

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 04 of 2020**

**STATE**

**V**

**NOUMAN PATEL**

**Counsel** : Ms. P. Lata and Ms. R. Uce for the State.  
: Mr. S. Heritage and Mr. A. Prasad for the  
Accused.

**Dates of Hearing** : 24, 25, 26, 27 and 28 April, 2023  
**Closing Speeches** : 08 May, 2023  
**Date of Judgment** : 08 May, 2023

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**JUDGMENT**

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 6<sup>th</sup> February, 2020:

***Statement of Offence***

**RAPE**: Contrary to section 207(1) and (2) (a) and (3) of the Crimes Act 2009.

### ***Particulars of Offence***

**NOUMAN PATEL** on the 2<sup>nd</sup> day of January, 2020, at Nadi in the Western Division penetrated the anus of "A.A", a child under the age of 13 years, with his penis.

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

### **BURDEN OF PROOF AND STANDARD OF PROOF**

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

### **ELEMENTS OF THE OFFENCE**

4. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the anus of the complainant "A.A" with his penis;
  - (c) "A.A" was below the age of 13 years.
5. The slightest of penetration of the complainant's anus by the accused's penis is sufficient to satisfy the act of penetration. As a matter of law a child under the age of 13 years does not have the capacity to consent.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
7. The second element is the act of penetration of the complainant's anus with the penis.
8. The final element of the offence is the age of the complainant. It is an undisputed fact that the complainant was 8 years in 2020 which establishes that he was below the age of 13 years at the time of the alleged incident.
9. In this trial, the accused has denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the anus of the complainant with his penis.
10. This court must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for this court to find the accused guilty. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.
11. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of rape then it should consider the lesser offence of attempt to commit rape.
12. I have directed myself that if the accused is not guilty of rape then I should consider the lesser offence of attempted rape. To prove the offence of

attempt to commit rape the prosecution must prove the following elements of this offence beyond reasonable doubt:

- (a) The accused;
- (b) Attempted to penetrate the anus of the complainant "A.A" with his penis.

13. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had attempted to penetrate the anus of the complainant with his penis.
14. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
15. The second element is the attempt to penetrate the complainant's anus with the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused.
16. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
17. This court will have to look at the conduct of the complainant and the accused at the time and the surrounding circumstances to decide this issue.

18. Before the accused can be found guilty this court must be satisfied beyond reasonable doubt of two things:-
  - (a) Firstly that the accused intended to penetrate the anus of the complainant with his penis;
  - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
19. In this case, the prosecution is alleging that the accused intended to penetrate the anus of the complainant with his penis. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. This court will have to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
20. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's anus with his penis and with that intention he did something which was more than merely preparatory.
21. The prosecution says when the complainant was about to leave the washroom the accused came and pushed the complainant in the washroom and closed the door.
22. The accused removed his trousers and pulled down his underwear and told the complainant to hold his penis and to masturbate him. The

complainant did as he was told. After this, the accused removed the complainant's pants and underwear turned the complainant facing the opposite side and then tried to insert his penis into the anus of the complainant.

23. If the above is accepted by this court that the accused did this, then it is for the court to decide whether what the accused did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
24. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then the accused is guilty of attempt to commit rape.
25. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempt to commit rape.
26. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

### **ADMITTED FACTS**

27. 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.
28. 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**

29. The complainant informed the court that in the year 2020 he was 8 years old and a year 3 student. On 2<sup>nd</sup> January, 2020 he went to Jamie Mosque in Namotomoto with his father. At the mosque the complainant told his father that he wanted to visit the washroom. When he was leaving the washroom the accused came and pushed him in and closed the door. There was no one else in the washroom at the time.
30. The accused removed his trousers, pulled down his underwear and told the complainant to hold his penis and to masturbate him. The complainant did as he was told. After this, the accused removed the complainant's pants and underwear turned the complainant facing the opposite side and then put something on the complainant's back and wanted to penetrate his anus with his penis. Upon further questioning the complainant said the accused was able to penetrate his anus with his penis.

31. According to the complainant it was very painful and he was shouting the accused penetrated his anus for more than 5 minutes. Thereafter, the accused took out his penis and the complainant saw that a white liquid came out. When the complainant was shouting the accused slapped the complainant on his cheek.
32. The complainant told the accused that he wanted to go, there was a padlock on the top side of the door which the accused removed since he was a tall person. The complainant was able to leave after wearing his pants. The accused gave the complainant \$2 coin and told him not to tell anyone about what had happened.
33. The complainant left the washroom and waited for his father. His father was praying in front of the prayer room and the complainant sat at the back. After the complainant's father finished praying they went to a restaurant to eat.
34. At the restaurant the complainant's father saw the \$2 coin in the complainant's hand. The complainant was not eating because he was feeling dirty he did not know which hand to use to eat since he had held the accused penis with his hands.
35. At this time the complainant told his father that he had held a person's penis in his hands and this person had penetrated the complainant's anus with his penis. The complainant further told his father that he had seen the perpetrator with the Maulana (Islamic Priest) and this person came to the mosque every day. After this, the complainant's father went and spoke with the Maulana, thereafter the complainant with his father went to the police station and together with the police the complainant and his father



again went to the house of the Maulana. The complainant also stated that the alleged perpetrator was wearing a blue Jhuba.

