

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 63 of 2020

STATE

V

SAILASA SAUKURU

Counsel : Mr. Joeli Nasa for the State
Mr. Eparama Sailo for the Accused

Dates of Trial : 31 May 2023 and 1 June 2023

Closing Submissions : 9 June 2023

Judgment : 24 August 2023

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SN".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SAILASA SAUKURU, on the 6th day of March 2020, at Nadi, in the Western Division, penetrated the vagina of **SN** with his fingers, without the consent of the said **SN**.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SAILASA SAUKURU, on the 6th day of March 2020, at Nadi, in the Western Division, unlawfully and indecently assaulted **SN** by squeezing her breast.

- [2] The accused pleaded not guilty to the two charges and the ensuing trial was held over 2 days. Thereafter, the Learned Counsel for the Defence and State made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act, and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act.
- [6] The first count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[7] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[8] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[9] Section 207 (2) (b) makes reference to a person penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent. In the instant case, the accused has been charged in count 1, for penetrating the vagina of the complainant with his fingers.

[10] Therefore, in order to prove the first count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 6 March 2020);
- (iii) At Nadi, in the Western Division;
- (iv) Penetrated the vagina of the complainant SN, with his fingers;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[11] To further elaborate upon these elements in respect of the said count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.

[12] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[13] The fourth element involves the penetration of the complainant's vagina, with the accused's fingers. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his fingers to any extent.

[14] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his fingers, without her consent.

[15] It should be borne in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

(a) by force; or

(b) by threat or intimidation; or

(c) by fear of bodily harm; or

(d) by exercise of authority; or

(e) by false and fraudulent representations about the nature or purpose of the act; or

(f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[16] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his fingers the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to

him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[17] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 30 years at the time of the alleged incident of Rape, and therefore, she had the mental capacity to give consent.

[18] The second count against the accused is a charge of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The offence of Sexual Assault is defined in Section 210 (1) of the Crimes Act as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—

(a) unlawfully and indecently assaults another person; or

(b)

[19] Therefore, in order to prove the second count of Sexual Assault, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified date (in this instance on the 6 March 2020);
- (iii) At Nadi, in the Western Division;
- (iv) Unlawfully and indecently assaulted SN, the complainant, by squeezing her breast.

[20] To further elaborate upon these elements in relation to the second count. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[21] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[22] The accused would be guilty of Sexual Assault, if he unlawfully and indecently assaulted the complainant. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As such, it is for Court to consider and decide whether the squeezing of the complainant’s breast by the accused, is an indecent act and thereby amounts to Sexual Assault.

[23] It must also be noted that in terms of Section 129 of the Criminal Procedure Act, it is stated that no corroboration of the complainant’s evidence is necessary to prove an offence of a sexual nature. Rape and Sexual Assault are obviously considered as offences of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

The Agreed Facts

[24] Section 135 of the Criminal Procedure Act deals with “Admission of Facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[25] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. THAT Sailasa Saukuru (hereinafter referred to as the “accused”), is 65 years of age and is a farmer.
2. THAT SN (hereinafter referred to as the “complainant”), is 30 years of age and is employed in domestic duties.

3. THAT the accused and the complainant were both residing at Sabeto Village and were neighbours at the material time.
4. THAT the complainant is the sister-in-law of the accused as she is married to the accused's brother.
5. THAT on the 6 March 2020, the complainant was alone at home when the accused came to their house to use their bathroom.

[26] Since the prosecution and the defence have consented to treat the above facts as "Admitted Facts" without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[27] The prosecution, in support of their case, called the complainant (SN) and her mother Vilisi Liku Nadoi.

[28] Evidence of the complainant SN

- (i) *The complainant's evidence was recorded in a 'closed court'.*
- (ii) *The complainant testified that she is currently 33 years old. She is residing at Sabeto Village in Nadi together with her husband, Asaeli Naulago Tuisawau and her 8 year old daughter, Laisa Mere.*
- (iii) *It is an Admitted Fact that the complainant is employed in domestic duties (Paragraph 2 of the Admitted Facts).*
- (iv) *The witness testified that in the year 2020, she was residing at Sabeto Village in Nadi and was a neighbour of Sailasa Saukuru, the accused. She said that their houses were three footsteps apart. It is an Admitted Fact that the accused and the complainant were both residing at Sabeto Village and were neighbours at the material time (Paragraph 3 of the Admitted Facts).*
- (v) *It is also an Admitted Fact that the complainant is the sister-in-law of the accused as she is married to the accused's brother (Paragraph 4 of the Admitted Facts).*
- (vi) *The complainant testified to the events which transpired on 6 March 2020. She said: "After raking the compound I was about to come into the house. I got my towel and I was on my way to the bathroom to shower. I went into the bathroom, I was having my shower. My back was towards the bathroom door. Whilst bathing, Sailasa came – he came and was standing on the porch. I was bathing in the bathroom".*
- (vii) *The witness said that it was around 9.00 or 10.00 in the morning and no one else was home at the time (other than for herself). Her husband had gone to*

take care of the cattle, whilst her daughter Laisa had gone to school. The witness testified that in 2020, apart from her husband and daughter there was no one else living with them (in their house).

