

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 46 of 2021

STATE

V

MOHAMMED SHIHAAB HAASHMI

Counsel	Ms. W. T. Elo for the State. Mr. A. Samy and Ms. R. Nair for the Accused.
Dates of Hearing	26 and 27 October, 2023
Closing Speeches	31 October, 2023
Date of Judgment	01 November, 2023

JUDGMENT

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

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

Statement of Offence

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

Particulars of Offence

MOHAMMED SHIHAAB HAASHMI, on the 17th day of February, 2021 at Sigatoka in the Western Division had carnal knowledge of “S.C”, without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer 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. In respect of the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the

accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

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

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. 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

15. 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.
16. 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

17. The complainant informed the court that on 17th February, 2021 the complainant was exchanging text messages with her friend Alvin. She

knows Alvin from her school days. In the text Alvin asked her if she can accompany him to Nadi for shopping and for them to have lunch and come back. Alvin also stated that he was going alone.

18. The complainant agreed, at 10 am Alvin came to pick her from near her house in a grey car. On the way Alvin picked his brother Dan and a cousin brother. From a Service Station at Sigatoka Town the group boarded the taxi driven by the accused.
19. At Nadi Town there was a cruising around in the taxi and thereafter Alvin and his brother purchased a carton of rum and cola. The accused suggested that they all go for a drink at the Wailoaloa beach. At around midday they arrived at the Wailoaloa beach. All the boys including the taxi driver went outside the car and they started drinking, the complainant was not drinking and she was standing under a coconut tree playing with Alvin's phone. The taxi driver was called by her friends as "lucky".
20. It was nearly 3pm they left Wailoaloa the complainant thought they were going back to Sigatoka, however, the car was driven to Natadola and parked on a private property on a slope. The complainant was seated inside while the others got off the car and were drinking at the back of the car, the boot of the car was open. After sometime the accused came opened the driver's side door and pulled up all the car windows. After doing this, the accused came to the back seat behind the driver's seat where the complainant was sitting.
21. He told the complainant to move inside the complainant asked "*what are you up to*", the accused said for them to tell stories. By this time it was around 5pm. The accused came and sat beside the complainant, closed the door and asked her to pay the taxi fare. The complainant told the

accused that the fare was paid by her friends. The accused kept insisting that the complainant pays the fare. The complainant told him to ask her friends. The accused did not but moved to the driver's seat and locked all the doors.

22. After the accused sat beside her, the complainant moved to press the door button to open the door so that she could go out of the car. At this time the accused pushed her and when she was leaning between the car seat and the door the accused tried to kiss her. The complainant put out her left hand to stop him by placing it on the accused neck and with her right hand she was banging on the car window and calling out Alvin's name. Alvin and his brothers were looking towards her but no one came to assist. The accused said *"you don't do anything because the car is mine and I will take you leaving those boys behind."* The accused pulled down her trousers and said; *"don't do anything or even tell them anything or else I will kill you."*
23. After hearing this the complainant did not do anything what she was thinking about was to just go home. The complainant started crying the accused removed his trousers and inserted his erected penis into her vagina and had sexual intercourse for 5 minutes which was painful to her.
24. When the accused stood up and was about to leave, he told the complainant not to tell the other boys anything or else he will kill her. The complainant was scared the accused opened the door, stood outside and wore his trousers. The friends of the complainant came and the accused started driving the car towards Sigatoka.
25. On the way the complainant was dropped near her home, by this time it was 6pm and she went to the back of her house. The reason for going

behind the house was she did not want to show her mother and other family members that she was scared and something had happened to her.

26. The complainant called out to Edwina, her younger sister and told her what had happened and also told her younger brother to get mom's phone so that she could call the police. Her mother inquired about the phone and asked the complainant to come inside the house. The complainant told her mother all that had happened to her that day and that the taxi driver had raped her. The matter was reported the same evening at the Cuvu Police Post. The complainant identified the accused in court.
27. In cross examination the complainant agreed that her parents were strict on her and when liquor was purchased she had told Alvin that she cannot go with people who usually drink. She did not leave the group because she did not know Nadi Town area well. At the Wailoaloa beach the accused drank beer with her friends.
28. Upon further questioning, the complainant said that the windows of the car were tinted to the extent that from inside one can see outside but not from outside. When asked that she could have opened the door and ran outside, the complainant said; *"I was sitting in the car on the right side he came in saying that he wanted to talk. I didn't expect him to do all that."*
29. When she was pushed by the accused on the back seat, he had told her if she did anything he will take her to another place. The complainant did not tell anything to Alvin because the accused had threatened her not to do anything or tell anyone or he will kill her. When it was put to the complainant that she was lying since the incident never happened, the complainant said the accused was there and he had raped her.