36. After the complainant and his father with the police officers arrived at the house of the accused the Maulana called the accused, when the complainant saw the accused he started crying since this was the same person who had done those dirty things to him. The complainant pointed to the accused in the presence of his father, the accused, police officers and the accused family. Furthermore, the complainant has seen the accused on many occasions coming to the mosque with the Maulana. The complainant was taken to the hospital for medical examination the same day, he recognized the accused in court and described him as a person who has some holes/marks on his face, tall with little beard.

37. In cross examination the complainant stated that he went to the washroom before the prayer started and there was no one in the washroom at the time. The complainant was referred to his police statement dated 3<sup>rd</sup> January, 2020 to Q. & A. 9 which was read as follows:

*Q. Baba, you went to the mosque to pray?*

*A: Yes, I was praying and the boy call me I go to him and he take me to the toilet.*

38. When questioned that the complainant was praying and the alleged perpetrator had called him, the complainant did not agree and stated that whatever he told the police officer was not written. He agreed that what he told the court that he went to the washroom the accused came and pushed him was different from the answer he gave in Q.9 of his police statement.

39. The complainant also agreed that there were lots of people in the mosque and the main prayer hall had windows so anyone going to the washroom which was on the left side would be seen from inside the prayer room. The complainant maintained that he told the court the accused had removed his trousers, pulled down his under wear and the complainant had masturbated the accused. The accused had put something on his penis and also something on his anus and then penetrated the complainant's anus for more than 5 minutes. The complainant was again referred to his police statement Q. & A. 13 which was read as:

*Q. Baba, when that boy say to do that what happened after?*

*A: I do that to him then he put his hand inside my underwear and was touching my bumbum.*

40. The complainant agreed he had not said the above as part of his evidence he was referred to Q. & A. 14 which was read as:

*Q: Baba, he touch you or squeeze your "bumbum".*

*A: Like that, (squeezing example of touch).*

41. The complainant agreed that he did not say the above as part of his evidence but agreed that he told the court that the accused had pushed him into the washroom and had removed his pants and underwear.

42. The complainant was referred to Q. & A. 15 of his police statement which was read as:

*Q: Baba, you know what else he do to you?*

*A: "Piche ghumais fir hama pyjamas ta fir apan pulu hama bum me halatara"*

43. The complainant agreed the meaning of the above in English was "he turned me around, pulled down my pants and put his penis inside my bum and it hurt me." When it was suggested that the Hindi word "halatara" in English meant attempt the complainant explained:

*It should be like he was penetrating his penis in my anus it would be halatara going inside but its written there halatara.*

44. The complainant agreed what he told the court is different from what he told the police and that he had shouted once.

45. The complainant agreed he did not tell his father at the mosque about what had happened to him and also he did not complain to the other people present in the mosque or to his father in the van when the complainant was taken by his father to a restaurant. The complainant maintained that at the restaurant he had told his father about what the accused had done to him.

46. According to the complainant he was in a bending position when the accused turned him around and in this position he could see what was happening. The complainant denied the suggestion that it could not be possible to see whilst bending. He maintained that he saw everything by turning his head. The complainant could not remember telling the police officer writing his police statement that the accused had penetrated his anus for 5 minutes the complainant stated that this was not mentioned in his statement.

47. When asked what made him remember that the penetration was more than 5 minutes when at the time of giving his police statement he had not told

this to the police officer. The complainant replied that he remembered it now but was unable to recall at the time he was giving his police statement.

48. When it was put to the complainant that he was making things up against the accused the complainant stated that he knew what the accused had done to him. He also denied lying in court.
49. When it was suggested to the complainant that he had thought that it was the accused who had sexually assaulted him the complainant denied this and maintained that he was sure it was the accused who had sexually assaulted him.
50. The complainant further stated that the accused was lying when it was suggested that the accused had never pushed him into the washroom. The complainant maintained the accused had penetrated his anus with his penis. The complainant stated that from the washroom he did not go and pray but was waiting in the room for his father. The complainant was referred to Q. & A. 22 as follows:

*Q: Baba, you know what happened after that?*

*A: I tell him I don't it, then I go pray. After pray when eating then I tell papa "Maulana's boy hurt me".*

51. The complainant disagreed that the accused was present at the prayer room all the time.
52. In re-examination the complainant stated he did not tell anything to his father at the mosque because his father was leaving the mosque and was a bit busy. Furthermore, the reason why he did not tell anyone else at the mosque was because the accused had told him not to tell anyone otherwise

he will kill the complainant. The complainant was afraid of the threat made to him so he did not tell his father anything while on the way to the restaurant from the mosque. The complainant was sure it was the accused and no one else and when he saw the accused he was able to recognize him.

53. The second witness Alfaz Rizwan Ali the father of the complainant informed the court that on 2<sup>nd</sup> January, 2020 the witness with the complainant went to the Nadi Jamie Mosque for his prayers. Before entering the mosque the complainant wanted to relieve himself so the complainant left.
54. After cleansing himself the witness entered the mosque and started praying. When he finished he turned and saw the complainant sitting in the last line at the back of the room. When he started his second namaz the complainant was beside him. After finishing his prayers the witness and the complainant went to a restaurant to eat.
55. After the food was served the witness noticed that the complainant was not eating, at this time he saw a \$2 coin in the hand of the complainant. The witness asked the complainant where he got the coin from. The witness also asked the complainant why he was not eating and what happened?
56. The complainant started crying and said someone had done some bad things to him. The witness asked what bad things, the complainant said when he went to the washroom a man came and pushed him inside and locked the door. This person told the complainant to suck his penis. The complainant refused and this person then assaulted the complainant,

pulled the complainant's pants down and touched the complainant's bum with his hand.