- (viii) The complainant was asked as to how she knew that Sailasa had come because she was in the bathroom. She said that they saw each other when Sailasa was standing in the porch at the time when she was preparing lunch for Laisa. Only after that had she gone to the bathroom.
- (ix) The witness continued: "After that Sailasa entered the house and sat on a chair. I don't know how he entered the bathroom.....I don't know how he entered the house because I was facing the wall – he just came and sat on the chair. This was whilst I was in the bathroom".
- (x) The following questions were then asked from the witness and she answered as follows:

Q. Whilst you were in the bathroom, what happened next?

A. Sailasa pushed the bathroom door. He entered the bathroom. He closed the bathroom door. He then fondled my breasts with his hands. Then he inserted his two fingers into my vagina (the witness used the Fijian term 'caga' for vagina).

Q. At the time he pushed the bathroom door whilst you were in the bathroom, how were you standing or positioned?

A. I was facing the (bathroom) door.

Q. Can you describe the bathroom?

A. It is a small bathroom. The witness said it is the size of the witness box. It had an overhead shower.

Q. At the time you were having your shower (bathing) were you wearing anything or were you naked?

A. At the time I was naked.

Q. What was Sailasa wearing at the time?

A. T-shirt and shorts.

Q. Do you remember the colour of the clothes he was wearing?

A. White t-shirt and black shorts.

Q. Who closed the bathroom door?

A. Sailasa.

Q. Was it closed and locked or just closed?

A. He just pushed it closed.

- Q. *How were you both positioned at the time he fondled your breasts?*
A. *We were facing each other.*
- Q. *What did he use to fondle your breasts with?*
A. *He used both hands.*
- Q. *What did you do in response?*
A. *I pushed him.*
- Q. *How did you push him? What did you use to push him?*
A. *I used my hands.*
- Q. *Did you manage to push him off or not?*
A. *I could not push him because I have epilepsy and feared that something might happen to me.*
- Q. *Did you consent for Sailasa to fondle your breasts with his hands?*
A. *No, I did not consent.*
- Q. *Did he use his fingers from his right hand or left hand (to insert into your vagina)?*
A. *Left hand.*
- Q. *How long did Sailasa insert his fingers into your vagina for?*
A. *2 minutes.*
- Q. *Were you both still facing each other?*
A. *Yes.*
- Q. *What did you do in response to that act?*
A. *I pushed him away with my hands.*
- Q. *What happened?*
A. *Sailasa went outside.*
- Q. *Did he ask for your permission to do this?*
A. *No.*
- Q. *Did you give your permission (for Sailasa) to insert his two fingers into your vagina?*
A. *No.*
- Q. *Did Sailasa know at the time that you did not give your consent to him?*

A. No.

Q. How did you feel at that point of time (after you pushed Sailasa and he went outside)?

A. I was scared.

Q. How long have you suffered from epilepsy?

A. It started around/during the time of cyclone Winston (in 2016).

Q. Did you scream for help?

A. No.

Q. Why didn't you scream for help?

A. Because he is big and also I am sickly.

- (xi) The complainant testified that after Sailasa had left, she came outside after having her shower. At the time her husband had returned from grazing their cattle. She said that there is a set of cement blocks stacked besides their neighbour's house. Whenever her husband returns home after grazing the cattle, he would sharpen his knife on those cement blocks. He was doing that at the time.
- (xii) The witness said that after coming out, she had prepared Laisa's lunch. Later she clarified that she continued to prepare Laisa's lunch. Thereafter, she took the lunch to Laisa's school – Sabeto Village Kindergarten. She had dropped off Laisa's lunch at school and then come to her mother's house, which is located besides the school. It was around 1.30 at the time.
- (xiii) The complainant said that her mother's name is Vilisi Liku Nadoi. She testified further as follows: "I went to tell her what happened to me that day. That Sailasa had harassed and touched me inside the bathroom".
- (xiv) The complainant identified Sailasa Saukuru as the accused in the dock.
- (xv) The complainant clarified that the bathroom door cannot be locked from inside. It can only be closed.
- (xvi) The witness was asked whether at the time the accused put his fingers into her vagina, was he still touching her breasts? She said it was not at the same time. He touched her breasts and then he inserted his fingers into her vagina.
- (xvii) The witness further testified that she did not tell her husband anything at the time, because she was scared.
- (xviii) The complainant was cross examined by the defence. The defence also put several suggestions to the complainant, totally denying the allegations of Rape and Sexual Assault.
- (xix) The witness agreed that she is married to Sailasa's brother, Asaeli. She also agreed that Sailasa is her 'tavale' and she always jokes around with Sailasa.