30. The complainant denied that the accused after dropping her at Natadola beach between 4 to 5pm had returned to do another job in Sigatoka. She said the accused was there with them and the reason why she got off at her house junction was because she wanted to have a good look at the accused taxi and especially what was written on the side since she was thinking of reporting the matter to the police.
31. The complainant agreed that it was not in her police statement that she had told her mother about what had happened to her but she had told the police officer writing her police statement. The complainant agreed she had only told Edwina. It was nearly 6pm when she reached home the complainant maintained that the accused was at Natadola and he was the one who had raped her.
32. The final witness Mereani Diqiqi, the mother of the complainant informed the court that on 17th February, 2021 at around 6pm the complainant came home. The witness was sitting at the front door she noticed that the complainant was looking down and her face was giving a different expression like being scared. The complainant went behind the house Edwina her younger daughter followed the complainant. After a while, Edwina called asking for the mobile phone so that the complainant could call the police.
33. Upon hearing this, the witness went to check what had happened when she asked the complainant she saw tears flowing down the complainant's cheeks. The complainant said at Natadola she was sitting at the back seat of the car while her friends were drinking outside the car. The driver of the car came and closed all the car windows and then he asked her to pay the taxi fare.

34. When the complainant told him the fare has been paid, the driver said for them to have sex, she refused and was looking out of the window shouting at her friends since she was so scared at the time. The complainant described the taxi driver and said the taxi driver had raped her. The complainant was taken to the Cuvu Police Post in the evening and a report was lodged.
35. In cross examination, the witness denied that the complainant was crying because she was afraid of the witness and that the witness will get angry since the complainant had been out the whole day.

RECENT COMPLAINT DIRECTION

36. 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.
37. 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 her mother that at Natadola when the complainant was sitting inside the taxi the taxi driver came inside and said for them to have sex, when she refused the taxi driver raped her.

38. This is commonly known as recent complaint evidence. The evidence given by Mereani is not evidence of what actually happened between the complainant and the accused since she was not present and she did not see what had happened.
39. 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 went home after being dropped near her house at around 6pm on the day of the alleged incident. The mother of the complainant became inquisitive after the complainant had asked for a phone to call the police. Mereani asked the complainant what had happen to her the complainant without hesitation told her mother the accused had raped her.
40. The prosecution is also asking this court to consider the observations of the complainant by Mereani from the time the complainant came home and at the time the complainant was relaying the conduct of the accused on her and therefore the complainant is more likely to be truthful.
41. On the other hand, the defence says the complainant made up a story against the accused, he was not at Natadola at the time and he did not do anything to the complainant as alleged. He had left the group at Natadola and gone to Sigatoka Town to pick another job and after dropping his customer at the Malomalo Public School he came to pick the complainant and her friends. The story narrated by the complainant lacks reliability and is baseless she did not tell any of her friends and/or raise any alarm because nothing had happened.
42. Mereani was a strict mother so when Mereani questioned the complainant who had been out of the house for the whole day with boys the complainant

falsely blamed the accused therefore the complainant should not be believed.

43. 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 her 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 her conduct and in her explanation of it.
44. This was the prosecution case.

DEFENCE CASE

45. 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.
46. The accused informed the court that he is a taxi driver and his taxi base is at the market stand. On 17th February, 2021 at around 10 to 10.30am, he received a call from one Alvin who is known to the accused to take him to Nadi from the Total Service Station. From the Service Station, the complainant and the three boys went with him to Nadi and from there to Wailoaloa beach and then to Natadola. The three boys were drinking beer while he and the complainant were not drinking.
47. On the way to Natadola, the accused received a call from Master Seru from Malomalo Public School. After dropping the group at Natadola, he does not remember what time it was he then went to Sigatoka Town.

48. It was sometimes in the afternoon he went to his base picked Master Seru and dropped him at his school quarters at Malomalo Public School. After dropping Master Seru, he went to pick the group at Natadola. He first dropped the complainant and then the others. This was the first time he had met the complainant. According to the accused, the back seat windows of the taxi were slightly tinted with no difficulties in vision either from inside or outside with central locking system that anybody from inside can unlock manually.
49. In cross examination by the state counsel the accused denied drinking alcohol that day. He had driven to Natadola with the complainant and the boys but he did not drink at Natadola in fact he had after dropping the group went to pick another customer. He was not at Natadola as alleged by the complainant and he did not do anything to the complainant.
50. The accused also stated that when he was driving at Maro junction towards Natadola he received a call from Master Seru who had done his shopping and wanted to be dropped home. The accused denied committing the offence as alleged.
51. The defence witness Serupepeli Ratudradra informed the court that he is a primary school teacher at Malomalo Primary School. He normally used RSL transportation from school to wherever he wants to go or his colleagues transport or he would go by the accused taxi, Lucky cab. The witness usually hires the accused fortnightly unless there is an emergency. According to the witness 17th February, 2021 was a school day which was the fourth week of the fourth term.
52. On this day he left school before 3pm since on the 19th it was his wife's birthday he went to Sigatoka Town to do his shopping alone. After doing

his shopping the witness called the accused to pick him and take him home. It was between 4 to 4.30 pm the accused came to pick the witness. The accused dropped the witness at his school quarters.

53. In cross examination by the state counsel the witness agreed that he was recalling exactly what he did on 17th February, 2021 but a month ago he could not recall anything about 17th February. The witness agreed that considering the distance involved he would have reached town at 6pm from the school and therefore the accused could not have picked him at 4pm. He had called the accused from the bus at 3.55pm when he was nearing the town.

54. The witness also agreed that when he was questioned by the police he could not recall anything. The witness was referred to his police statement dated 11th September, 2023 last paragraph which was read as:

“I wish to say that on 17th February, 2021 I can’t recall whether I was with him or not. I hardly being with him like only the two of us, it’s always me and my family whenever we need to hire him. That’s all I wish to say.”

55. The witness denied he was lying in court.

56. In re-examination the witness stated that he reached town before 4pm and he had called the accused at 3.55 pm. When asked how he was able to recall what he did that day when he told the police he could not recall what he had done. The witness stated that after the police left when he was applying for his leave then he recalled that it was the fourth term then he started going through the attendance register and then he was able to recall what he told the court.

57. This was the defence case.

PREVIOUS INCONSISTENT STATEMENT

58. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel during the cross examination of the defence witness Serupepeli Ratudradra had questioned these witnesses about some inconsistencies in their police statements they had given to the police when facts were fresh in their minds with their evidence in court.
59. This court is allowed to take into consideration the inconsistencies between what these witnesses told the court and their police statements when considering whether these witnesses were believable and credible. However, the police statements are not evidence of the truth of its contents.
60. 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.
61. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.

ANALYSIS

62. The prosecution states that the complainant and her friends on 17th February, 2021 at around 10 to 10:30 am went in the taxi of the accused to Nadi. On the return journey the accused drove the taxi to a secluded private property in the interior of Natadola.
63. The accused and the complainant's friends consumed beer at the Wailoaloa beach and they also continued drinking at Natadola. The complainant did not drink at all. As the drinking was in progress the accused came into the taxi and wound up all the windows. He then opened the back door and told the complainant to shift inside so that he can talk with her. The accused at first insisted that she pays the taxi fare when she said the fare had been paid the accused pushed the complainant on the seat threatened and forcefully removed her trousers and penetrated his erected penis into her vagina and had forceful sexual intercourse for about 5 minutes.
64. The complainant did not consent to what the accused had done to her. The accused again threatened the complainant not to tell any of her friends about what he had done. After the complainant was dropped home she told her mother about what the accused had done to her. The complainant's mother observed that the complainant was not her usual self she was looking down and appeared scared. The complainant started crying when her mother asked what had happened. The matter was reported to the police the same evening.
65. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. The accused after dropping the complainant and her friends at Natadola near Yatule Resort had left the

group to attend to another customer who was a school teacher. After dropping this customer the accused came and picked the complainant and her group and then dropped the complainant first at her home and then the others.

66. Serupepeli Ratudradra also came to court and confirmed that at around 4pm the accused had picked him from Sigatoka Town and dropped him at his school quarters.
67. Finally the defence is saying that no one can be at two places at the same time. The accused did not do anything as alleged. The complainant has lied to the court she did this to avoid the wrath of her parents particularly an angry mother who had told the complainant time and again not to go out with anyone. The complainant had no choice but to blame the accused who was not part of her group of friends but an outsider. The defence is asking this court not to believe the complainant.

DEFENCE OF ALIBI

68. It is noted that the accused is relying on the defence of alibi. He took the position that in the afternoon of 17th February, 2021 after dropping the complainant and her friends at Natadola he had attended to another customer and therefore he was not in his taxi with the complainant as alleged.
69. 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.
70. 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 somewhere else.
71. 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.

72. 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, they 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- 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 mere, 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.

DETERMINATION

73. At the outset I would like to state that Mereani in her evidence had said the complainant had told her that she was punched by the accused. This aspect of Mereani's evidence has been disregarded as an uncharged act.
74. 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.

75. In this case, there are two different versions of the event, in this regard this court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offence alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
76. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022).
77. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the

prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”

78. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant as truthful and reliable. She gave a coherent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegation.
79. The complainant was resolute and unwavering in what she had encountered in the taxi. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. In cross examination she was not evasive and had given frank answers to the questions asked.
80. I accept that it was the accused and no one else, who had forcefully penetrated the complainant’s vagina with his penis without her consent.
81. The allegation is about a broad day light happening and the close proximity of the accused and the complainant before, during and after the allegation cannot be ignored. I observed that the complainant had expressed herself clearly that she did not consent to what the accused had done.
82. I also accept there were some inconsistencies between what the complainant told the court and her police statement, however, these

inconsistencies were not significant to adversely affect the credibility or the thrust of the complainant's evidence.

83. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.20 (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;”

84. 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...'

85. The complainant was giving evidence after two years of the incident hence there were bound to be some inconsistencies or omissions. The defence did not raise any motivation on the part of the complainant to falsely implicate the accused.
86. I also accept the accused had threatened the complainant not to tell anyone and as a result the complainant had not told her friends anything about the incident at the scene. Different people react differently to what they have gone through some respond instantly and some not. When asked by her mother about what had happened the complainant did not hesitate to tell her mother about what the accused had done to her and the police were promptly notified?
87. The decisive aspect of recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. I accept the complainant was consistent in her conduct and in her explanation as well. In fact as per the evidence of Mereani the complainant had given a detailed account of what the accused had done to her that day.

88. 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 was not at Natadola at the time of the allegation and he did not do anything to the complainant as unworthy of belief.
89. The accused was not straight forward in his answers during the cross examination and was trying to derail the cross examiner by not answering the questions posed. He did not tell the truth when he said after dropping the complainant and her friends at Natadola he had gone to attend to another customer by driving to Sigatoka Town and then to Malomalo is a made up story bordering on absurdity. Serupepeli the defence witness also did not tell the truth it was obvious to me that he was protecting the accused by saying that the accused had picked him from town at 4pm and dropped him to his school quarters when Serupepeli told the court the bus ride from the road side to town would normally take 1½ hours. This witness had memorized what he wanted to tell the court and was reciting the same in a hurried manner.
90. When Serupepeli was interviewed by the police on 11th September, 2023 he told the police he could not recall whether he was with the accused or not on the day in question and yet he was able to give every detail of what he did especially the timing is highly suspicious. I reject the evidence of Serupepeli that he had after giving his police statement done his research, asked his colleagues and uplifted information kept at his school as unbelievable. If there was any truth in what he told the court in this respect he could have done the same thing at the time of giving his police statement.

91. I do not give any weight to the evidence of the accused and Serupepeli both gave a version of events which do not add up as a truthful narration. Both were trying to overshadow the real facts to make their version of events look trustworthy and reliable.
92. I 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 and his defence witness Serupepeli 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 beyond reasonable doubt.
93. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the offence as charged.

CONCLUSION

94. This court is satisfied beyond reasonable doubt that the accused on 17th February, 2021 had penetrated the vagina of the complainant with his penis without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
95. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.

96. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

01 November, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.