognized in common law is regarded as part of law in Fiji, direction on the fourth element is only to be given in cases where evidence is led or an assertion is made that the accused knew or reasonably believed that the complainant was consenting and where relevant to the facts in issue in the proceeding.

60. There was no argument about honest belief or awareness at trial, only consent. The issue of the Accused's honest belief and knowledge in consent did not arise even by implication because Accused did not give evidence of actual consent by Complainant from which it could have been inferred that he believed or knew Complainant was consenting.

61. On the Complainant's account, if it was accepted, there was no prospect of the Accused having a reasonable belief or knowledge in consent. Neither the Accused nor his Counsel advanced such a preposition at trial. Only issue which was raised in respect to the count of rape is consent. There are two starkly different accounts were given. Eventually, the Assessors accepted the evidence of the Complainant and rejected that of the Accused.

62. However, since the issue on the forth element was raised by the Counsel for Defence in her final remarks with somewhat forceful manner and her assertion contained some misleading statements, suggesting that the Prosecution needs to show the Complainant communicated her lack of consent by protesting, shouting, struggling etc. in order to prove that the Accused knew or believed that the Complainant did not consent, it is not improper to direct assessors as to the way evidence is to be approached on the issue of so called fourth element of Rape so that any misconception that may have been instilled in assessors' mind could be erased. *The Court is entitled to comment upon the way in which the evidence should be approached where there was a danger that the jury might reach an unjustifiable conclusion without it. See: D [2007] EWCA Crim 2556.*

63. The Prosecution does not have to show the complainant communicated her or his lack of consent in order to prove that the accused knew that the complainant did not consent: Name withheld *[2012] NSWCCA 247 at [47].*

64. Some common law jurisdictions (Victoria, Australia) have even incorporated provisions to institute a communicative model of sexuality, also called an affirmative or positive consent standard, under which it is expected that a person who consents to particular sexual acts will communicate that consent, directly or indirectly. As a consequence, if consent is not communicated, the legislation makes it clear that non-consent should be assumed. Under the communicative model of sexual conduct, if affirmative consent has not been communicated, the initiator of sexual penetration is expected before proceeding to take reasonable steps to ascertain whether the other person is consenting.

65. This standard (though not part of law in Fiji) with regard to the third element (lack of consent) runs contrary to the argument of the Counsel for Defence

which advocates a requirement (to prove the fourth element) of communication by the complainant of her dissent.

66. Although not directly relevant to the issues argued at trial, in light of direction I have given in my summing up, it is appropriate to deal with the applicability of the fourth element or *mens rea* in a Rape case in Fiji.

67. Section 5 of the Crimes Act 2009 says:

> *(1) Act shall be interpreted in accordance with the principles of legal interpretation ordinarily applied by the courts of Fiji.*
>
> *(2) Expressions used in this Act shall be presumed to be used with the meaning attaching to them in the criminal law as applied in jurisdictions based upon the laws of England, and shall be construed in accordance with such meanings —*
>
> *(a) so far as is consistent with their context; and*
>
> *(b) except as is expressly provided in this Act.*
>
> *(3) Nothing in section 2 or any other provision of this Act prevents a court from relying on the authority of any judgment of a court in Fiji, or any comparable foreign jurisdiction, in the aid of any matter of interpretation arising in the context of any offence prescribed by this Act, or any other Act or Decree.*

68. Difficulties arise in trying to determine the requisite *mens rea* for an offence when statutes offer a standard such as "negligently," "recklessly," or "knowingly," these words are ambiguous and subject to interpretation. Rape definition in the Crimes Act is silent on the issue of *mens rea,* (intention, knowledge, recklessness or belief in consent) and as to the standard of *mens rea* to be applied in proving the charge. It becomes even more difficult when the statute does not provide a standard. More importantly, once a standard for *mens rea* is established, it becomes necessary to delineate whether to enforce that standard on objective or subjective grounds.

69. Webster's Third New International Dictionary" explains that "subjective" is characteristic of a reality perceived in the mind, as opposed to an actual independent reality. **A** subjective standard of reviewing a person's intent focuses on what the perceptions are in that person's mind and how that person views the circumstances of a particular situation. Using a subjective

standard, fault may only be assigned when it can be shown that the actor, in his own mind, realized the risk that his conduct involved.

70. In contrast, an objective standard focuses on evidence independent of the actor's thought. It views the facts for what they are, rather than what the actor perceived them to be. Moreover, the objective approach evaluates those facts based on what is considered reasonable by current societal standards.