She agreed that she and Sailasa usually exchange funny jokes and sometimes share jokes that are sexual in nature.

- (xx) The complainant agreed that on 6 March 2020, when Sailasa had come to use the bathroom at her house, he had heard the shower was on and he had announced himself and asked who is in the shower.*
- (xxi) It was suggested to the complainant that she had opened the bathroom door when Sailasa had asked who was in the shower. The witness denied this suggestion.*
- (xxii) It was suggested to the complainant that Sailasa had seen her naked when she had opened the door. It was further suggested that she had open the door and revealed herself to Sailasa. The witness denied these suggestions.*
- (xxiii) It was suggested that she had hoped that Sailasa was going to join her in the shower. She denied the suggestion. It was further suggested that Sailasa did not accept her advances and went inside the sitting room. The witness denied the suggestion.*
- (xxiv) It was further suggested to the complainant that because of the conversations that she has with Sailasa, which are sexual in nature, she had thought that Sailasa wanted to have sex with her on that day. The witness denied the suggestion.*
- (xxv) The witness agreed that she did not report the incident to her husband when her husband had come back from the farm. She also agreed that she went straight to her mother's place. Thus, it was further suggested to the complainant that she was worried about what Sailasa was going to tell her husband about what she did that day. The witness denied this suggestion.*
- (xxvi) It was suggested to the witness that she went to her mother's place and made up the story that Sailasa pushed the bathroom door and forced himself into the bathroom. The witness denied the suggestion.*
- (xxvii) It was also suggested to the witness that she was worried about what Sailasa was going to tell her husband, so she went and told her mother that Sailasa had inserted his fingers into her vagina in the bathroom. The witness denied this suggestion.*

[29] Evidence of Vilisi Liku Nadoi

- (i) The witness testified that she is 66 years of age and residing at Sabeto Village in Nadi. She is married and has 7 children. She has a daughter by the name of SN (the complainant), who is the fifth in the family.*
- (ii) The witness testified to the events which took place on 6 March 2020. She said on that day she was at home. Between 12.00 and 12.30 p.m. the complainant (SN) had come home after taking lunch for her daughter. The witness had also been preparing lunch at the time. The complainant had come to tell her what had happened to her on that day.*

- (iii) *The witness said: "SN told me that she was going to have her shower. She brought her towel and hang it on the bathroom door and went inside to have her shower. She said whilst having a shower, she felt Sailasa entered the bathroom and closed the bathroom door and started harassing her. SN had her back towards the door (the door was behind her) she said that he fondled her breasts and also touched her vagina".*
- (iv) *When asked whether the complainant had said anything else to her, the witness said: "SN said that she was struggling to push him out and she could not shout as she was trying to come out as she was scared. When she was finally able to push him out, she came out of the bathroom, she wrapped herself in her towel and then Sailasa told her that this is to remain between us and that Asaeli and Nasau should not know".*
- (v) *The witness said that Nasau is Sailasa's wife.*
- (vi) *The witness testified further that the complainant suffers from epilepsy. During the first year of her vocational studies the complainant had started getting epilepsy, as a result of which, she had stopped schooling. The witness said that the complainant was around 16 or 17 years at the time.*
- (vii) *The witness was cross-examined by counsel for the defence. She admitted that although the alleged incident happened on 6 March 2020, her statement had only been recorded on 24 May 2023. Thus, she admitted that she did not go to the Police straight away to report on what the complainant had told her.*
- (viii) *The witness also admitted that the complainant had been having epilepsy for more than 15 to 20 years. She said that now it is not like when it started. It is better now.*

[30] At the end of the prosecution case this Court decided to call for the defence in respect of the two counts. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[31] The accused decided to testify on his own behalf. He also called two witnesses in support of his case – Jonacani Vatanitawake, the Assistant Roko Tui Ba, and Asaeli Naulago, the husband of the complainant.

Case for the Defence

[32] Evidence of Sailasa Saukuru

- (i) *The witness testified that he is 69 years old and residing at Sabeto in Nadi. As for his occupation, he stated that he and his wife look after the Hot Water Pool at Sabeto (the Sabeto Mud Pool). He is currently staying at the Sabeto Mud Pool.*
- (ii) *The witness said that the complainant is the wife of his younger brother. He has known the complainant for about 10 years. They are also cousins and at times joke with each other. They usually joke with each other at home – at the complainant’s home.*
- (iii) *The witness testified that on the 6 March 2020, he was at home in Sabeto Village. At the time he was living with his wife and kids. The complainant lived close to his house, which is his brother’s house. The distance between the two houses was about 5 metres. He said there was just a gap in the middle.*
- (iv) *The witness testified to the events which took place on 6 March 2020. He said: “On that day I returned from the plantation/cassava patch, then I told my wife to cook the cassava. It was after 8.00 in the morning. It was about 9.00 when I came back. When I returned I told my wife to peel and cook the cassava, while I sat in the front porch to rest. After resting, I then stood up, I wore a sulu on top and I put my towel on my shoulders. When I entered our bathroom there was a big pot in the bathroom with water and clothing. After that I came out. Then I went besides my brother’s house to have my shower”.*
- (v) *The witness continued that when he came to the main door of his brother’s house he went inside and went into the bathroom. When he stood in front of the bathroom door he saw that there was a towel hanging over the door. So he had asked as to who was showering in the bathroom. At that time the complainant had opened the bathroom door. There was no clothes on her – she was naked. The complainant had looked at him and then closed the door.*
- (vi) *The witness had then told the complainant to quickly finish her shower. He then went to the sitting room to wait for her to finish showering. He had been sitting and waiting in the sitting room for about half an hour. When he realized that the complainant had finished her shower, he had gone to the bathroom and had his shower.*
- (vii) *The witness testified that he had asked his brother Asaeli and the complainant beforehand, if in the event his bathroom is occupied, whether he can come and use their bathroom. He said he had used their bathroom many times before.*
- (viii) *When asked as to why the complainant had opened the door while she was naked, the witness said: “She was probably using our relationship as cousins/tavale – because they are cousins that’s why she was behaving like that”.*

- (ix) *The witness said that he came to know about the allegations made against him by the complainant only when the police came. This was two days after the alleged incident.*
- (x) *The witness totally denies the allegations made against him by the complainant.*
- (xi) *When asked as to why the complainant had told the police that he had raped her in the bathroom, the witness said that she was probably ashamed because she had exposed herself.*
- (xii) *The witness was cross-examined at length by the State Counsel and the prosecution case theory was put to the witness.*
- (xiii) *It was suggested to the witness that when he came to the complainant's house to use their bathroom and saw a towel on the bathroom door, that he knew that someone was already in the bathroom at the time. The witness denied this suggestion and said that he only heard the water running inside the bathroom.*
- (xiv) *It was further suggested to the witness that despite seeing a towel hanging on the door and hearing water running, that he had opened the bathroom door and gone inside. The witness denied this suggestion.*
- (xv) *It was further put to the witness that he knew that the complainant was alone at home at the time and that Asaeli was out in the farm. The witness said that he did not know this. However, it is an Admitted Fact that on 6 March 2020, the complainant was alone at home when the accused came to their house to use their bathroom (Paragraph 5 of the Admitted Facts).*
- (xvi) *The witness agreed that prior to the day of the alleged incident that his relationship with the complainant was good and cordial. Therefore, it was suggested to the witness that there was no reason for the complainant to make up such a story against him, unless the incident had really happened. The witness denied this and said that the incident did not happen.*
- (xvii) *It was further suggested to the witness that he would not expect the Court to believe that just because of the shame of having exposed herself (naked), that the complainant had made up these allegations against him. The witness said that the complainant had made up the story for that reason.*

[33] Evidence of Jonacani Vatanitawake

- (i) *The witness testified that he is 34 years of age and residing at Natabua. He is the Assistant Roko Tui Ba. This is his fourth year in that capacity. His office comes under the ITaukei Affairs Board and the Ba Provincial Office. The Ba Provincial Office covers the province of Ba, which is from Nadi to Tavua. [Rakiraki would come under the Ra Provincial Office].*
- (ii) *The witness said that his office looks after ITaukei traditions and cultures. It looks after the wellbeing of the ITaukei, good governance, conservation of the resources and in addition it looks after the resolutions that come during the District Council meetings.*