57. The same man then told the complainant to remain quiet and not to make any noise otherwise the complainant will be sent to the grave yard. When the complainant did not suck this man's penis the man said "*with your hand make his penis long*". After this the man applied something on the complainant's bum and told the complainant to bend. The man then inserted his penis into the complainant's bum.
58. The complainant was in pain, he cried and shouted. After this the man pressed the complainant's throat and told him not to shout. Again the man inserted his penis into the complainant's bum. After this the man ejaculated the complainant also gave a description of the alleged perpetrator as having a long face, fair and wrinkles on his face. The complainant also said he saw this person going and coming out of the Maulana's quarter's gate. The man opened the door after the complainant said that his father will leave after his prayers.
59. The witness went to the Maulana's house and asked for permission to see the CCTV camera since the mosque has camera fitted all over. The witness came to know the camera was not working. Thereafter the witness went and reported the incident at the Nadi Police Station.
60. The police officers accompanied the witness and the complainant to the Maulana's house. After a while the accused came out of the house, the complainant identified the accused and started crying. The complainant was taken to the hospital for medical examination. The witness knows the accused as the Maulana's son and he also recognized the accused in court.

## **RECENT COMPLAINT DIRECTION**

61. 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.
62. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told his father after they left the mosque about what the accused had done to him. The complainant informed his father that the accused had come and pushed the complainant inside the washroom and locked it. The accused after making the complainant bend down inserted his penis into the complainant's bum.
63. This is commonly known as recent complaint evidence. The evidence given by Alfaz Ali is not evidence of what actually happened between the complainant and the accused since he was not present and he did not see what had happened.
64. 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 his father about what the accused had done to him a short while after the incident.

65. The prosecution is asking this court to consider the age of the complainant at the time and the fact that he relayed relevant and important information about the conduct of the accused on him and therefore he is more likely to be truthful. According to the prosecution it is not expected of an 8 year old boy who has suffered an unexpected sexual experience will tell every detail of such an experience to the first person he sees. What the complainant told his father was enough to put his father on alert that something serious had happened to the complainant.
66. On the other hand, the defence says the complainant had made up a story against the accused. The complainant saw his father praying so he could have informed other people present in the mosque about what had happened to him. The complainant did not and when the complainant was going to the restaurant in the vehicle he could have told his father but he still did not. In the restaurant the complainant did not volunteer the information to his father it was only upon the prompting of his father about the \$2 coin that the complainant made up a story against the accused.
67. The defence is also saying that Alfaz gave one version to the police and a completely different version in his evidence. To the police the witness said a person tried to penetrate his son's anus with the penis whereas he told the court his son told him that his bum was penetrated by the penis. The defence also states that this court should consider that there are two different versions before the court which shows the complainant was making up a story and therefore he should not be believed.
68. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to his credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable



and credible. The real question is whether the complainant was consistent and credible in his conduct and in his explanation of it.

69. In cross examination the witness agreed on the day in question there were about 40 people in the mosque. When the witness saw the complainant after his prayers the complainant looked a bit scared but was not crying. During the second prayer session the complainant was with the witness but not praying. The witness also stated that the complainant at this time did not complain to him at the mosque or in the car on the way to the restaurant but looked scared.
70. The witness was referred to the first page of his police statement dated 2<sup>nd</sup> January, 2020, line 9 which was read as:
- After the prayer I went with my son for lunch at Ali's Halal Restaurant in Nadi Town. While having lunch I noticed my son he was not eating his food, at the same time I saw him holding one \$2 coin I then asked him who gave him the \$2 coin.*
71. The witness agreed that he did not tell the police officer writing his police statement that his son was scared in the car from the mosque to the restaurant. The witness also agreed that when he gave his police statement everything was fresh in his mind. When it was suggested that the reason why it was not in the police statement was because his son was normal in the vehicle and not scared the witness said "it's a bit long time I don't know I must have not put that" the witness was not able to recall if the police statement was read to him but he had signed after approving it.
72. The witness was also not able to recall the above saying it's been a long time. When suggested that the police statement was read back to him and

he did not tell the police to change his statement the witness said that he might not have understood.

73. The witness agreed that in the restaurant the complainant did not tell him the name of the alleged perpetrator. The witness and the complainant have visited the mosque from a long time and he knows the accused. The witness agreed that he told the court that the complainant had told him that someone had inserted his penis into his anus. The witness was referred to his police statement, page 2, line 1 which was read as follows:

*...and then he was trying to push his penis inside my son's anus.*

74. When questioned that after 3 years he told the court that he was told by the complainant that someone had inserted his penis into the complainant's anus the witness said he had told the police about the penetration. When asked about the two different versions the witness stated that he was told by the complainant the penis had been penetrated inside the complainant's anus. The witness denied he had told the incorrect thing to the police he stated that the police officer must have misunderstood him and written something else. The witness could not recall reading his police statement before signing.