71. It should be acknowledged that the meaning attaching to fourth element of Rape as applied in jurisdictions based upon the laws of England is not uniform.

72. Rape laws, particularly fault element and element of consent have been reformed in recent years in common law jurisdictions (especially, in Australia and Canada) to reflect changing standard and expectations regarding both sexual conduct and the appropriate treatment of sexual assault victims in criminal trial. Those reforms are intended to reflect contemporary view of sexual autonomy of women and equal access to justice.

73. Since the English decision in ***Directorof Public Prosecutions v. Morgan***, (2 All E.R. 347 (1975) the common law position was that- if a man committed the *actus reus* of rape – the guilty act, but he honestly believed that the woman was consenting regardless of how unreasonable that belief was, he cannot be convicted of rape because the *mens rea* – the guilty mind – was not present. Accordingly, at common law, an accused could argue that he believed the complainant was consenting, even if there were no reasonable grounds for such a view.

74. This theory was known formally as the 'mistaken belief' clause and informally as the 'rapists charter' (Temkin, 1987) because it meant that a woman could be actively non-consenting, even shouting 'no' and struggling to free herself, and a man could still be acquitted of rape. It is a defence that is very difficult, if not impossible, to disprove because the defence relies upon what was going on the defendant's mind.

75. Feminist activist groups campaigned for many years that the mistaken belief defence should be based on some test of reasonableness or that the mistaken belief clause should be abolished altogether. These are issues that have been widely debated throughout the common-law world.

76. England and New Zealand, have now reformed their rape laws to institute an 'objective' fault element. In these jurisdictions, the accused can only rely on an honest belief in consent if that belief was also 'reasonable'. This is variously

framed as a defence of 'honest and reasonable belief', or as an element of the offence so that the prosecution must prove that the accused did not believe on reasonable grounds that the complainant was consenting.

77. Rape is now a statutory offence in England and Wales. The offence is created by section 1 of the Sexual Offences Act 2003 which reads:

> *(1) A person (A) commits an offence if—*
>
> *(a) they intentionally penetrate the vagina, anus or mouth of another person (B) with his penis*
>
> *(b) B does not consent to the penetration, and*
>
> *(c) A does not reasonably believe that B consents.*
>
> *(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.*

78. In Australia this issue divided rape law reform campaigners into two groups; the 'subjectivists' who argued that the Morgan ruling should be upheld and the 'objectivists', who argue that the belief should be reasonable. In Western Australia, Tasmania, Queensland, the objectivists have triumphed.

79. In Victoria, The Crimes Amendment (Rape) Bill 2007 (Victoria) aimed to clarify the instructions to juries on this issue. Specifically, the Explanatory Memorandum confirmed that the requisite fault element for rape was awareness of the possibility of non-consent, rather than absence of an honest belief in consent. The Memorandum continued:

> *"The directions make it clear that evidence or an assertion of a belief in consent is to be taken into account when determining whether the prosecution has proven beyond a reasonable doubt that the accused was aware that the complainant might not be consenting. Evidence of, or an asserted belief in, consent, even if accepted by the jury, is not necessarily determinative of whether the prosecution has met this burden".*

80. That is to say, belief in consent and awareness of the possibility of an absence of consent are not mutually exclusive. In circumstances where the prosecution has satisfied the jury beyond a reasonable doubt that an accused person was aware that the complainant might not be consenting, if the jury is equally satisfied in relation to the other elements, then they should convict

irrespective of whether they accept the evidence or assertion that the accused believed the complainant was consenting.

81. In short, it was explained that a claimed belief in consent was not itself determinative. Rather, 'belief' was a factor for the jury to consider in deciding whether the prosecution had proven that the accused was aware that the complainant was not or might not have been consenting.

82. In his Second Reading Speech on the Crimes Amendment (Consent — Sexual Assault Offences) Bill 2007, NSW Attorney General, John Hatzistergos, said:

> *"The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards"*

83. However, the 2010 decision of the Victorian Court of Appeal in ***Worsnop v The Queen*** *('Worsnop')* (2010) 28VR187 provides an example of rape law reform intended by the Crimes Amendment (Rape) Bill 2007 (Victoria) not achieving its intended effects. In Worsnop, the Court held that a jury direction on the 'mental' or 'fault' element for rape, introduced by the Crimes Amendment (Rape) Act 2007 (Vic), had not altered the law in the ways imagined by the 2007 Act's drafters and supporters. *Worsnop* determined that a jury cannot convict for rape if they find there is a reasonable possibility that the accused held an honest belief in consent (however unreasonable or mistaken). On this point, the Court found that both the Explanatory Memorandum accompanying the Crimes Amendment (Rape) Bill 2007 (Vic) and the Victorian Criminal Charge Book ('Criminal Charge Book') were incorrect.