- (iii) *The witness explained his job description as Assistant Roko Tui Ba.*
- (iv) *He also explained the meaning of the 'veitavaleni' relationship. He said: "There is no English version to see the real meaning. So like in Fijian we just have to say 'tavale' which means from the dad's side and the dad's sister-their sons and daughters they are called 'tavale' (cousins). We can share jokes, we can make fun with each other. Even if our wives are there, we can still share jokes with our 'tavale' anytime. Similarly, where their husbands are there, the 'tavales' can act the same".*
- (v) *When asked whether two 'tavales' can reveal each other naked to one another, the witness said that he has not seen that happen. He was further asked, whether in his capacity he knows that there are instances where they can jokingly expose themselves to their 'tavales'. The witness categorically said no.*

[34] Evidence of Asaeli Naulago

- (i) *The witness testified that he is 63 years of age and residing at Sabeto Village in Nadi. He is living with his wife and one daughter, who is in Class 3. He is a farmer by occupation. His wife is the complainant in this case. He has been married to the complainant since 2014.*
- (ii) *The accused Sailasa Saukuru is his older brother. In March 2020, he was residing about 15 metres away from his house.*
- (iii) *The witness testified to the events which took place on 6 March 2020. He said that on that particular morning he had gone down to graze the cattle. He had left home around 7.00 in the morning and returned home around 10.00 a.m. He said when he returned home, he had not seen the complainant. The house was closed.*
- (iv) *In cross-examination the witness stated that 2 days later, on 8 March 2020, the complainant had told him that Sailasa had forcefully touched her breasts and also touched her female private part/vagina on that day. The complainant informed him that Sailasa had done these things to her while she was having her bath in the bathroom, when he was away changing the cattle.*
- (v) *On hearing this, the witness said that he had told the complainant to go and see Sailasa's wife and inform her of what had happened – because they were all related. However, the complainant did not listen to what he had said. She had waited for her sister to finish work and they went and reported the matter to the Police.*

Analysis

[35] As stated before, the prosecution, in support of their case, called the complainant (SN) and her mother Vilisi Liku Nadoi. The accused decided to testify on his own behalf. He

also called two witnesses in support of his case, namely Jonacani Vatanitawake, the Assistant Roko Tui Ba, and Asaeli Naulago, the husband of the complainant.

[36] The burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charges of Rape and Sexual Assault beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraphs 10 and 19 of this judgment, respectively, in respect of the two counts.

[37] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as Admitted Facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

[38] Based on the said Admitted Facts it is admitted that the complainant is the sister-in-law of the accused as she is married to the accused's brother. It is an Admitted Fact that the accused and the complainant were both residing at Sabeto Village and were neighbours at the material time. Therefore, they are known to each other. The identity of the accused is not in dispute.

[39] It is also Admitted Fact that on the day of the alleged incident, 6 March 2020, the complainant was alone at home when the accused came to their house to use their bathroom.

[40] I have summarized the evidence of all witnesses led during the trial.

[41] The accused totally denies all the allegations made against him by the complainant. His defence is that the complainant was probably feeling ashamed because she had exposed herself to him naked, when she had opened the bathroom door, and that this had prompted the complainant to make up these allegations against him.

[42] During his testimony when asked as to why the complainant had opened the door while she was naked, the accused stated: "She was probably using our relationship as cousins/tavale – because they are cousins that's why she was behaving like that". However, defence witness, Jonacani Vatanitawake, the Assistant Roko Tui Ba, categorically stated that there are no instances known to him where two 'tavales' would expose themselves naked to each other even jokingly.

- [43] Therefore, considering the totality of the evidence in this case, it is my opinion, that the accused's version cannot be accepted as truthful and reliable and I reject his evidence.
- [44] The complainant testified at length as to how the accused had committed the alleged offences on her.
- [45] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable. The complainant withstood the rigorous cross examination by the Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.
- [46] I also accept the evidence of the complainant's mother, Vilisi Liku Nadoi, as truthful and reliable. She was the recent complaint witness. She testified that, on the 6 March 2020, the complainant had told her that she was going to have her shower. She brought her towel and had hung it on the bathroom door and went inside to have her shower. Whilst having a shower, she said the accused had entered the bathroom and closed the bathroom door and started harassing her. The complainant had said that that the accused had fondled her breasts and also touched her vagina.
- [47] The above clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offences and describe every detail of the incidents, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.
- [48] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [49] It must also be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted.

[50] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Rape and Sexual Assault with which the accused has been charged.

[51] In the circumstances, I find the accused guilty of the first count of Rape and the second count of Sexual Assault with which he is charged.

[52] Accordingly, I convict the accused of the first count of Rape and second count of Sexual Assault as charged.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT LAUTOKA

Dated this 24th Day of August 2023

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: KLaw Chambers & Partners, Barristers & Solicitors, Nadi.