75. When the witness was questioned that there was no mention of the complainant telling him that someone had penetrated the anus of his son as per his police statement. The witness maintained that he was told by his son that someone had penetrated his son's anus. The witness explained at the time of giving his police statement he might have rushed and signed and he might not have understood what's written.

76. The witness agreed that he told the court his son had told him that his son's anus was penetrated two or three times in and out. When the witness

was referred to his police statement the witness agreed that this was not mentioned in his police statement. The witness maintained his son had told him about the penetration but he may not have told the police. Furthermore, the witness agreed that in his police statement there was no mention of his son telling him the alleged perpetrator will send his son to the graveyard.

77. The witness also agreed that he told the court his son had told him that the same person had pressed his throat but in his police statement it was mentioned that someone had threatened to strangle his son's neck.
78. The witness agreed that his son did not tell him that the alleged perpetrator would come in and out of the Pesh Imam's house and that is why it is not in his police statement. It was also not in his police statement that his son was scared in his car because it is possible the police did not ask him this question. The witness came to know the name of the accused at the police station.

#### **PREVIOUS INCONSISTENT STATEMENT**

79. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and Alfaz Ali had questioned these witnesses about some inconsistencies/omissions in their police statements which they had given to the police when facts were fresh in their minds with their evidence in court.
80. This court is allowed to take into consideration the inconsistencies or omissions between what these witnesses told the court and their police statements when considering whether these witnesses were believable and

credible. However, the police statements are not evidence of the truth of its contents.

81. 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.
82. If there is any inconsistency or omission, 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 inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
83. The final witness Lanieta Vakarauvanua informed the court that she graduated with MBBS degree from University of Fiji this is her ninth year as a Medical Practitioner.
84. On 2<sup>nd</sup> January, 2020 the witness was based at the Nadi Hospital and she had examined the complainant. According to the witness the patient was not much in distress but took his time to answer questions.
85. The specific medical finding was:
  - (a) Slight redness around the anal opening which is the anal orifice.
86. The professional opinion of the witness was there was physical injury caused to the complainant the history given was consistent with the

medical finding. The injury was red in colour and it looked fresh, the conclusion of the witness was that there was physical evidence of sexual assault.

87. The witness also stated that there can be many causes of redness around the anal opening such as eating spicy food and having diarrhea or having itchiness, however, in this case the only complaint of the patient was that he was sexually assaulted. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.1.
88. Finally the witness stated that in this case according to the patient the alleged perpetrator had wanted to penetrate the anus of the patient. The witness also stated that anal muscles are strong which can contract so when someone does not want something to go in, the muscles will try and close. In this case a slight entry could have happened because of the redness that was seen around the anal opening.
89. In cross examination the witness stated that she did take the consent of the patient but it is not recorded in the medical form. The witness agreed that the patient did not tell her that the alleged perpetrator had penetrated his bum but she was told that there was an attempt to do so.
90. According to the witness the patient was normal and stable when he walked in the room and sat down. The redness seen could happen if a person had diarrhea, passing hard stool but not from scratching but may be from an allergic reaction causing itchiness. The witness did not see any blood during her examination in the anal area of the patient or in the undergarment.

91. Upon further questioning the witness said if there is certain penetrative force and the penis is fully penetrated then definitely there will be bleeding. When it was suggested to the witness that in this case there was no penetration the witness responded by saying:

*"I cannot say there was no penetration. I am looking at penetration from the length of the anus of that child, which is shorter in a child compared to an adult so we cannot tell there is penetration or not"*

92. The witness could not confirm whether there was penetration or not, however, she agreed even the slightest penetration would be painful.

93. In re-examination the witness stated that she had obtained the consent of the patient's parent verbally. In respect of not asking whether the patient was having diarrhea or any other condition or illness the witness stated that she only filled in the remarkable findings in the medical report. The witness stated that based on her findings it could have been a case of penetration at the opening of the anus.

94. Upon questioning by the court the witness stated that full penetration would be the penis penetrating into the whole anus which is about 2mm to 1cm and for penetration at the opening of the anus may be the head or tip of the penis had penetrated the anus.

95. The witness further stated that if there is penetration at the opening of the anus there could be some redness at the opening or there could be some redness and inflammation in the tissues. The witness agreed in this case she could not tell whether it was full penetration or slight penetration.

## **DIRECTION ON EXPERT EVIDENCE**

96. This court has heard the evidence of Dr. Vakarauvanua 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 her evidence as a whole is to assist this court.
97. 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.
98. 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.
99. This was the prosecution case.

## **DEFENCE CASE**

100. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be

subjected to cross examination and also called one witness. This court must also consider their evidence and give such weight as is appropriate.

100. The accused informed the court he is the son of Maulana Patel, in the year 2020 the accused with his parents, two brothers and a sister were residing at the Nadi Jamie Mosque quarters which is situated in the mosque compound.
101. Since 2012 the accused is employed as a baker and there are two shifts to be done the night shift is from 6pm to 6am and the day shift is from 6am to 6pm. On 2<sup>nd</sup> January, 2020 the accused came home at 6 am after doing night shift.
102. He went and slept waking up in the afternoon when asked if he had met anyone the accused said *"no, I just came had my bath and after having food I slept."* It was between 4 to 5 pm his father came and woke him and told him the police have come. The police officer asked him if at any time he had done anything to the complainant the accused denied saying he was sleeping. According to the accused there were 3 to 4 police officers.
103. This conversation was in the sitting room of the house in front of his parents, sister, the complainant and his father. The accused stated that he was not identified by the complainant at his house.
104. Shortly after the accused went to the Nadi Police Station with his brothers. The accused only went to the mosque during his day off which is on Sunday's rest of the days he prayed at home. The accused further said that he does not know the complainant and when he used to go to the mosque on Sundays he did not meet the complainant at any time. The



accused also does not know the complainant's father and he did not even meet this person during his visit to the mosque on Sundays.

105. The accused denied all the allegations raised against him by the complainant saying that he was sleeping at home and that the complainant was lying. The accused also stated that he does not have any marks or wrinkles on his face and he never had any wrinkles or marks on his face.
106. In cross examination the accused said that a prayer is held between 12 to 1pm at the mosque but he prays at home. However, his father goes to the mosque every day and his mother stays home. The accused does not know if his mother was cooking in the kitchen or not when he came from work that morning.
107. The accused also stated that he does not know that 1<sup>st</sup> January, 2020 was a public holiday. He had gone to work and at the time of the alleged incident he said he was at home sleeping. On this day he did not go to the mosque between 12 to 1pm.
108. It is only on Sundays the accused goes to the mosque at about 1pm when it was put to the accused that apart from Sundays he also went to the mosque on other days to pray the accused said that he prayed at home.
109. On 2<sup>nd</sup> January, the accused was not wearing a blue jhuba and he does not know the complainant because he does his prayers at home. When it was put to the accused that the complainant used to come to the mosque with his father to pray in his presence, the accused denied this saying he did not know the complainant since he prayed at home.

110. The accused denied committing the offence as alleged by the complainant saying he did not go to the mosque as alleged and that the complainant was lying. All the time the accused has lived at the Nadi Jamie Mosque he has never used the mosque washroom.
111. When it was put to the accused that there was no reason for the complainant to make a false allegation the accused said he did not know the reason why he was falsely alleged. The accused also maintained that he was not lying but telling the truth since he has taken an oath. The accused denied he was identified by the complainant in front of the police officers and that the complainant had cried upon seeing him.
112. The accused agreed that on this day at 5am his father had gone to the mosque for his prayers and in the morning his mother had cooked breakfast.
113. In re-examination the accused stated that a lot of people wore the blue jhuba to the mosque. The accused will not be able to know whether his father had gone to the mosque at 5am on 2<sup>nd</sup> January, 2020.

#### **DEFENCE OF ALIBI**

114. It is noted that the accused is relying on the defence of alibi. He took the position that on 2<sup>nd</sup> January, 2020 he was not at the Nadi Jamie Mosque washroom since he was at his home sleeping after coming home from work at 6am. This means at the time of the allegation the accused was sleeping at his home.
115. In view of the above defence I have reminded myself of the following:

- a) Firstly, the prosecution has to prove the guilt of the accused so that this court is sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the defence of alibi. Even if this court concludes that the alibi was false, that does not by itself entitle this court to find the accused guilty;
- b) Secondly, it is borne in mind that an alibi is sometimes invented to bolster a genuine defence;
- c) Even if this court concludes that the defence put forward by the accused has not been made out that does not of itself entitle this court to find the accused guilty. The prosecution must still satisfy this court beyond reasonable doubt of his guilt.

116. The accused has denied any wrong doing his defence is he did not commit the offence as alleged since he was not at the alleged crime scene but at home sleeping.

117. From the above, there are three possibilities that arise which is open for consideration:

- a) If the alibi is accepted then this court is obliged to find the accused not guilty;
- b) If this court rejects the alibi then this court would not necessarily find the accused guilty but must assess the evidence as a whole; and
- c) If this court does not accept the alibi, and also does not reject it in the sense that this court regards it as something which could

reasonably be true then in such a case this court must find the accused not guilty.

118. Prematilaka, JA sitting as a single judge in Court of Appeal in *Pauliasi Raisele v State* [2020] FJCA 49; AAU088.2018 (1 May 2020) made a pertinent observation in respect of the above from paragraphs 20 to 28 as follows:

*[20] The learned trial judge had in paragraphs 103 and 125 directed the assessors and himself on the lines suggested in Ram and Mateni. He cannot be faulted in that respect.*

*[21] A slightly different approach, however, had been taken in some other jurisdictions such as Australia, Sri Lanka and New Zealand. Section 150(8) of the Criminal Procedure Act 1986 (NSW) states that*

*“evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”*

*[22] In what would be the appropriate direction on alibi in NSW Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring said in R v Amyouni NSWCCA 18/2/88 unrep. BC8802201:*

*“It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury.”*

*“One is that they accept the alibi, in which event they would be obliged to acquit. The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the*

also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit.”

[23] Again in *R v Kanaan* (2005) 157 A Crim R 238; [2005] NSWCCA 385 Hunt AJA (Adams and Latham JJ concurring) said

“[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt.”

“[135]... An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility: *Regina v Youssef* (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:

The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time.”

[24] In Sri Lanka in *Yahonis Singho v. The Queen* (1964) 67 NLR 8 at 9-11 T. S. Fernando J. said

*'If the evidence of an alibi is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more, it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane's evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection.'*

*[25] Yahonis Singho was quoted with approval in Mannar Mannan v Republic (1987) 2 SLR 94 where, however, the proviso under section 334(1) of the Code of Criminal Procedure Act was applied and the conviction was upheld which was affirmed by the Supreme Court in Mannar Mannan v Republic (1990) 1 SLR 280.*

*[26] Blackstone's Criminal Practice 1993 at page 1773 states*

*'Although there is no general rule of law that in every case where alibi is raised the judge must specifically direct the jury that it is for the prosecution to negative the alibi, it is the clear duty of the judge to give such a direction, if there is danger of the jury thinking that an alibi,*

*because it is called a defence, raises some burden on the defense to establish it (Wood (No.2) (1967) 52 Cr App R 74 per Lord Parker CJ). See also Johnson [1961] 1 WLR 1478 and Denney [1963] Crim LR 191.'*

*[27] It is well established that it is for the prosecution to negative an alibi as in the case of self-defence or provocation [See Killick v The Queen (1981) 147 CLR565; [1981] HCA 63; 37 ALR 407, R v Johnson (1961) 46 Cr App R 55; 3 ALL ER 969 and R v Taylor [1968] NZLR 981 at 985-6] because by raising an alibi, the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or any reasonable possibility that the alibi was true [ see R v. Small (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)]. If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of an acquittal entered, however cogent the prosecution evidence would otherwise be [see Palmer v R (1998) 193 CLR1; [1998] HCA 2; 151 ALR 16]*

*[28] I think that it is in the light of these decisions that one should reconsider as to what the appropriate direction particularly on the intermediate position on alibi defence should be in Fiji. However, it is within the domain of the Full Court of the Court of Appeal to make a pronouncement, if considered appropriate, at least for future guidance.*

119. The final defence witness WCpl. 3795 Virisila Rakadi informed the court that on 2<sup>nd</sup> January, 2020 she had recorded the police statement of Alfaz Rizwan Ali at the Nadi Police Station. The witness stated that she had recorded what the witness had told her, however, the witness could not recall whether Alfaz had read his statement or it was read to him.

120. In cross examination the witness stated that she is a trained police officer to write police statements. The witness could not recall why the declaration section of the police statement was not complete. The witness could not confirm whether the police statement was read to the witness or not.
121. The witness explained that Alfaz was telling his side of the story in the English language and he was able to understand English. When questioned whether she had asked Alfaz if he had understood what is written in his police statement the witness could not remember whether she had asked Alfaz this.
122. The witness agreed that whatever is mentioned in the police statement has been written by her in her own words after it was narrated by Alfaz. The witness also agreed that she was not sure whether the police statement was understood by Alfaz because the witness was not sure whether the statement was read to Alfaz or not.
123. In re-examination the witness stated that the declaration certificate is completed only when the person giving the statement does not understand or cannot read the statement. In this case there was no interpreter.
124. This was the defence case.

### **ANALYSIS**

125. The prosecution alleges that on 2<sup>nd</sup> January, 2020 the complainant went to the mosque with his father before going into the prayer room the complainant went to the washroom to relieve himself. As the complainant was leaving the washroom the accused came and pushed the complainant inside and locked the door.



126. The accused removed his trousers and pulled down his underwear and told the complainant to hold his penis and to masturbate him. The complainant did as he was told. After this, the accused forcefully removed the complainant's pants and underwear and turned the complainant facing the opposite side and forced him to bend and then penetrated the complainant's anus with his penis.
127. The complainant shouted since it was very painful to him the accused penetrated the anus of the complainant for more than 5 minutes. After the accused took out his penis the complainant saw that a white liquid came out of the penis.
128. The complainant told the accused that he wanted to go, there was a padlock on the top side of the door which the accused removed since he was tall. The complainant was able to leave after wearing his pants. The accused gave the complainant a \$2 coin and told him not to tell anyone about what had happened otherwise he will kill the complainant.
129. The complainant told his father about what the accused had done to him. The matter was reported to the police and the complainant was medically examined. The doctor saw slight redness around the anal opening which is the anal orifice. The injury was fresh indicating that there was physical evidence of sexual assault.
130. The prosecution also states that the complainant had correctly identified the accused in court. The accused is no stranger to the complainant, the complainant had on previous occasions seen the accused in the mosque compound with the Maulana/Pesh Imam who is the father of the accused and also in going inside and leaving the mosque quarters where the accused was staying with his parents and siblings.

131. Finally, the prosecution submits that although the complainant did not know the name of the accused it does not mean that it was not the accused. The complainant was able to describe the accused and had recognized him when the complainant, his father and police officers went to the house of the accused. The complainant also cried upon seeing the accused.
132. On the other hand, the defence says the allegation is baseless and a made up story by the complainant. The accused did not do anything to the complainant as alleged how could he have done so when he was not in the washroom at the time. The complainant also lied in court when he narrated a story that was not possible and/or probable. The complainant lied to his father when he told his father that it was the accused who had done bad things to him.
133. If what the complainant told the court is correct then the complainant had all the opportunity to tell the people in the mosque and his father after his father finished his prayers. The complainant could have also told his father in the vehicle whilst going from the mosque to the restaurant, the complainant was with his father and there was no one else.
134. Even at the restaurant the complainant did not say anything about the incident. It was after the father of the complainant started asking questions about the \$2 coin in the complainant's hand which the father of the complainant suspected to have been stolen from his money till that the complainant made a story against the accused as a convenient way of getting out of the situation.
135. The defence submits that the accused told the truth when he said that he was not at the mosque but sleeping at home having come back from work

after doing night shift. The medical report of the complainant is not conclusive since the injuries seen could be self-inflicted. Moreover, the doctor was not certain whether there was any penetration of the anus or not.