84. In Victorian law, as it now stands, knowledge about lack of consent is dealt with in s 61HA(3) which reads:

> The accused knows that the person was not consenting if he or she:
>
> (a) knows that the person does not consent
>
> (b) is reckless as to whether the person consents, or
>
> (c) has no reasonable grounds for believing that the other person consents.

85. Section 61 HA (3) (c) requires the Crown to prove beyond reasonable doubt that there were "no reasonable grounds" for the accused to believe that the other person consented. It is a significant departure from both the pre-Act statutory position and the common law, which maintained a subjective fault element.

86. For the purpose of determining knowledge of lack of consent, the jury is to have regard to all the circumstances of the case, including any steps taken by the accused to ascertain whether the complainant consents, but excluding any self-induced intoxication on the part of the accused.

87. In the Victorian Law, the mental element for rape would be made out if the jurors were satisfied beyond reasonable doubt that the accused was aware of the existence of a Section 36 circumstance. (Section 36 gives an expanded non exhaustive list of situations where a person's consent to an act is not freely and voluntarily given similar to Section 206 (2) of the Crimes Act).

88. However, this section has been interpreted in recent decisions. Accused's awareness of a Section 36 circumstances should only be a factor for the juror's to consider in deciding whether the claimed belief in consent was reasonable in the circumstances. However, even then, the 'reasonableness' or 'unreasonableness' of the accused's belief is itself only a guide to whether it was actually held, not that it be reasonable or accurate. *Roberts* [2011] VSCA 162 (2 June 2011)

89. A judge must take special care in directing the jury in relation to s 61HA(3)(c). The jury is to proceed on the assumption that if the accused honestly believed the complainant consented, the law requires it to test that belief by asking whether there were reasonable grounds for it in the circumstances of the case: [2016] NSWCCA 52 at [155].

90. It is erroneous to instruct the jury or imply that the jury should ask what a reasonable person might have concluded about consent, rather than what the accused might have believed in all the circumstances and then test that belief by asking whether there might have been reasonable grounds for it. The belief is that of the accused and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable: ***O'Sullivan v R*** (2012) 233 A Crim R 449 at [124]–[126].

91. All around the common law world, since at least the 1970s, rape and other sexual offences have been the subject of review, revision and reform. In light of ambiguities in the common law world in this regard, it will be important

for Parliament to take into consideration the reforms that have taken place in other common law jurisdictions in respect of *mens rea* of Rape law and clearly state the law in Fiji.

92. Courts in Fiji have given following direction where necessary,

> *If you accept that the complainant was not consenting you must ask yourself did the Accused know that she was not consenting, and if not, was that a reasonably held belief, or was the Accused reckless in going on knowing that she might not be consenting?*

93. Assuming that *mens rea* (knowledge or belief) of the Accused is in issue in this case, the Prosecution has still proved the charge in terms of the above mentioned direction.

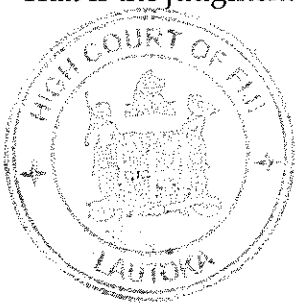
94. When Accused took Complainant's hand to put it in his *sulu* for her to touch his penis, she pulled her hand away. Then accused started kissing her breast. She just felt uncomfortable. Then he went down to have oral sex and started licking her vagina. As she turned her head towards the bed, he came on top of her. He put his penis inside her vagina and turned her face to kiss her. She pulled her face away and told him that her stomach was paining.

95. In this context, Accused had no reasonable grounds to believe that Complainant was consenting to sexual acts. Accused was aware that Complainant gave consent to a therapy or massaging and not for any sexual activity. Accused admitted that Complainant agreed only to a therapy. Accused knew the existence of a 206 (2) situation [S 206 (2) of the Crimes Act]. Accused had no reasonable ground to believe that Complainant was consenting to sexual activities although she was not protesting, shouting or struggling.

96. I agree with the unanimous opinion of the assessors. It is open for them to reach such a conclusion on the evidence led in the trial.

97. Prosecution has proved the charges beyond reasonable doubt. Accused is convicted on all counts as charged.

That is the judgment of this Court.



Aruna Aluthge
JUDGE

AT LAUTOKA
07th July, 2017

Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused