

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

**Criminal Case No.: HAC 60 of 2021**

**STATE**

**V**

**MOHAMMED IFTIKAR**

**Counsel** : Ms. S. Prakash for the State.  
: Mr. M. N. S. Khan for the Accused.

**Dates of Hearing** : 16,17,18,19 October, 06 November, 2023  
**Closing Speeches** : 08 November, 2023  
**Date of Judgment** : 09 November, 2023

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "M.K")*

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

**FIRST COUNT**

***Statement of Offence***

**INDECENT ASSAULT:** Contrary to section 212 (1) of the Crimes Act 2009.

***Particulars of Offence***

**MOHAMMED IFTIKAR**, between the 1<sup>st</sup> day of August, 2020 and the 31<sup>st</sup> day of August, 2020 at Varoko, Ba in the Western Division, unlawfully and indecently assaulted "M.K".

**SECOND COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**MOHAMMED IFTIKAR**, between the 1<sup>st</sup> day of January, 2021 and the 31<sup>st</sup> day of January, 2021 at Varoko, Ba in the Western Division, unlawfully and indecently assaulted "M.K".

**THIRD COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**MOHAMMED IFTIKAR** between the 1<sup>st</sup> day of January, 2021 and the 31<sup>st</sup> day of January, 2021 at Varoko, Ba in the Western Division, had carnal knowledge of "M.K" without her consent.

**FOURTH COUNT**

***Statement of Offence***

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

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

**MOHAMMED IFTIKAR** between the 1<sup>st</sup> day of March, 2021 and the 7<sup>th</sup> day of March, 2021 at Varoko, Ba in the Western Division, had carnal knowledge of "M.K" without her consent.

2. In this trial, the prosecution called eight witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for one count of indecent assault and two counts of rape only.

### **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.
4. The accused faces a total of three counts being one count of indecent assault and two counts of rape, the evidence in respect of each count will be considered separately from the other if the accused is guilty of one count, it does not mean that he is guilty of the other counts as well. This also applies with the findings of not guilty.

### **ELEMENTS OF THE OFFENCE**

#### **INDECENT ASSAULT**

5. To prove the offence of indecent assault the prosecution must prove the following elements beyond reasonable doubt:
  - (a) The accused;

- (b) Unlawfully and indecently;
  - (c) Assaulted the complainant by touching her stomach, breast and kissing her neck.
6. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
  7. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
  8. Assault is the unlawful use of force on the complainant by the act of touching her stomach, breast and kissing her neck.
  9. In respect of the offence of indecent assault the accused has denied committing this offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant by touching her stomach, breast and kissing her neck.
  10. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court must find the accused guilty of the offence of indecent assault. However, if there is a reasonable doubt with respect to any elements of the offence of indecent assault then this court must find the accused not guilty.

## **RAPE**

11. In respect of the two counts of rape the prosecution must prove the following elements of this offence 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.
  
12. In this trial, the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent on two occasions and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
  
13. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
  
14. The second element is the act of penetration of the complainant's vagina by the penis.
  
15. The third element is of consent, which 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.

16. 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.
17. 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.
18. If this court is satisfied beyond reasonable doubt that the prosecution has proven 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.
19. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of rape, then this court must find the accused not guilty.
20. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
21. 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**

22. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
23. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

### **PROSECUTION CASE**

24. The complainant informed the court that in the year 2020 she was 16 years of age and a student. She was able to recall August, 2020 she knows the accused from childhood. He was their neighbour and her father's friend. The accused used to come to her house every now and then to drink grog with her father.
25. In 2020 the complainant's parents were separated and she was living with her father and younger brother Arman Feroz Khan. One day in August, 2020 the complainant's brother was at home watching T.V, she was in the kitchen doing some chores and her father was not at home.
26. The accused came from behind got hold of her stomach and her breast and started kissing her neck. The complainant got scared and as a result she did not make any noise. After sometime the accused went away. The complainant did not tell anyone because she was scared that if she told anyone then what will happen. The accused after the incident continued

to come to her house and still she did not tell anyone about what the accused had done to her.

27. One day in January, 2021 the complainant was alone at home the accused came outside her house and was calling her she did not open the door so the accused threatened her by saying that he will do something to her. Upon hearing this, the complainant got scared she only opened the door after the accused said that he will spoil her life.
28. The complainant was in the sitting room, the accused came into the house pushed her on the floor and went on top of her held her hand and removed her pants. She was wearing a top and pants the accused removed his pants and inserted his penis into her vagina and had sexual intercourse with her until he ejaculated on her stomach. The complainant was crying since she was in pain and she did not like what the accused was doing to her. She told the accused that she did not want these things to be done to her. The complainant did not do anything because she was scared.
29. After the accused left, the complainant cleaned the blood on the floor and had her shower. After sometime her father and brother came home but she did not tell them anything about what the accused had done to her. She also did not tell anyone else because she was thinking about what the accused had said to her that is he will spoil her life. Her father was a male so she did not tell her father anything. Upon further questioning the complainant said she did not tell her sister since her sister was married and living in Lautoka and her mother was separated from her father.
30. The complainant also remembered one day in March, 2021 she was at home with her brother and her father had gone somewhere. Her brother was watching T.V in the sitting room and she was sleeping in her bedroom.



When she opened her eyes she saw the accused who forced her and came on top of her removed her pants and took his penis and penetrated her vagina and had sexual intercourse with her till he ejaculated.

31. The complainant did not like what the accused was doing to her and she felt pain, she was crying and telling the accused not to do this to her. The complainant tried to push the accused but she could not so she did not do anything. After the accused left she changed the bed sheet and had her shower. The complainant did not tell her father and her brother or anyone about what the accused had done since she was scared.
32. A few days later she went to Nadi with her friends on a Friday and returned on Monday. On Monday while sitting with Salman her boyfriend at that time she told Salman about what the accused had done to her. According to the complainant Salman told her mother since she had told Salman that she will not be able to tell her mother.
33. In the presence of the complainant Salman called her mother and relayed to her mother what she had told Salman. The complainant did not want to go home because the accused was frequently coming to her home and doing things to her which she did not like hence she wanted to go to her mother. At the Ba Police Station the complainant lodged a complaint against the accused. The complainant identified the accused in court.
34. In cross examination the complainant said that she told the court in respect of the March, 2021 incident that her brother had opened the door for the accused. She was sleeping when she opened her eyes she saw the accused standing in her bedroom.

35. The complainant was referred to her police statement dated 23<sup>rd</sup> March, 2021 to 2<sup>nd</sup> page, 2<sup>nd</sup> paragraph which was read as:

*"The last incident was the first week of March, 2021 when I was alone at home."*

36. The complainant agreed in her evidence she had said her brother was at home and had opened the door which was different to her police statement. The complainant said what she told the court was true.

37. Furthermore, the complainant agreed that in her evidence she had said when the accused was having sex with her she did not like it. When the police statement was shown the complainant she said it was not written there. The complainant also agreed that in her evidence she had told the court that the accused had ejaculated on her stomach, she was crying and she had said she did not like all the things the accused was doing to her, she changed the bed sheet and took a shower after the accused left. The complainant agreed that all of the above were not in her police statement.

38. The Ba Police had called her so she went to Ba Police Station the complainant was referred to her police statement last paragraph 2<sup>nd</sup> page which was read as:

*"It was during the weekend when I was out with my friends and I call my mother again to inform her about the incident as I am scared of staying home with my father. I then came with my father today to report the matter to the police."*

39. The complainant agreed Salman took her to the Police Station and her father was already there. She stated from Nadi she came to Lautoka but this was not in her police statement because the police did not ask her

this. The complainant agreed that Salman had called her mother since she was embarrassed to talk to her mother and it was Salman who had relayed to her mother about what had happened to her.

40. The complainant was referred to her police statement to the 1<sup>st</sup> sentence on page 2 which was read as:

*“It was during the weekend when I was out with my friends and I called my mother again”*

41. When questioned that this was not the first time she had spoken to her mother the complainant did not agree and she said this was the first time. Upon further questioning the complainant maintained her answer and said that at the time her parents were separated. The complainant agreed in her house the kitchen is separate from the sitting room and the kitchen is just behind the settee in the sitting room which is about 3 meters to the kitchen.

42. In respect of the incident in the kitchen the complainant did not scream, or shout or alert her brother or did anything. The complainant agreed the accused just did it and left and her brother was only 3 meters away. The complainant did not do any of the above because she was scared and she did not know what was happening to her.

43. The complainant agreed it was not in her police statement that she was upset, crying, angry, agitated or hyper or throwing a tantrum after the alleged incident. The complainant stated the touching of her breast by the accused was for a few minutes and after the alleged incident she did not tell her father, brother, mother, Salman, school classmates, counselors and the police.

44. The complainant agreed she had access to her father's phone to speak to Salman. She denied that she had called her mother in February, 2021. The complainant did not do anything to protect herself from the accused and she did not tell her father to keep the accused away from her or to her brother not to go anywhere or leave her alone at home.
45. In respect of the incident in January, 2021 her brother and father were not at home, on this occasion she had opened the door thinking that whatever the accused said that he'll spoil her life if she does not open the door he will do such a thing to her. The complainant was scared and once she opens the door the accused will come in and not do anything to her.
46. Upon further questioning the complainant said at that time she got scared that the accused might tell someone about what he had done to her on the earlier occasion in the kitchen. After the accused left she did not tell anyone such as the police, her mother, boyfriend, classmates, school teachers etc. The complainant agreed after the first incident she still continued talking to the wife of the accused when she used to meet his wife but she did not tell her anything about what her husband was doing to her.
47. The complainant agreed that in November, 2020 she had taken a photograph with the two daughters of the accused which was marked and tendered as defence exhibit no.1.
48. The complainant was referred to her police statement page 2, 1<sup>st</sup> sentence which was read as:

*"He came inside the house and at the same time he hold my hand tightly and forcing me to lie down on the floor."*

49. The complainant agreed the accused had held her hand very tightly and was very rough on her but there was no mention of any bruises or marks or laceration on her hand in her police statement.

50. The police statement was further read:

*“He then took off my clothes and he lie on top of me, at that same time he took off his clothes. He stated to kiss me on my neck and lips then he moved down to my breast. He then inserted his erected penis into my vagina and he moved in and out for sometimes when he inserted his erected penis I could feel the pain and I tried to push him away but I could not as he was so strong. He then ejaculated outside.”*

51. The complainant agreed that there is no mention of ejaculating on the stomach or that she tried to run, scream and shout. The complainant did not complain to anyone about the second incident, not even to the accused wife, her brother, or father. She also did not tell her father to keep the accused away from the house.

52. In respect of the third incident the complainant agreed that she told the court her brother had opened the door but this was not in her police statement. The police statement of the complainant 2<sup>nd</sup> paragraph on page 2 was read as follows:

*“The last incident was the first week of March, 2021 when I was alone at home when this man came to see me. At that time my father left to the garage with my brother. I opened the door for him and he came inside the house.”*

53. When questioned that she had opened the door the complainant said *“in one incident I opened the door and in one incident my brother.”* After further questioning the complainant’s police statement was further read:

*“He then got hold of my hands and took me to the room.”*

54. When questioned this can't be right the complainant agreed and explained that when she was in the room her brother had opened the door and the accused came inside her bedroom. When she opened her eyes, he was standing there. The complainant denied she had lied in her police statement but agreed that it was incorrect. The complainant agreed that as per her police statement as read there was nothing mentioned about her struggling or screaming or alerting anyone or her brother because she was scared and she said *“not everyone can tell or share this to anyone.”* The complainant further explained that she did not have the courage to tell anyone but she did tell her boyfriend in Nadi.
55. Even the complainant had her boyfriend's phone number and was speaking with him since she could not at the time tell her father similarly she could not tell her boyfriend. The complainant did tell her boyfriend since she had felt she had gone through a lot she did not tell her father because he was an elder. When she was taken to the hospital she had told the doctor that she had been raped.
56. The complainant agreed that it was from the Hotel in Nadi she had spoken to her mother about the incident for the first time. The police statement of the complainant 2<sup>nd</sup> last sentence, 2<sup>nd</sup> paragraph on page 2 was read:  
*“It was sometimes last month I call my mother to inform her. My mother then told me that she will come to pick me and for us to report the matter to the police.”*
57. When reminded that she had told the court that Salman had spoken to her mother. The complainant agreed but said that what is written in the

police statement about her calling her mother one month earlier she did not say this to the police.

58. The complainant agreed that what she told the court and what is stated in her police statement were two different versions. The reading of the police statement continued from page 2, 2<sup>nd</sup> paragraph, 3<sup>rd</sup> last sentence as follows:

*“He then left to his house I was so scared and I did not inform anyone. It was sometimes last month I call my mother to inform her. My mother then told me that she will come to pick me and for us to report the matter to the police.”*

59. When questioned again that she had spoken to her mother in February the complainant stated that it was Salman who spoke with her mother in the month of March, and she was present.

60. The complainant’s police statement page 2, last paragraph was read:

*“It was during the weekend when I was out with my friends and I call my mother again to inform her about the incident.”*

61. The complainant agreed that what she told the court and what is written in her police statement were two different versions.

62. The complainant agreed that she had given a second police statement on 18<sup>th</sup> May, 2021. In this statement she had told the police that she had left home on 19<sup>th</sup> March, 2021 which was a Friday by telling her father she was going on a trip and she came back to Ba on 22<sup>nd</sup> March at 10.45 pm.

63. The complainant also told the court that it was on Sunday night she told her boyfriend Salman about what the accused had done to her. The complainant was referred to her second statement dated 18<sup>th</sup> May, 2021 to page 1, 1<sup>st</sup> paragraph to 2<sup>nd</sup> paragraph till the 3<sup>rd</sup> sentence as follows:

*“Further reference to the statement that I gave to the police on 23<sup>rd</sup> March, 2021 I would like to state that I left home on Friday 19<sup>th</sup> March, 2021 to Nadi and I never inform my father about it. The reason for me leaving the house is that I am afraid of staying home as this man always come to my place when my father is away and forced me for sex.”*

*“I went to Nadi on that day with two of my form mates and we stay in Maya’s Hotel where I met my boyfriend namely Salman. I then confess it to Salman on that day that one of my father’s friend namely Imroz used to come to our home and forced me for sex. I was in Nadi from Friday.”*

64. The complainant agreed that she told the court she had told Salman on Sunday but her police statement stated Friday 19<sup>th</sup>. The complainant denied that she had told Salman on Monday. When she told Salman about the incidents Salman told her to tell her mother. The complainant maintained that on Monday a call was made to her mother.
65. The complainant agreed that after all the incidents she did not leave her father's house. She denied that the reasons for her non action was that it was a lie against the accused otherwise she would have left her father's house after the first or second incident.
66. The complainant agreed that she had given a second police statement on 18<sup>th</sup> May, 2021 after 2 months of her first police statement at the request of the police. After the incidents and reporting the matter to the police the complainant went to the house of the accused since she was told by the



police not to discuss the incidents with anyone and at the time no one knew about the incidents so she went for Eid celebration.

67. When shown some photographs the complainant agreed that those photos were taken at the house of the accused during the accused wife's birthday party. The complainant was in the photo with her father and brother in one photo, and in another photo she was with her father and accused daughter this was on 14<sup>th</sup> February, 2021.
68. The complainant came to Ba Police Station after a phone call was made by the police she agreed that when she was in Nadi with Salman she had uploaded some photos on her Instagram. The 9 photographs of the complainant with Salman was marked and tendered as defence exhibit no. 2.
69. The complainant agreed that she had not made any complaints regarding the incidents at any of the Police Stations in Nadi and Lautoka but to Salman. The complainant maintained that all the incidents she told the court had happened. The complainant denied that she had raised the allegations against the accused to protect her boyfriend from investigation and possible charge of abduction.
70. When questioned whether it was normal for a person who has been allegedly sexually abused by the accused to go to his house to take part in the birthday party of his wife and then smile in the photo the complainant said it was not normal. This photograph dated 14<sup>th</sup> February, 2021 was marked and tendered as defence exhibit no 3.

71. The complainant again denied that the allegations made against the accused were not true and a fabrication to save her boyfriend Salman from possible abduction charge. The complainant maintained that whatever she told the court had happened.
72. In re-examination the complainant stated that she had agreed that it was not in her police statement the narration that she did not like what the accused was doing to her but she had told this to the police writing her police statement. The complainant maintained that the accused had ejaculated on her stomach. The complainant also does not know why it is not in her police statement that she was crying.
73. The complainant stated that she did not tell the police officer writing her police statement that she had changed the bed sheet after the accused left her bedroom and then she had a shower. She also stated that she did not tell her mother about the incidents because she did not see her mother for 6 years. Her father was with her but she did not share with him these things.
74. The reason why the complainant did not call her sister and tell her about what the accused was doing to her because the complainant and her sister were not talking to each other. Although the complainant was talking to her boyfriend Salman for one year she only told him when they met in person. She did not tell the police because at the time she was afraid so she did not tell anyone anything similarly she did not tell her classmates, teachers or school counselors because she did not know what these people will think about her.
75. The complainant did not scream to alert her brother from the kitchen because it was the first incident that had happened to her and she did not understand what happened to her. Also for the third incident she did not

scream to alert her brother and tell her brother anything because her brother was a small boy at the time.

76. In respect of allowing the accused inside her house the complainant thought that the accused will not do anything to her and if she does not open the door he will go and tell people bad things about her. The complainant said just like she did not have the guts to tell her father she could not tell the accused wife.
77. Finally the complainant said her police statements were written by a police officer. She told Salman on Sunday night and Salman had called her mother on Monday and she was present when Salman was talking to her mother.
78. The complainant did not have the guts to go and lodge a report at Nadi and Lautoka Police Stations. Even though Salman was with her in Nadi she first wanted to share with him about what had happened to her and then wait for his response. When her police statement was recorded the first time the police did not ask her about what had happened in Nadi.
79. The second witness the brother of the complainant Arman Feroz Khan informed the court that the accused used to come to his house and was his father's best friend. During school holidays when his father goes out for work purposes the accused would come home on more than one occasion.
80. Sometimes the accused would come to his house and be out of sight for about 20 to 30 minutes. The accused would sometimes use their washroom but the witness did not ever go and check where the accused was in his house because the accused was like a family member.

81. In cross examination the witness said he had not stated anything about the rape of his sister in his police statement dated 23<sup>rd</sup> march, 2021. The witness did not see any rape or any indecent or sexual assault on his sister. At no time when the accused was in his house did he hear any shout or scream from his sister.
82. The witness had noticed that when the accused came home his sister was not normal and after the accused left she would not be smiling, however, he did not ask his sister why this was so. The witness agreed the above was not in his police statement.
83. Upon questioning by the court the witness said he was 10 years of age at the time.
84. The third witness Yogita Latchmi a Welfare Officer informed the court that on 23<sup>rd</sup> March, 2021 she met the complainant who informed her that she was a victim of rape which started in August, 2020 and it continued and happened in the absence of her father.
85. The complainant also informed the witness that the complainant was threatened by the perpetrator and the complainant's mother was aware of the incident as well. The complainant was abused from August, 2020 till February, 2021. The witness referred the child to the police with the parent for medical examination to be done.
86. In cross examination the witness agreed that the complainant had told her she was raped in August 2020. The witness also agreed that she was told by the complainant her brother was at home on some of those incidents but this was not in her police statement. The witness agreed that she told the court the complainant had told her that she was threatened by the

perpetrator but it was not in her police statement. Also it was not in her police statement that the abuse continued on the complainant till February, 2021.

87. According to the witness the police had referred the child to her, the last sentence of her police statement dated 17<sup>th</sup> May, 2021 was read as:

*"She also stated that she informed her mother about this and her mother never reported the matter to the police. I then referred her to the police at Ba Police Station."*

88. The fourth witness Salman Farzi Ali the boyfriend of the complainant at the time informed the court that in 2021 he was in a boyfriend and girlfriend relationship with the complainant. They were talking to each other over the phone for one year and they decided to meet each other in Nadi. For two days they were in a hotel in Nadi this was in March, 2021 starting from Friday afternoon. On Sunday the complainant told him her father's friend came to her home and forcefully touched her and had forceful sex. The witness asked why she did not tell this to anyone. The complainant said that person had told her if she tells anyone he will destroy her life.

89. The complainant also said that she did not want to go home since she was afraid. The witness told the complainant that he will talk to her the next day which was Monday. On Monday the witness called the complainant's mother and relayed the information. The mother said that she cannot do anything as the father had taken out a DVRO against her and she could not meet her children. The complainant told the witness that it was the accused who had done those things to her. The mother told him to report the matter to the police.

90. According to the witness when the complainant was telling her the above she had broken down and was crying so the witness told the complainant that they will go and report this matter to the police on Monday. On Monday the witness with his friends and the complainant went to his friends family house in Lautoka and it was during the day the witness received a call from Ba Police Station. The police officer asked if the complainant was with him when he said yes the officer asked the witness to bring the complainant to the police station.
91. The complainant gave her statement and the witness did the same. When questioned why the matter was not reported to the police the witness said *“she wasn’t stable, she was having breathing problem and then she started saying she was having asthma.”*
92. In cross examination the witness stated that he was talking to the complainant every day and she did not tell him about the allegations. They were talking to each other from March, 2020.
93. The witness stated that in his evidence he had said that he had asked the complainant why she did not tell anyone about what had happened to her but this was not in his police statement. The witness also agreed it was not in his police statement that the complainant had told him the accused had told her if you tell anyone, *“I will destroy your life”*.
94. The witness agreed his memory at the time of giving the statement was vivid. The witness also agreed that it was not mentioned in his police statement that the mother had told him there was a DVRO against her and she could not do anything and it was also not in his police statement that the complainant was crying. The witness also agreed that there was

nothing in his police statement about the complainant suffering from asthma.

95. The witness maintained that he had spoken to the complainant's mother. Upon further questioning the witness stated that the complainant had told him on Sunday and he checked out on Monday. The witness read his police statement dated 18<sup>th</sup> September, 2023, 2<sup>nd</sup> paragraph, line 6"

*"...we stayed there from Friday and checked out on Sunday."*

96. The witness stated they had checked out on Monday and not as mentioned in his police statement he further explained that the complainant had told him on Sunday about what had happened to her but it was on Monday she had said that she did not want to go home. The witness denied that the complainant and he had made up a story to avoid abduction charges against him.

97. In re-examination the witness agreed that he had said it was not in his police statement that the complainant had told him the accused will spoil her life if she does not open the door. He told the police whatever he could recall at the time since he had almost panicked when giving his police statement. It was also not in his police statement that he had told the complainant tomorrow we will go to the police station because whatever came to his mind he had said it and this also applied to why the complainant broke down and was crying was not in his police statement. The witness said what the complainant told him about the incident he had to remember clearly.

### **RECENT COMPLAINT EVIDENCE**

98. Complainants 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.
99. 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 boyfriend Salman Ali after about seven months of the first incident that the accused had forcefully touched her and had forceful sexual intercourse with her.
100. This is commonly known as recent complaint evidence. The evidence given by Salman is not evidence of what actually happened between the complainant and the accused since this witness was not present and did not see what had happened.
101. 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 her boyfriend Salman the accused had forcefully touched and had forceful sexual intercourse with her when they met in Nadi. Furthermore, the complainant did not tell anyone about what the accused was doing to her because the accused had threatened the complainant that he will spoil her life if she tells anyone about what the accused had done to her.



102. The prosecution further states that the information given by the complainant to her boyfriend was sufficient to alert her boyfriend that the accused had done something wrong to the complainant. The prosecution also says although a bit late in time but when the opportunity presented itself she did not hesitate to tell her boyfriend about what the accused had done to her therefore she is more likely to be truthful.
103. On the other hand, the defence says the complainant did not tell the truth to her boyfriend. She made up a story to falsely implicate the accused. She had lied to her father that she was going on a school trip but was with her boyfriend unbeknown to her father. The story narrated by the complainant to Salman is a concocted story not only by the complainant but by the boyfriend as well.
104. The complainant was 17 years of age at the time and it would be correct to say that she knew what she was doing. It took the complainant about seven months after the so called first incident to tell her boyfriend about what the accused was doing to her is unthinkable. She was talking to her boyfriend every day for the past one year and both decided to meet secretly in Nadi. If the allegation was true the complainant would have told the boyfriend when she was conversing with him from March, 2020. The accused was her neighbour, her father's best friend and would sometimes go to her house so he was an easy target to be falsely accused of something he did not do.
105. The defence also states that the complainant in her evidence said she told Salman on Monday morning yet in cross examination she changed her tune to say it was Sunday. Salman on the other hand said the complainant told him on Sunday and they checked out on Monday whereas in his police statement Salman said they had checked out on Sunday. The story to

blame the accused was to ensure that Salman escapes abduction charges and therefore the complainant should not be believed.

106. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

107. The fifth witness Maureen Shabana Ali informed the court that the complainant is her second eldest daughter. In 2021 the witness was living in Namosau having being separated from the complainant's father. Since the complainant did not have a phone the witness was not able to have any conversation with her daughter. The father of the complainant had blocked her phone number so she could not call and talk to her daughter.

108. The witness recalled that in the month of March, 2021 on a Monday morning she received a phone call from Salman's phone. The complainant told her:

*"Mummy I don't want to stay there I have a problem there Imroz is having sex with me and I am fed up with it. I don't want to stay at home and I want to come to you."*

109. The witness told her daughter to go to the police station and report the matter and also call her father to the police station. She cannot bring her home since full custody is with her father and a DVRO has been issued against her. When the complainant was telling her this she was crying and not conversing properly. The witness also stated that she went to the

Social Welfare Office but the officer wanted to see the father because at that time the witness was not staying with the complainant.

110. In cross examination the witness stated that she received a call from her daughter on Monday morning and she had spoken to her daughter. First her daughter spoke to her and then Salman. The complainant was referred to her police statement dated 26<sup>th</sup> April, 2021, 2<sup>nd</sup> paragraph which was read as:

*"I could recall that sometimes in February, 2021 I received a call from my daughter "M" and she informed me that".*

111. The witness said it was March, 2021 and not February, 2021. The witness agreed that it was mentioned in her police statement *"she informed me that their neighbour namely Imroz Khan used to do bad things to her like kissing and touching."*

112. The witness stated that it was not in her police statement that her daughter had told her *"there's a big problem, I don't have a phone and my father's phone is blocked and I don't want to stay there."* The witness also stated that her daughter had informed her that the accused was touching and kissing her. It was not in her police statement that the accused was having sex with her daughter and her daughter was fed up of this.

113. The witness agreed that she did not tell the police officer writing her police statement that her daughter had said that she does not want to stay at home and wanted to come to her but her daughter had told her of this. The witness said her daughter had called her on Monday at nearly 8am.

114. The witness did not go to the police station to report the matter because she was afraid that she did not have her daughter's custody and her daughter was not staying with her.
115. The witness maintained that she wanted her daughter to report the matter to the police and if she was called by the police then she will go to the police station. The reason why the witness had gone to the Social Welfare Office was because she thought the police report had already been lodged.
116. The police statement does not mention anything about her going to the Social Welfare Office because she went to the Social Welfare Office after giving her police statement. When it was put to the witness that she had given her police statement on 26<sup>th</sup> April, 2021 the witness stated she had given her statement in March because at that time she was working. The date written was wrong and the date was not read to her.
117. In re-examination the witness stated that her daughter had told her that the accused was having sex with her and she does not want to stay at home and wanted to come to her. The witness had given her police statement in the month of March because she was at work and the police had come at her work place. She felt it was better to go to the Social Welfare Office then the police station because she was not staying with her daughter.
118. The sixth witness the father of the complainant Feroz Khan informed the court that on 22<sup>nd</sup> March, 2021, he was at the Ba Police Station when his daughter made a complaint of rape. The witness also said that his daughter had lied to him that she was going for a trip from school. She went on Friday but he only came to know that there was no such trip when he met the College Principal on Monday.

119. The witness went to the police station and reported that his daughter was missing. The accused was with him at this time the police officer called his daughter's phone and Salman's phone but there was no answer.
120. The witness told the police officer to contact the mother. He accompanied the police officers to the house of the mother where the police officers were able to get Salman's phone number.
121. The police contacted Salman and his daughter was brought over to the Ba Police Station by Salman at 10.30pm. The accused was his best friend and at the police station his daughter and Salman were questioned by the police officers. After a while he came to know that his daughter had made a complaint against the accused for raping her. The witness was asked to go and report the incident at the Social Welfare Office which he did the next day.
122. The witness said his relationship of 25 years with the accused was such that they used to share everything with each other and they were neighbours.
123. In cross examination the witness was referred to his police statement dated 23<sup>rd</sup> March, 2021, page 1, line 5 the witness agreed that he told the police *"I came to know that one Imroz was involved with my daughter"*. The witness also agreed that there was no mention of any rape in that sentence. The witness also agreed that nowhere in his police statement it was written that he saw his daughter upset, or angry etc. and he was not told that the accused was in his house for 20 to 30 minutes on one occasion. The witness stated that all his children were well and they did not have any medical conditions.

124. In re-examination the witness said that his son used to tell him that the accused used to come home in his absence but he was not told that the accused on one occasion was in his house for 20 to 30 minutes without being noticed.
125. The seventh witness PC 5846 Malakai Bula informed the court that on 22<sup>nd</sup> March, 2021 he was doing night shift he was the inquiry man attending to reports. On this day there was a missing persons report received from the father of the complainant.
126. The witness went to the house of the mother, the complainant was not there but they received the phone number of the friend with whom the complainant was believed to be. When a call was made the daughter answered. Upon questioning the daughter she said that she was on her way to Ba. The daughter and three other boys arrived at the police station at around 10.45 pm.
127. The complainant was taken inside the police station by a woman police officer, the witness escorted the three boys to another part of the police station. The witness cautioned the three boys in regards to the missing persons report. It was revealed that one of the three boys was the boyfriend of the girl. The witness then questioned the boyfriend about their whereabouts. The witness came to know that the girl does not want to go home because the father's friend namely Iftikar usually came home when the father was not around and sexually abused her. The matter was transferred to the Sexual Offence Unit.
128. In cross examination the witness said the report was lodged by the father at around 9pm and not between 5 to 5.30pm. The witness knows the difference between sexual abuse, indecent assault and rape. The witness

was referred to his police statement dated 18<sup>th</sup> May, 2021, 2<sup>nd</sup> paragraph, line 15 which was read as:

*"I then got the information after questioning the 3 boys that one of them is the boyfriend of "M.K". When I further questioned the boyfriend about his girlfriend then he told me that they in a hotel in Nadi for 3 days and whilst they were there "M.K" confessed to him that the reason she did not want to stay home anymore was that her father's friend usually comes when her father is not around and sexually abuse her."*

129. The witness agreed he was not told about any rape that night. The accused was also at the police station.
130. The final witness DC 3651 Vimal Sharma informed the court that on 23<sup>rd</sup> March, 2023 he was instructed to draw a rough sketch plan of the crime scene and to photograph the scene as well.
131. The rough sketch plan of the sitting room was marked and tendered as prosecution exhibit no. 1, the rough sketch plan of the bedroom was marked and tendered as prosecution exhibit no. 2 and the photographs of the crime scene were marked and tendered as prosecution exhibit no. 3.
132. In cross examination the witness agreed that he went to draw the sketch plan about an alleged rape.
133. This was the prosecution case.

## **DEFENCE CASE**

134. 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. This court must also consider his evidence and give such weight as is appropriate.
135. The accused informed the court that he owns a cane truck registration no. AA 050. The motor vehicle accident compensation document was marked and tendered as defence exhibit no. 4
136. The accused knows the complainant who is the daughter of his best friend of 25 years Mohammed Feroz. He was doing mechanical works from his home so he would do welding works for Feroz whenever required. Both families were also in good relationship with each other. Feroz operated an upholstery business from home and their houses were about 300 meters apart.
137. During the harvesting season he uses his truck to deliver the cane to the sugar Mill. When the Mill is operating well he makes two trips to the Mill but sometimes one trip or even stay at the Mill for two days if there is a breakdown of the Mill. He is married and his wife stays home and he has one son and two daughters. The accused denied committing all the offences as alleged he said it was all lies.
138. In cross examination the accused said that he was not interested in whether the accused was at his house or not. The accused used to go to the house of the complainant to drink grog with Feroz. He sometimes calls Feroz but only for work purposes.



139. The accused denied that he called Feroz to ask him where he was and when he would be back home. The accused was referred to his caution interview dated 17<sup>th</sup> May, 2021 to Q. & A. 70:

*Q: According to Feroz's statement when he drives his car out of his compound and you call him to ask where are you and how long you will be out.*

*Ans It is true when some work arises then I call him.*

140. The accused agreed that he told the truth to the police. The accused agreed that he was asked when he sees Feroz's car not in the compound he called to ask where Feroz was and when Feroz would come back home. The accused had said that he did not call to ask that because it is only when work arises then he calls Feroz. Upon further questioning the accused said *"when I call it is regarding work and I don't ask him and whatever he wants to share he share and whatever I share I share with him."*

141. The accused said he is engaged in taking his cane to the Mill sometimes 6 days, sometimes 7 days in a week and he has day offs as well. The accused denied committing all the offences as alleged he said it was a lie. The complainant was like his daughter.

142. In re-examination the accused said when he called Feroz he had not seen Feroz leave his compound. The complainant was angry on him and therefore she made up the allegations to save her boyfriend Salman since she was under 18 years.

143. This was the defence case.

### **PREVIOUS INCONSISTENT STATEMENT**

144. This court directs its mind to the fact that the defence counsel during the cross examination of the prosecution witnesses and the state counsel during the cross examination of the accused had questioned these witnesses about some inconsistencies and omissions in their police statements and the caution interview which they had given to the police when facts were fresh in their minds with their evidence in court.
145. This court is allowed to take into consideration the inconsistencies and omissions between what the prosecution witnesses and the accused told the court and their police statements and caution interview when considering whether the prosecution witnesses and the accused were believable and credible. However, the police statements and the caution interview were not evidence of the truth of its contents. 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.
146. 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 concerned. 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 or omission is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.

## **ANALYSIS**

147. The prosecution states that the complainant and the accused are known to each other. The accused was also a neighbour of the complainant and her father's friend. The accused used to go to the house of the complainant as and when he wanted. In the year 2020 the complainant was 16 years of age.
148. One day in August, 2020 the complainant was at home with her younger brother Arman when the accused came into their house. Her father was not at home Arman had opened the door of the house to allow the accused inside. The complainant was in the kitchen doing her chores when the accused came from behind and touched her stomach, breast and kissed her neck.
149. The complainant got scared and she did not do anything since this was the first time something like this had happened to her. The complainant was living with her 10 year old brother and father. She did not know what to do and as a result she did not tell anyone about what the accused had done to her. The complainant's mother was not living with them as well. The complainant did not like what the accused had done to her.
150. Thereafter one day in January, 2021 the accused from outside the complainant's house called the complainant asking her to open the door. The complainant refused at this time the accused threatened the complainant if she does not open the door he will spoil her life. The complainant got scared and she thought rather than annoying the accused who may tell people against her or about what he had done to her previously the complainant opened the door so that he does not say anything against her.

151. The accused came in the sitting room he pushed the complainant on the floor went on top of her held her hand and forcefully removed her pants. She was wearing a top and pants the accused removed his pants and had forceful sexual intercourse with her until he ejaculated on her stomach. The complainant was crying since she was in pain and she did not like what the accused had done to her. She had told the accused that she did not want these things to be done to her. The complainant did not do anything because she was scared.
152. After sometime her father and brother came but she did not tell them anything about what the accused had done to her. She also did not tell anyone else because she was thinking about what the accused had said to her that is he will spoil her life if she told anyone. Her father was a male so she did not tell her father anything.
153. Finally one day in March, 2021 the complainant was at home with her brother since her father had gone somewhere. Her brother was watching T.V in the sitting room and she was sleeping in her bedroom. When she opened her eyes she saw the accused who forcefully came on top of her removed her pants and forcefully had sexual intercourse with her till he ejaculated.
154. The complainant did not like what the accused was doing to her and she was feeling pain she was crying and telling the accused not to do this to her. The complainant tried to push the accused but could not so she did not do anything. The complainant did not tell her father and her brother or anyone about what the accused had done since she was scared.
155. The prosecution submits that on all occasions the complainant did not consent to what the accused was doing to her. In the meantime, the

complainant was talking to Salman Ali and they were in a boyfriend and girlfriend relationship from March, 2020.

156. The complainant and Salman met each other for the first time in March, 2021 after the last incident away from home and it was here she was able to tell Salman about what the accused was doing to her and as a result she did not want to go back home. The complainant and Salman eventually went to Ba Police Station and it was here the complainant was able to lodge her report against the accused.
157. The prosecution is asking this court to consider the fact that the complainant was living without her mother and she did not have the guts to tell her father and Salman about what the accused was doing to her until she was able to muster enough courage to tell Salman on a one to one conversation about what the accused had done to her. Thereafter a police complaint was lodged by the complainant.
158. The complainant an ordinary unsophisticated individual living in a rural setting was threatened by the accused during the second incident in January, 2021 that he will spoil her life if she told anyone about what he was doing to her. There has been a delay in complaining to Salman and eventually reporting to the police, since the complainant's circumstances were beyond her control.
159. Firstly, the accused was a frequent visitor to her home and her father's best friend of 25 years who had a trust relationship with her father. The bonding between her father and the accused was so strong that the complainant was skeptical and wary of the reaction she will get if she tells someone hence the delay. The complainant said that she did not know the response she would get if she tells someone.

160. Secondly, there was no one in her house to whom she could confide in her father was out of bounds because he was an elder and her brother was too young 10 years at the time to be told anything.
161. Thirdly, for the rape counts she was threatened by the accused that he will spoil her life if she told anyone. Upon hearing this she was scared that she lost all the zeal or courage to tell anyone.
162. The prosecution further submits that the accused took advantage of the fact that the complainant did not make any complaints about the first incident so he got bold and continued to come to her house and on two different occasions thereafter he raped the complainant in her house.
163. The court ought to consider the situation of the complainant holistically there was no one to help her and it cannot be expected that a female child would be having the guts to tell her father about what she was going through sexually and more so by the best friend of her father. The time was right when she met Salman away from home and without any fear or pressure from any one on her freewill she told Salman about what the accused had done to her and subsequently reported the matter to the police.
164. Finally the prosecution is asking this court to consider the reality of the complainant's situation, she had not spoken to her mother for 6 years and as a teenager she required the mother to be with her but this was not to be. There were inconsistencies between the complainant's evidence and her police statements, however, one cannot be expected to give evidence as per his or her police statements, human mind and passage of time are contributory factors which cannot be ignored. The complainant had

honestly told the court that she did not read her police statements before coming to court hence inconsistencies and omissions were bound to occur.

165. Salman was also able to tell the court about what the complainant had told him and he was able to narrate it to court. The inconsistencies between his evidence and his police statement were not significant. Furthermore, it does not matter on which day the complainant told Salman what is crucial is that a complaint was made by the complainant.
166. Salman rightly told the complainant's mother as soon as he was made aware of the complaint and the mother of the complainant had told them to report the matter to the police which they did. Another thing the prosecution says is important to note is the strong relationship that existed between the complainant's family and the accused family. The complainant did not have the courage to tell the wife of the accused because she was scared to do this.
167. Furthermore, due to the closeness between the complainant's and the accused family the complainant had no choice but to attend the accused wife's birthday and also the Eid celebrations. She had not gone to the accused house alone but with her father and brother. There is no doubt the complainant had taken photos with the accused daughter and his wife but this does not mean that nothing had been done by the accused to the complainant. The accused was not in the photos and it is highly improper for the accused to take advantage of these occasions as mentioned above to say that nothing had happened between the complainant and him.
168. On the other hand, the defence says the allegations are a made up story narrated in court by the complainant. The truth is that the accused did

not do anything to the complainant as alleged. The defence is asking this court to consider the evidence with an open mind and objectively.

169. The complainant was a teenager going to school she was a free agent the accused was not even living in the same house. For the first incident the defence is saying her brother was in the house and only three meters away from the kitchen and some meters away from the bedroom where the final alleged raped occurred. She said in the first alleged incident the accused left in a few minutes she did not mention anything about being threatened by the accused so there was no reason for her to be scared. In the very least the complainant could have alerted her brother she did not because nothing had happened.
170. In respect of the second allegation the sequence of events told by the complainant about how the alleged rape took place in the sitting room does not make sense. Firstly she should not have opened the door. If the accused was an evil man and if she had experienced his untoward behaviour on an earlier occasion common sense dictates that she would have been protective of herself. There is no justification in the reason she gave for the opening of the door and allowing the accused into the sitting room.
171. In respect of the final allegation the brother told the court the accused would be missing in his house for 20 to 30 minutes that is a long time and anyone will be suspicious of what a person is doing in the house yet no effort was made by the brother to find out where the accused was. The bedroom was in the same house the complainant explained of forceful sexual intercourse pain and crying yet she did not shout or yell or do anything that would have alerted her brother who was watching T.V in the sitting room a few meters away.



172. The complainant was not restrained by the accused if she had difficulties in telling anyone at home she should have told her friends, teachers and Salman with who she was talking every day for one year and yet not a word to Salman about the incidents is very unusual. She went to Nadi with her class mates yet she did not tell her class mates anything.
173. Moreover, she was talking to her mother as per her mother's police statement and also the complainant's police statement her mother had acknowledged the complainant had told her about the allegation through the phone of Salman. A genuine complainant would have done anything and everything to tell her mother or anyone about what was happening to her. The issue of DVRO was not put before the court in a material sense as to what in effect were the orders made against the mother of the complainant. The court has been left guessing it can be inferred that since the mother had spoken to the complainant there was no restriction for the complainant to talk to her mother.
174. A forensic examination of all prosecution witness evidence will show there were many inconsistencies between what they told the court and what was mentioned in their police statements when facts were fresh in their minds goes to the root or core of their evidence in court.
175. The defence further states that there was a strong motivation by the complainant to falsely implicate the accused who was the only best target in order to protect Salman from being charged for abduction. According to PC. Malakai's evidence the police had enough evidence to charge Salman for abduction. What saved Salman was the complainant's false complaint of sexual abuse against the accused. Salman supported the complaint so what the police did was stop the allegation of abduction lodged by the complainant's father and run after the accused.

176. The complainant had lied to her father to be with Salman and unbeknown to the complainant her father had lodged a missing person's report with the police. To give credibility to her self-esteem in front of her father the complainant brought about the allegation of sexual abuse. This contention is also supported by the lack of urgency shown by both the complainant and Salman to report the matter to the police either in Nadi or Lautoka.
177. If the allegations against the accused were indeed genuine they would have immediately gone to the nearest police station. Rather than do this, they were visiting families in Lautoka without any effort made to report the matter to the police. They only drove to Ba Police Station after the Ba police called Salman and asked for the whereabouts of the complainant. Salman did not tell the truth when he said the complainant was suffering from asthma so that was the reason why they could not report the matter to the police in Nadi and Lautoka is a cover up when the father of the complainant told the court the complainant did not have any medical condition.
178. Finally, the defence is saying the complainant did not tell anyone about what the accused had done when she had all the opportunity to do so or shout or yell, she did not because nothing happened.

#### **DETERMINATION**

179. At the outset I would like to mention that three photographs out of the nine photos tendered as defence exhibit no. 2 has been disregarded completely as irrelevant. These photographs were downloaded from the complainant's Instagram profile which should never have been tendered in the first instance.

180. I would like to once again remind myself that the burden to prove the accused guilty 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.
181. The complainant was 16 and 17 years of age respectively at the time of the allegations. The accused and the complainant are known to each other and the accused was frequently going to the house of the complainant. The accused relied on the defence of complete denial.
182. There are two different versions of what had happened, 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 offences alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
183. 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).
184. 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.”*

185. After carefully considering the evidence adduced by the prosecution and the defence, I do not believe the evidence of the complainant as truthful and reliable. The evidence of the complainant is not plausible on the totality of the evidence in fact what she told the court is not probable. The complainant was of an age who knew right from wrong and she was possessed of reasonable intelligence to tell someone and protect herself from the accused by refusing to open the door in respect of one of the incidents. The complainant struck me as a bold person who would not compromise herself or her chastity to anyone.

186. She had the guts to lie to her father and then leave her home yet she did not tell anyone about her situation does not make sense to me. The complainant was going to school she was not restrained by the accused

and yet she did not tell anyone including her classmates who had gone with the complainant to Nadi is a big question mark.

187. Everything was plain sailing for the complainant until the police called and asked Salman that the complainant be brought to the police station. This is where the allegations against the accused was concocted derailing the possible investigation of abduction against Salman. Once the police were told of the allegations of sexual abuse by the complainant the focus of attention shifted to the accused away from Salman.
188. In my considered judgment the complainant did not tell the truth and she was supported by Salman who became the recent complaint witness. There was a significant difference about the day when the complainant had told Salman about the allegations with what was written in their police statements and their evidence.
189. In addition to the above all the prosecution witnesses had significant inconsistencies and omissions between what they told the court and their police statements. I have taken note of the fact that passage of time does affect a person's memory, however, the discrepancies and omissions here were so overwhelming that this court cannot attach any weight to the evidence of the complainant in respect of the allegations raised and Salman who had a vested interest in ensuring that the police did not investigate him for abduction. Maureen the mother and Feroz the father of the complainant also did not take the prosecution any further with Arman the brother of the complainant.
190. In my considered judgment the complainant did not give an honest account of what had happened what she told the court is not believable

and her demeanour was not consistent with her honesty. The evidence of the complainant brings into fore more questions than answers.

191. The brother of the complainant told the court about his ignorance to be inquisitive when the accused was out of sight for 20 to 30 minutes is also far-fetched. If the complainant was crying and there was force used on her then how come Armaan who was only a few meters away in the same house was not able to sense anything yet he was very confident in saying that on one occasion the accused was missing in his house for 20 to 30 minutes is beyond me.

### **LATE REPORTING**

192. There is also an issue of late reporting by the complainant to the police. The delay is about 7 months from the date of the first allegation in August, 2020. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4<sup>th</sup> October, 2018)* had explained this issue as follows:

*"[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in Tuyford 186, N.W. 2d at 548 it was decided that:-*

*"The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By*

*applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”*

*“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:*

*“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”*

193. On the totality of the evidence there was nothing compelling about the situation of the complainant that she could not speak out against the conduct of the accused if indeed this was happening to her as alleged.

Although the complainant's mother was not living with her from my observations of the complainant she appeared to be a strong willed person who could not be forced to do something against her belief and liking.

194. Moreover, I do not accept that the so called threat by the accused that he will spoil the complainant's life was forceful enough to instill fear in the mind of the complainant. The late reporting eventuated at the behest of the complainant since nothing had happened but became glaringly obvious after the missing person's report became known to Salman and the complainant.
195. The complainant was an independent person and there was no authority or control by the accused on her. If the allegations were genuine she would have told Salman with whom she was talking everyday over the phone, or her class mates especially those who had accompanied her to Nadi or someone else. I do not accept that the complainant was a victim of circumstances which resulted in delayed complaint to Salman and late reporting to the police.
196. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her 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, however, in this case the complainant had concocted a story to make it look like a genuine complaint to Salman. Another puzzling aspect of this case is why the complainant would want to leave her home when her father and brother were not the alleged perpetrators. The accused was not staying with the complainant or had made any serious life threatening gestures that would have scared the complainant to an extent that she would want to leave her house.



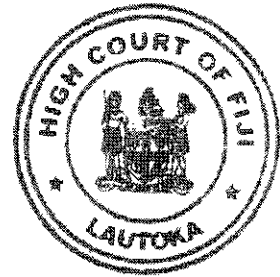
197. The inconsistencies and omissions as highlighted between evidence in court and police statements of the prosecution witnesses were significant which creates a reasonable doubt in the prosecution case. The prosecution witnesses were also not consistent with each other and there was a disarray of facts from the complainant and the other prosecution witnesses.
198. In view of the above it is unsafe to convict the accused and therefore the benefit of the doubt ought to be given to the accused. I give no weight to the evidence of the complainant this court is not satisfied beyond reasonable doubt that the accused had committed the offences alleged.
199. Moreover, the accused in his evidence maintained his denial throughout. I also did not find him to be a forthright and a convincing witness. He was telling the court what appeared to be a replay of what he had thought about. He was very cautious in choosing his words, he would time and again smile and not be serious about what he was saying in court. At best he was anxious to smear the complainant and gave lengthy unwarranted explanations.
200. The inconsistency brought about by the state counsel between the accused evidence and his caution interview were not significant to diminish the already suspect credibility of the accused. Since the prosecution has the burden to prove the accused guilt beyond a reasonable doubt the lack of reliability and credibility of the accused evidence does not affect the outcome of this case.
201. There is a reasonable doubt in the prosecution case which this court cannot ignore. This court is not satisfied beyond reasonable doubt that the

accused is guilty as charged and therefore this court has no option but to acquit the accused of all the counts as mentioned in the information filed.

202. This is the judgment of the court.



**Sunil Sharma**  
Judge



**At Lautoka**

09 November, 2023

**Solicitors**

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

**Messrs Nazeem Lawyers, Ba for the Accused.**