

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 30 of 2020

STATE

V

ISIKELI KUNAGUDRU

Counsel : Mr. T. Tuenuku for the State.
: Ms. E. Radrole for the Accused.

Dates of Hearing : 26, 27, 28 July, 2022
Closing Speeches : 01 August, 2022
Date of Judgment : 03 August, 2022

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following amended information:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 27th of August 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of “A.N” without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 12th of September 2019, at Keiyasi village, Navosa in the Western Division, penetrated the vagina of “A.N” with one of his fingers, without her consent.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 12th of September 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of “A.N” without her consent.

FOURTH COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 23rd of September 2019, at Keiyasi village, Navosa in the Western Division, penetrated the vagina of “A.N” with one of his fingers, without her consent.

FIFTH COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 23rd of September 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of “A.N” without her consent.

SIXTH COUNT

Statement of Offence

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

Particulars of Offence

ISIKELI KUNAGUDRU, on the 4th of October 2019, at Keiyasi village, Navosa in the Western Division, had carnal knowledge of “A.N” without her consent.

2. In this trial, the prosecution called five witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of counts one, two and three for the offences of rape as charged. For counts four and six the accused had a case to answer for the lesser offences of indecent assault. In respect of count five for the offence of rape the accused did not have a case to answer.

BURDEN OF PROOF AND STANDARD OF PROOF

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

ELEMENTS OF THE OFFENCE

RAPE

4. In respect of the first, second and third counts the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis and fingers;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis and fingers without her consent and the accused knew or believed the

complainant was not consenting or didn't care if she was not consenting at the time.

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

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis and fingers is sufficient to satisfy the act of penetration.

INDECENT ASSAULT

14. To prove the lesser offences of indecent assault 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 touching her breast and putting his hand under her dress.
15. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed the offences.
16. 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.
17. Assault is the unlawful use of force on the complainant by the act of touching her breast and putting his hand under her dress.

18. In respect of the offences of indecent assault the accused has denied committing these offences. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by touching her breast and putting his hand under her dress.
19. 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 of the offences of indecent assault. 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.
20. As a matter of law, I 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.
21. In this case, the accused is charged with more than one offence, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

22. 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.

23. 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

24. The complainant informed the court that in the year 2019 she was staying at Keiyasi village with her grandmother Mere Serea and uncle Vonivate Batitoa. The accused is her uncle who was living in Keiyasi village as well and he is a church elder. The complainant had dropped out of the school system after completing term 1 of form 3.
25. On 27th August, 2019 the complainant was at the house of her 2 year old cousin sister Salote and was looking after her since all the family members had gone to the farm including the complainant's grandmother and her uncles.
26. After attending to the household chores the complainant went to lie down in the sitting room to take a nap. After a while, the accused came into the house laid beside the complainant and started touching her from her breast downwards. The complainant told him not to do it but he kept on doing. The accused told the complainant not to scream but to lie still. The complainant did not stand up and leave because she was scared of the accused and there was no one else around.

27. Thereafter, the accused lifted the complainant and took her to the sleeping area behind the curtain where the mattresses were. When asked to explain how she was lifted the complainant stated *“he did not lift me I had put Salote to sleep and I had gone to the sleeping area to play with my phone that’s when he came into the sleeping area.”*
28. When she went into the sleeping area she was lying down on the mattress on her side facing the wall. The accused came and lay beside the complainant and kissed her neck. When she turned the accused touched her breast she told him not to do it but the accused told her not to scream and not to do anything but to lie still.
29. The accused got hold of Salote’s clothes and with it blocked her mouth. The complainant was scared she wanted to sit but the accused pushed her down he took off his pants, blocked her mouth and with his other hand pulled down her pants, at this time the complainant was lying facing up. The accused by this time was on top of the complainant.
30. After this, the accused penetrated her vagina with his penis and had sexual intercourse for 5 minutes. The complainant did not agree to what the accused had done to her. The accused thereafter wore his clothes and left, the complainant came out of the house to look for someone to relay the incident to but no one was there. The complainant stated that she was unable to do anything to the accused because she was small and he was big.
31. Thereafter, the complainant went and lay down in wait for her grandmother to come in the afternoon so that she could tell her what had happened. As soon as her grandmother arrived the complainant told her grandmother about what the accused had done to her. The complainant

told her grandmother that the accused had come to harass her and put his penis in her vagina.