136. Finally, the defence also submits that what the complainant told the court does not make sense and is riddled with doubt and the accused has been wrongly blamed for something he did not do. The defence is asking this court not to believe the complainant but to believe the accused who gave a frank and honest account that he was not at the washroom as alleged.

### **DETERMINATION**

137. 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.
138. Before proceeding I would like to state at the outset that there are two important issues that need to be determined in respect of the allegation. Firstly, who is the alleged perpetrator and secondly, whether there is conclusive evidence about the slightest of penetration of the complainant's anus by the accused penis.
139. The complainant did not know the name of the perpetrator until he heard the name at the police station, however, the complainant had seen the accused on many occasions previously since he would go to the mosque for his prayers and also the accused used to go in and come out of the

mosque quarters gate and the accused would be with the Maulana at the mosque as well.

140. In the afternoon of the alleged incident the Maulana called the accused who was positively recognized by the complainant. The accused in his evidence also told the court that he is the son of the Maulana and that they were staying in the mosque compound at the time of the alleged incident.

### **TURNBULL DIRECTIONS**

141. The defence has taken the position that the complainant made a mistake in thinking that it was the accused who had sexually assaulted the complainant for someone else so he had identified the wrong person in court.
142. This case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.
143. I have carefully looked at the following circumstances in which the identification by the complainant was made in the washroom:

*How long did he have the person he says was the accused under observation?*

According to the complainant he had been with this person in the washroom for more than 5 minutes.

*At what distance?*

This person was touching the complainant so very close to each other.

*In what light?*

According to the complainant the alleged incident happened in the washroom and no issues were taken by any counsel that it was not day time or about the lighting.

*Did anything interfere with that observation?*

The complainant did not say there was any obstruction or interference he was able to see the face of this person clearly which prompted him to describe this person.

*Had the witness ever seen the accused before?*

The complainant said he had seen his person at the mosque, with the Maulana and going into and out of the mosque quarters on many occasions before the alleged incident.

144. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. The complainant did not elaborate about what he meant by the person having holes in his face and what type of holes were there.

145. I have given the above directions as a matter of caution after the defence had raised the issue of identification of the accused in the circumstances narrated by the complainant.
146. Finally, I would like to state that the complainant did not make any mistake in recognizing the accused since he has seen the accused on previous occasions at the mosque and in the washroom he had seen the accused from close range. The complainant later in the day also saw the accused at the accused house and the complainant had recognised the accused as the alleged perpetrator.
147. In view of the above, this court accepts that it was the accused and no one else there is no mistake made by the complainant in the recognition of the accused.
148. In respect of the issue of penetration the complainant initially said the accused tried to penetrate his anus and then said that there was penetration of his anus by the accused. In cross examination the complainant was referred to his police statement particularly to Q. & A. 15 which is reproduced herewith: (Hindi version answer)

*Q: Baba, you know what else he do to you?*

*Ans: "Piche ghumais fir hama pyjamas ta fir apan pulu hama bum me halatara."*

149. The Hindi word "*halatara*" has no special meaning compared with the Hindi word "*halata raha*" since both words mean the same that is penetration. The defence suggestion that the word "*halatara*" means attempt is incorrect attempt in Hindi is "*koshis*" which means to attempt or try.

150. When the complainant went to the hospital he told the doctor that a guy had tried to rape him in the toilet. The above is also supported by what the complainant's father Alfaz told the police officer writing his police statement. In his police statement Alfaz mentioned that his son had told him the alleged perpetrator was trying to push his penis inside his son's anus.
151. Furthermore, the doctor was unable to make a conclusive finding whether or not there was even a slight penetration into the anal opening. In this regard the doctor's medical finding of slight redness around the anal opening in the surrounding tissues does suggest that there was some intrusion between the buttocks but not enough to show full or slight penetration of the anal opening.
152. The father of the complainant told the court that his son had informed him that the alleged perpetrator had penetrated the complainant's anus with his penis. However, when this witness was referred to his police statement in cross examination this witness had told the police officer when facts were fresh in his mind that the complainant had told him the alleged perpetrator had tried to penetrate the complainant's anus with his penis.
153. After carefully considering the evidence adduced by the prosecution and defence, I accept the evidence of the complainant as truthful and reliable to the extent that it was the accused who had attempted to penetrate the anus of the complainant with his penis. The complainant was steadfast in what the accused had done to him and had also positively recognized the accused and had given a clear description of him.
154. The defence raised the issue that the accused does not have any holes or marks on his face hence the accused has been wrongly identified is far-

etched. The incident happened three years ago my observations of the accused face are that he has a long face, has beard, and is of fair complexion and when he talks or shows an expression the skin on his lower face automatically folds.