32. Her grandmother responded by saying that she will tell her uncles and there would be a meeting where the accused would be questioned. The complainant did not report the incident to the police because she was scared and was waiting for her uncles approval.
33. In the morning of 12th September, 2019 the complainant was sleeping in the sleeping area of the house. The accused came and forcefully turned her by pushing her shoulder from the front side resulting in her facing up since she was lying on her side. The accused put his pants down, went on top of the complainant and removed her pants.
34. The complainant tried to turn and sit but could not since the accused was on top of her. The accused told her to lie still and not do anything. The complainant was crying since she was afraid of what the accused was doing to her. The accused had sex with her for about 4 minutes. At this time she was trying to sit but could not. The complainant got hold of the curtain and pulled it and was trying to see if someone was outside. There was no one there so she lay down crying. The complainant wanted to seek assistance and she did not agree to have sex with the accused.
35. The complainant also informed the court that on the same occasion before having sex the accused had inserted his finger into her vagina and that she did not agree for the accused to insert his finger into her vagina. After the accused wore his clothes he left.

36. The complainant stood up got her towel and went to where her grandmother was in the farm. At the river bank she called out to her grandmother but her grandmother did not hear her.
37. When the complainant's grandmother came home in the afternoon the complainant was in the kitchen crying. She told her grandmother about what the accused had done that is the accused came during the day and had put his penis into her vagina. Again her grandmother told her that she would call a meeting because it was a family matter.
38. On 23rd September 2019 at around 9 am the complainant was at home her grandmother had gone to the farm. After completing the household chores the complainant was playing with her phone at the sleeping area. After a while the accused came around and asked her about the whereabouts of the other family members. The complainant told him that they had gone to the farm.
39. The accused left and shortly after came back. The complainant had a swollen leg she could not walk he came and lay beside her and started touching her from her breast downwards. The complainant told the accused to go away and also that everyone at home was aware of what he has been doing to her. The accused said "*do not worry about it because nothing will happen*". The accused left after saying this.
40. The complainant tried calling her grandmother's employer but there was no response, the reason for this was that she wanted her grandmother to come home. Thereafter, the complainant called her mother in Suva and told her to ask her grandmother why she had not yet reported the matter to the police. Soon after her grandmother came home, the complainant again told her grandmother that the accused had touched her. The

complainant's grandmother said that she was waiting for all her uncles to come for a meeting.

41. On 4th October 2019 at 9 am the complainant was at home her grandmother and her uncle had gone to the farm. After completing her household chores the complainant went to lie down in the living room. The accused came and sat beside her and said for them to go to the sleeping area. The complainant asked what they are going to do there the response was *"you already know what we are going to do."*
42. The complainant told the accused to go away but he did not go so she stood up and sat by the door and looked outside to see if someone was around but there was no one.
43. The reason for this was to call any person to come and stay with her since she was alone in the house. The accused left, but he came back after sometime, at this time the complainant was sleeping. When she woke up she found the accused lying beside her and his hand was under her dress. The complainant pushed the accused hand stood up and went outside. The accused told her not to tell anything to anyone about what he had done to her. The complainant ran to Salote's parents house and locked herself. In the afternoon the complainant's grandmother came and was calling her she opened the door and told her grandmother about what the accused had done to her. She told her grandmother the accused had come and touched her.
44. A family meeting was called the complainant, the accused and her uncles were present but not her grandmother. According to the complainant she told everything the accused had been doing to her and the accused admitted he had done those things to her. On the same night her uncles decided that the matter be reported to the police. The complainant was

taken to the hospital for a medical checkup she did not agree to have sex with the accused or for him to penetrate her vagina with his finger.

45. In cross examination, the complainant stated that houses in the village were close to each other and her neighbours would usually go to their farms in the morning. She did not shout because the accused had told her not to shout or do anything. She had the opportunity to shout but did not.
46. The complainant said that she had resisted but the accused kept saying that he wanted to do it. On 27th August 2019 the complainant agreed that she was lying in the sleeping area. When it was suggested that she could have chased the accused at that time the complainant stated that she told him to go away but he forcefully held her. She was smaller than the accused so she could not do anything. The complainant was unable to push the accused away when he was inserting his penis into her vagina because he was on top of her and holding her tightly.
47. The complainant agreed that in her evidence she had said that she had only attended the first term of school in 2019. The complainant was referred to her police statement dated 12th October, 2019 where it was stated that she had attended second term of school. When asked which version was correct the complainant said what she told the court that she left school after completing term one.
48. The complainant also agreed that she told the court that Merewai had come home on the 27th but this was not mentioned in her police statement. However, she had told the police officer writing her statement but the officer had told her to talk about what had happened to her. The complainant also agreed that in her police statement she had told the police officer that the accused had lifted her to the sleeping area which is a different version to what she told the court in her evidence.

49. When it was put to the complainant that nothing happened as mentioned by her on 27th August 2019 she maintained that it had happened. On 12th September, 2019 the accused came into the house, the complainant also denied pulling the mattress into the sitting room and lying on the mattress and exchanging kisses with the accused.
50. The complainant was not able to do anything although this was the second incident. She agreed that she should have been more careful, however, she did not expect this from the accused she had the chance to protect herself but did not and she could have locked the door.
51. The complainant agreed on 12th September she could have resisted the actions of the accused and could have run out of the house. When it was suggested she did not do the above because she was in a relationship with the accused she denied.
52. The complainant maintained that the accused on 12th September had inserted his penis into her vagina and also on this date he had inserted his finger into her vagina. The complainant did not scream for help because her neighbours were not around she just laid down and cried. The complainant, however, agreed with the suggestion that she could have screamed for help but she did not use that opportunity. The complainant agreed she could have come out of the house and sought help from her neighbours, but she did not.
53. The complainant denied on 23rd September, 2019 she had called out to the accused to come and massage her. The complainant denied the accused had only massaged her back and chest. She agreed this was the third incident and she should have been extra careful and that she did not take the opportunity to even seek or shout for help on this date.

54. The complainant agreed she could have locked the house but she did not or call someone from her phone. The complainant maintained her evidence of the 23rd September, and 4th October 2019. She agreed she would not have known what had happened to her on 4th October, 2019 because she was sleeping. The complainant maintained that on 27th August, 2019 there was sexual intercourse and also on 12th September as well and on the same day she had not consented for the accused to penetrate her vagina with his finger.
55. In re-examination the complainant explained the reason why she did not lock the door of the house. She stated that she did not expect the accused to come back after the first incident. The complainant further stated that she was not lifted by the accused but she went to the sleeping area.
56. The second witness Mere Serea informed the court that she is the maternal grandmother of the complainant. In the year 2019 the complainant was residing with her at Keiyasi Village. The witness knows the accused who is her nephew.
57. The witness stated on 27th August, 2019 when she returned from the farm in the afternoon the complainant was at home. At home the complainant said *“mum namesake Gudru had sex with me.”*
58. Upon hearing this, the witness got afraid since the accused is a family member and the complainant called him uncle. The witness did not do anything or tell anyone although the complainant had told her twice that the accused had sex with her. The witness was afraid to talk about the issue because of the close family relationship. The witness does not know who reported the matter, however, the police came during the family meeting.

RECENT COMPLAINT EVIDENCE

59. Complainant's 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.
60. 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 would be given to the fact that the complainant told Mere her grandmother twice after the alleged incidents that the accused had sex with her.
61. This is commonly known as recent complaint evidence. The evidence given by Mere Serea is not evidence of what actually happened between the complainant and the accused since this witness was not present and did not see what had happened between the complainant and the accused.
62. 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 told Mere on two occasions after she returned from the farm that the accused had sex with her. The complainant had told her grandmother in the afternoon on the same day of the incidents which indicates her promptness in telling her grandmother about what the accused had done to her. The prosecution is asking this court to consider the fact that the complainant had relayed

to her grandmother about what the accused had done to her which was a crucial and important aspect of her complaint.

63. The prosecution submits that the complainant had given relevant and important information about what the accused had done to her on both occasions which was sufficient to alert Mere about the seriousness of the complaint. The prosecution also says there was no need for the complainant to go into every detail of what had happened to her when narrating the incidents due to the fact that she was scared of what the accused had done to her and therefore she is more likely to be truthful.
64. On the other hand, the accused says the complainant did not tell the truth she made up a story against him. The complainant did not give details of the allegations raised against him because he did not have sex with her. From the evidence of Mere it is obvious that she did not believe the complainant that is the reason why Mere did not tell anyone about what the complainant had told her. The complainant has made up those allegations against him and therefore she should not be believed.
65. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
66. In cross examination, the witness agreed that the complainant had told her that the accused had sex with the complainant. The witness agreed the complainant had told her the accused came home on 27th August, 2019. The witness was referred to her police statement dated 17th October,

2019, to paragraph 15 where it was mentioned that in the morning of the 28th August, 2019 the complainant had told her that the accused had caressed her breast and back. The witness agreed the above was written in her police statement but she maintained that the complainant had told her the accused had sex with her. The witness said the second time the complainant had informed her of what had happened to her was on the 17th of September, 2019.

PREVIOUS INCONSISTENT STATEMENT

67. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and Mere had questioned these witnesses about some inconsistency in their police statement which they gave to the police when facts were fresh in their minds with their evidence in court.
68. This court is allowed to take into consideration the inconsistencies between what these witnesses told the court and their police statements when considering whether these witnesses are 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 witnesses. 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 inconsistencies are so fundamental, then it is for this court to decide to what extent that influences the reliability of these witnesses evidence.

71. The third witness, Sairusi Qali informed the court that he is the cousin brother of the accused and the complainant is his niece. On 9th October, 2019 at about 7 pm the accused came to see him. The accused told him that he wanted to apologize to the complainant and her grandmother. Upon hearing this, the witness sent his wife to get the complainant and her grandmother.
72. After his wife left the accused told the witness to tell the complainant and her grandmother not to report the matter to the police and he will give them a bullock. As soon as the complainant and her grandmother arrived the witness asked the complainant and her grandmother what was the problem for which the accused was apologizing. There was no response. According to the witness he did not know what the problem was.
73. In front of the witness the accused asked for forgiveness from the complainant and her grandmother. The accused said *"I request both of you to forgive me because of the weakness I had."* There was a family meeting where the complainant told everything the accused had done to her in the presence of the accused. The accused did not say anything. It was after the meeting the matter was reported to the police.
74. In cross examination, the witness agreed that it was also for the purpose of maintaining a good relationship with the complainant and her grandmother that the accused had apologized.

75. The fourth witness Dr. Shymal Chand informed the court that he graduated with an MBBS degree from the University of Fiji in 2016 and he did his internship at the Lautoka and C.W.M. Hospital for 15 months. He has five years experience as a Medical Practitioner.
76. On 16th October, 2019 the witness had examined the complainant at the Sigatoka Hospital. The specific medical findings of the witness were:
- a). No sign of physical assault, bruises on the body;
 - b). No bite marks noted.
77. According to the witness since the last incident was on 4th October, 2019 which is more than one week ago the sexual assault kit was not used since it would not show any specific results.
78. The conclusion of the witness was that there was no physical injuries noted on the complainant but emotional trauma could not be ruled out. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.
79. In cross examination, the witness said that there was no sign of any forceful sexual intercourse from the medical findings.
80. In re-examination the witness clarified that no injuries can be noted despite forceful penetration.

DIRECTION ON EXPERT EVIDENCE

81. This court has heard the evidence of Dr. Chand who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in his evidence as a whole is to assist this court.
82. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.
83. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
84. The final prosecution witness DC 4180 Tevita informed the court that he was the interviewing officer. On 20th October, 2019 he had interviewed the accused at the Keiyasi Police Station in the English language. The witnessing officer was Sgt. Liviana Tora, all three had signed the caution interview on every page. The caution interview of the accused was marked and tendered as prosecution exhibit no. 2.

85. The witness also pointed out there is a typing error at question no. 22 the date should be 27th August, 2019.

CAUTION INTERVIEW

86. The answers in the caution interview is for this court to consider as evidence but before the admissions are accepted, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for this court to accept or reject the answers given in the caution interview.

87. It is for this court to decide whether the accused made those admissions and whether those admissions are the truth. If this court is not sure whether the accused made the admissions in his caution interview then those admissions will be disregarded. If this court is satisfied that those admissions were made by the accused, then this court should consider whether those admissions are the truth. What weight is to be given to those admissions is a matter entirely for this court. The defence did not cross examine this witness.

88. This was the prosecution case.

DEFENCE CASE

89. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.

90. From the line of cross examination the defence took the position that the complainant gave an incorrect and untruthful account in court. It was the complainant who had called the accused in her house at all times. She was the one who had left the door of the house open because she knew the accused would be coming. She could have shouted or yelled or run away from the house if there was anything untoward done to her. The accused in his caution interview told the truth when he told the police that he did not have sexual intercourse although she wanted to but he did not.
91. He felt sorry for the complainant when he was on top for her because she had a small vagina so he did not penetrate her vagina with his big penis. In this regard he had penetrated her vagina with his fingers on one occasion but with her consent. In respect of the two lesser offences of indecent assault the accused submits that he had touched the complainant but with her consent.
92. The defence further states that the apology of the accused has been misinterpreted by the prosecution to make the accused look like the perpetrator which must be considered in the context it was offered by the accused. The apology was to maintain the family relationship with the complainant and her grandmother.
93. For the first and the third counts the accused denies penetrating the vagina of the complainant at all, for the second count he had penetrated the vagina of the complainant with his fingers with her consent. In respect of the lesser offences the accused touched the complainant with her consent.
94. It was the complainant who would bring the mattress in the living room and lie down for the accused to lie with her. The description given by the

complainant in her evidence does not make sense thus making it obvious that the complainant did not tell the truth.

95. The evidence of the doctor supports the contention of the defence that there were no injuries noted and/or seen on the complainant that would suggest any forceful penetration. This expert's evidence is worth considering in particular the fact that the evidence of the doctor does not support the evidence of the complainant.
96. Finally, the defence is asking this court not to give any weight to the complainant's evidence which is not the truth of what happened.
97. This was the defence case.

ANALYSIS

98. The prosecution alleges that on 27th August, 2019 and 12th September, 2019 the accused forcefully penetrated the vagina of the complainant who was 16 years at the time with his penis and also on the 12th the accused penetrated the vagina of the complainant with his fingers. On all three occasions the complainant did not consent to what the accused was doing to her.
99. The accused did not stop here he continued with his abuse, on 23rd September, 2019 he touched the breast of the complainant when he was lying beside her on the mattress. Thereafter on 4th October, 2019 the complainant was sleeping on the mattress when she woke she saw the accused lying beside her and his hand was under her dress. The complainant did not consent to what the accused had done to her.

100. The prosecution further stated that on 27th August, 2019 at about 9 am the complainant was alone, after attending to her household chores she went to lie down in the sleeping area of the house and was playing with her phone when the accused came into the house.
101. He blocked her mouth and with his other hand pulled down her pants, at this time the complainant was lying face up. The accused took off his pants by this time he was on top of the complainant. After this, he had forceful sexual intercourse with her. The complainant told the accused not to do it but the accused told her not to scream and not to do anything but to lie still.
102. The complainant was scared she wanted to sit but he pushed her down. The accused penetrated the vagina of the complainant with his penis and had sexual intercourse for 5 minutes. In the afternoon the complainant told her grandmother about what the accused had done to her.
103. In the morning of 12th September, 2019 the complainant was sleeping in the house alone. The accused came and forcefully turned her to face up since she was lying on her side. The accused put his pants down, went on top of the complainant and removed her pants.
104. The complainant tried to turn and sit but could not since the accused was on top of her. The accused told her to lie still and not do anything. The complainant was crying since she was afraid of what the accused was doing to her. The accused had sex with her for about 4 minutes. Before having sexual intercourse the accused inserted his finger into the complainant's vagina.

105. When the complainant's grandmother came home in the afternoon the complainant was in the kitchen crying. She told her grandmother about what the accused had done.
106. On 23rd September 2019 at around 9 am the complainant was at home alone her grandmother had gone to the farm. After doing the house chores the complainant was playing with her phone whilst lying on the mattress. The complainant had a swollen leg she could not walk the accused came and lay beside her and started touching her from her breast downwards. The complainant told the accused to go away and also that everyone at home was aware of what he has been doing to her.
107. The complainant called her mother in Suva to ask her to tell her grandmother about what the accused was doing to her and why her grandmother had not reported the matter to the police. Soon after her grandmother came home, the complainant again told her grandmother the accused had touched her.
108. On 4th October 2019 at 9 am the complainant was alone at home she went to lie down in the living room. The accused came and sat beside her and said for them to go to the sleeping area. The complainant told the accused to go away but he did not go so she stood up and sat by the door and looked outside to see if someone was around but there was no one.
109. After the accused left the complainant went to sleep. When she woke up she found the accused lying beside her and his hand was under her dress. The complainant pushed the accused hand away stood up and went outside. The accused told her not to tell anything to anyone. The complainant ran to a neighbour's house and locked herself. In the afternoon the complainant told her grandmother about what the accused had done to her.

110. The complainant did not consent to what the accused had done to her on all occasions.
111. On the other hand, the accused denied any wrong doing. The defence says what the complainant told the court should not be believed. On 27th August and 12th September the accused never had any sexual intercourse with the complainant. They were in a relationship and it was the complainant who had invited him to the house on all occasions and consented for him to penetrate her vagina with his fingers on one occasion.
112. The accused told the truth to the police during his caution interview which explains in detail what had happened. In respect of the allegations of indecent assault the complainant had consented to the acts of touching by the accused.
113. The defence further says from the evidence it is obvious that the complainant's grandmother did not believe the complainant hence she did not tell anyone or report the matter to the police. This contention is supported by the fact that the grandmother was not part of the family meeting. Moreover, the apology of the accused has been incorrectly assumed to be an admission of offending, this is far from the truth. The accused had apologized to keep the family relationship intact but not to admit that he had done anything wrong because he did not do anything wrong.
114. The complainant had consented which is obvious from her conduct in leaving the door of the house open, inviting the accused into the house, not shouting or yelling. It was a village setting and houses were next to each other. The complainant also did not run out of the house if there was anything done to her which she did not like. The complainant was

16 years at the time who was matured enough to understand what was being done to her hence she would have resisted in all possible ways to raise the alarm but she did not. The complainant in cross examination had admitted that she had all the opportunity to scream or shout or run away but she did not. The complainant did not do anything to ensure that she was safe in the house because there was nothing to be worried about.

115. The complainant also had the opportunity to push the accused away from on top of her yet she did not do so. The defence is asking this court not to believe the complainant.

DETERMINATION

116. 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.
117. After carefully considering the evidence adduced by the prosecution and the line of defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegations.
118. The complainant was steadfast in what she had encountered on all the occasions. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. It is also

noteworthy that the complainant had promptly told her grandmother about what the accused was doing to her.

119. It was the grandmother of the complainant who did not wish to report the matter to the police because she did not want the family matter to be exposed and more so the accused was her nephew. However, this witness told the truth when she narrated what the complainant had told her. This witness was able to recall only two occasions the complainant had told her about what the accused had done to her does not affect her evidence.
120. The slight delay in reporting to police cannot be attributed to the complainant because the circumstances of the complainant were beyond her control. It was the complainant's grandmother who had delayed reporting to the police. I accept that the complainant was afraid of the accused and was therefore relying on her elders particularly her grandmother for assistance. However, the matter only came to fruition after the complainant called her mother in Suva and asked her to talk to her grandmother about why she was not reporting the matter to the police.
121. Furthermore, experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or push the accused away from on top of her does not mean that she was consenting to the forceful acts of the accused.
122. I agree with the complainant that she did all that she possibly could do to resist the accused. I also observed that the complainant took exception to what the accused had done to her and she had clearly expressed herself that she did not consent to what the accused was doing to her.

123. There was an inconsistency between what the complainant and her grandmother told the court with their police statements given in October, 2019. The inconsistencies were not significant to adversely affect the credibility of these witnesses. I accept that both these witnesses told the truth in court.

124. The Court of Appeal made a pertinent observation in respect of the above in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

‘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 scrutinise 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...’

125. Sairusi Qali was also a truthful witness as well he told the truth when he said the accused in his presence had apologized to the complainant and her grandmother for what he had done to the complainant. I do not accept that the accused had apologized for the sake of maintaining the family relationship he knew what he had done to the complainant was wrong and by his apology he wanted to stop the complainant and the grandmother from reporting the matter to the police.

126. In the caution interview the accused gave a mixed statement. From the line of cross examination the accused completely denied doing anything sexually to the complainant on 27th August but in his caution interview at Q.33 the accused told the police:

“I kissed her I caressed her breast and then touched the hairy part of the vagina and then deeped my hand into her vagina and at the same time fondle the clitoris, I then lying on top of her and took my penis outside my pants but I felt sorry for her I then stood up and then get dress then went outside.”

127. Furthermore, the accused in his line of defence completely denied doing anything sexually on 12th September to the complainant. However, in answer to Q. 39 the accused told the police:

Ans: 39. I was about to insert my penis into her vagina but I felt sorry for her so I just slide my penis on top of the mouth of the vagina.

128. It is also worth noting that the accused in answer to Q. 20 had told the police *“...I only had sexual intercourse with her for two times as I asked her then she agree.”* Based on the above, there is an obvious contradiction between what the accused stated in his caution interview and the line of defence. I do not accept that the accused did not have forceful sexual intercourse with the complainant on 27th August and 12th September. Looking at all the evidence holistically the accused did not tell the complete truth in his caution interview. He gave the answers in respect of the allegations to protect himself by saying that the complainant had consented which was far from the truth.

129. In my considered judgment the complainant did not consent to any acts of the accused. The definition of consent as mentioned in the early part

of this judgment is crucial to resolve this issue. It is obvious to me from the conduct of the accused that he was forcefully doing what he wanted to do. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

130. Furthermore, the defence contention that the complainant was not doing anything to push him away or was just lying down doing nothing hence showing consent is rejected by this court as untenable on the totality of the evidence. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent. I also accept that the complainant was scared of the accused.
131. The complainant had promptly told her grandmother about what the accused had done to her more particularly that the accused had sex with her adds to the credibility of the complainant. The lack of all the details of how he did it did not affect the credibility of the complainant. It is not expected that a complainant will immediately tell every detail about an unexpected sexual encounter to the first person seen. The complainant had told her grandmother about what the accused had done to her shows consistency in her evidence.
132. Despite vigorous cross examination the complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.2011 (2 October 2015)* had made the following pertinent observations about the above at paragraph 16 as follows:

[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;”

133. I agree with Dr. Chand that it is not necessary for injuries to be seen on a patient to suggest forceful sexual intercourse and other abuses. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of complete denial of sexual intercourse and defence of consent in respect of digital penetration and indecent assault as untenable and implausible.
134. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

135. This court is satisfied beyond reasonable doubt that the accused on 27th August, 2019 and 12th September, 2019 had penetrated the vagina of the complainant with his penis without her consent.

136. Furthermore, this court is also satisfied beyond reasonable doubt that on 12th September, 2019 the accused had penetrated the vagina of the complainant with his fingers without her consent.
137. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
138. The accused is acquitted for the offence rape in counts four, five and six, however, this court is satisfied beyond reasonable doubt that the accused on 23rd September, 2019 (lesser offence in count four) and 4th October, 2019 (lesser offence in count six) unlawfully and indecently assaulted the complainant by touching her breast and had put his hand under her dress respectively.
139. In respect of the above counts this court is satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant. The acts of the accused in the above counts have some elements of indecency that any right minded person would consider such conduct indecent in nature. Finally, the complainant did not consent to the above mentioned acts of the accused.
140. In view of the above, I find the accused guilty of rape as per counts one, two and three as charged and two counts of indecent assault being lesser offences in respect of count four and six and he is convicted accordingly. The accused is acquitted for the offence of rape in counts four, five and six.

141. This is the judgment of the court.



Sunil Sharma
Sunil Sharma
Judge

At Lautoka

03 August, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.