155. The complainant was 8 years old at the time and I do not expect a child of such an age to give a photographic description of the accused. However, the complainant gave a consistent account of what the accused looked like. In any event the complainant had seen the accused some three years ago. I accept the response of the complainant that when he saw the accused three years ago he had seen the holes or marks on the face of the accused is an acceptable response.
156. I accept the complainant was honest in saying that it was the accused who had done something bad to him, however, considering the evidence adduced it is not possible to say with certainty that the penis of the accused had penetrated into the complainant's anus. There is no doubt that the penis had penetrated between the buttocks which is confirmed by the doctor who saw slight redness around the anal opening.
157. The complainant was also able to withstand cross examination and was not discredited that it was not the accused who had attempted to penetrate his penis into his anus. The complainant was firm and unwavering in what he had encountered on the day in question.
158. The fact that the complainant did not yell or tell anyone immediately after the alleged incident or to his father whilst in the vehicle going to the restaurant is immaterial since the accused had threatened the complainant that he will kill the complainant if he told anyone about what the accused had done. In my considered judgment the complainant only



became comfortable when he was away from the mosque and that is when the complainant told his father about what the accused had done to him.

159. 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.
160. The complainant struck me as a simple, sensitive and shy person who would not share his problem with anyone or everyone about what the accused had done to him. The fact that the complainant narrated crucial information about what the accused had done to him to his father in my considered judgment was enough to alert Alfaz that something had happened to his son.
161. It is not expected of an 8 year old child who has just had an unexpected sexual encounter to tell the first person he meets everything about what had happened to him. The failure by the complainant to tell anyone at the mosque or to his father in the vehicle from the mosque to the restaurant does not affect his credibility at all.
162. Furthermore, the doctor also confirmed that the slight reddening seen around the anal opening was likely to be as a result of penetrative force, however, there was no conclusive evidence to suggest any intrusion into the anus. The doctor also said that any forceful penetration into the anus would have resulted in bleeding which was not the case here.
163. There were some inconsistencies between what the complainant told the court and his police statement. However, the age of the complainant at the time and passage of time are crucial in this regard.

164. The inconsistencies or omissions between the complainant's evidence in court and his police statement were not significant to adversely affect the credibility of the complainant in respect of his recognition of the accused and that there was an attempt made by the accused to penetrate the complainant's anus with the accused penis. The complainant was also not shaken as to the basic version of what he told the court in respect of the above.
165. 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;"*

166. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following manner 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...'*

167. The circumstances of the complainant ought to be considered holistically. It cannot be ignored that the complainant was oblivious to an unexpected conduct by a person he had seen at the mosque on previous occasions from a long time.
168. There is no requirement for a complainant of sexual assault to disclose every detail of the accused conduct to the person the information is relayed to. The crucial aspect is the relaying of material and relevant unlawful sexual conduct of the accused which was done by the complainant to his father and the doctor.
169. The decisive aspect of recent complaint evidence is to show consistency of the complainant's conduct with his evidence given at trial. It is not expected of anyone who has had an unexpected sexual encounter to give

every detail of the accused unlawful sexual conduct to the person the complaint is relayed to.

170. In this case the complainant had relayed crucial information to Alfaz that the accused had done something to the complainant. I also accept the observations of Alfaz that the complainant looked scared and had cried after he saw the accused at the mosque quarters in front of the accused, the police officers and others. I also accept the observations of Alfaz that the complainant had cried when narrating (at the restaurant) about what had happened to him.
171. The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20<sup>th</sup> August, 2014)* at paragraph 39 made an important observation about the above as follows:

*The complainant 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 unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.*

172. I accept the evidence of all the prosecution witnesses as reliable and credible that it was the accused who had attempted to penetrate the anus of the complainant with his penis.
173. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. I reject the defence assertion that the accused had not done anything to the complainant as unworthy of belief. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said he did not do anything to the complainant because he was sleeping at home after

coming home from night shift. I do not give any weight to his evidence in this regard.

174. I also do not accept that the allegation was made up by the complainant to falsely implicate the accused. On a review of the entire evidence before this court particularly the defence of alibi raised and the evidence of the accused I rule that the prosecution which has the burden to disprove the defence of alibi raised has been able to rebut the defence of alibi raised beyond reasonable doubt.
175. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the lesser offence of attempt to commit rape.

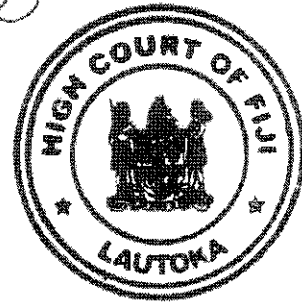
### **CONCLUSION**

176. This court is not satisfied beyond reasonable doubt that the accused on 2<sup>nd</sup> January, 2020 had penetrated the anus of the 8 year old complainant with his penis. However, this court is satisfied beyond reasonable doubt that on the above mentioned date the accused had intended to penetrate the anus of the complainant with his penis and what he did was more than merely preparatory.
177. In view of the above, I find the accused not guilty of one count of rape as charged and he is acquitted of same, however, I find the accused guilty of the lesser offence of attempt to commit rape and he is convicted accordingly.

178. This is the judgment of the court.



**Sunil Sharma**  
**Judge**



**At Lautoka**  
08 May, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Iqbal Khan & Associates for the Accused.**