

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case No.: HAC 112 of 2021

STATE

V

ASAELI LESU

Counsel : Mr. S. Seruvatu for the State.
: Ms. N. Sharma and Mr. A. Barinisavu for the Accused.

Dates of Hearing : 09, 10, 11, 12 April, 2024
Closing Speeches : 16 April, 2024
Date of Judgment : 16 April, 2024

JUDGMENT

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

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

COUNT ONE

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of June, 2019 and the 31st day of November, 2019 at Nadi, in the Western Division, had unlawful carnal knowledge of “M. N”, without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of June, 2019 and the 31st day of November, 2019 at Nadi, in the Western Division, unlawfully and indecently assaulted “M. N”.

COUNT THREE

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of January, 2020 and the 31st day of June, 2020 at Nadi, in the Western Division, unlawfully and indecently assaulted “M. N”.

COUNT FOUR

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of January, 2020 and the 31st day of June, 2020 at Nadi, in the Western Division, penetrated the vagina of “M. N”, with his tongue, without her consent.

COUNT FIVE

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of January, 2020 and the 31st day of June, 2020 at Nadi, in the Western Division had unlawful carnal knowledge of “M. N”, without her consent.

COUNT SIX

Statement of Offence

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

Particulars of Offence

ASAELI LESU between the 1st day of January, 2021 and the 31st day of March, 2021 at Nadi, in the Western Division had unlawful carnal knowledge of “M. N”, without her consent.

COUNT SEVEN

Statement of Offence

ATTEMPTED RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

ASAELI LESU on the 25th day of September, 2021 at Nadi, in the Western Division, attempted to have unlawful carnal knowledge of “M. N”, without her consent.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of two counts of rape being counts one and six and one count of indecent assault being count two 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

RAPE

4. To prove counts one and six the prosecution must prove the following elements of the offences of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis 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. This element is not in dispute.
7. The second element is the act of penetration of the complainant's vagina by the penis. This element is also not in dispute.
8. The third element of consent is in dispute, 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.
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 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.
12. 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.

13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.

INDECENT ASSAULT

14. To prove count two the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant by massaging her breast.
15. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
16. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
17. Assault is the unlawful use of force on the complainant by the act of massaging her breast.
18. In respect of the count 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 massaging her breast.
19. If this court is satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then this court

must find the accused guilty of the 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.

20. As a matter of law, I direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.
21. In this case, the accused has been put to his defence for three offences, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

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

PROSECUTION CASE

24. The complainant informed the court that in 2019 she was living with the accused who is her maternal uncle (mother's brother), sister Mereseini, grandmother and two brothers.
25. One day in 2019 the complainant with the accused and some others went to the Wailoaloa Beach. At the beach while the drinking was continuing the complainant wanted to relieve herself.
26. When the complainant was going to relieve herself the accused followed her. The complainant was about 50 meters away from the others when the accused came to the complainant and put a cutter on her neck and told her that he wanted to have sex. The complainant refused and told the accused that she could not because he was her uncle. The accused did not stop but kept on putting the cutter a 5 cm long blade on her neck and with the other hand the accused was trying to pull down her trousers.
27. The complainant did not like this and she started to cry the accused made the complainant lie down. After removing her trousers and panty the accused inserted his penis into the complainant's vagina which was painful to her. The accused also pulled up her thin strap bra and massaged her breast. The complainant further stated that she was trying to stop the accused by pushing him away but she could not and the accused continued having sexual intercourse with her.
28. When asked why she was not able to do anything to the accused the complainant said the accused was lying on top of her. After the sexual intercourse the accused threatened the complainant if she told anyone he will kill her and cut her into pieces and throw her in the water.

29. Upon hearing this, the complainant got scared when the complainant went home she did not tell anyone about what the accused had done. However, in 2020 the complainant told her sister Mereseini that the accused used to attempt to do such things to her and she does not want to stay in the family house. When asked what she told Mereseini the complainant said *"I told her whatever happened at Wailoaloa that he followed me to where I went and relieve myself and then he was trying to get involved with me until he was satisfied with his attempt."*
30. After the complainant's family came to know there was a family meeting in which the accused and the complainant were present, this meeting was organized by her uncle Semisi Qoro. In the meeting, the accused promised that he will not do it again but still he did not stop.
31. One day in the year 2021 the accused came home and forced the complainant to go with him to Masimasi. When the complainant sat in the car, the accused drove to Masimasi into the bush.
32. The accused got off the car but the complainant refused to get out. The complainant questioned the accused why they were there. The accused replied that he wanted to have sex. Upon hearing this, the complainant said that she wanted to go home, the accused pulled the complainant out of the car by holding her hand and neck.
33. When outside the car, the complainant was told to bend down and hold on to the car door. The accused removed the complainant's trousers and panty took out his penis and inserted it into her vagina from behind. When the accused was doing this, the complainant was crying she did not know what to do.

34. After the accused finished having sexual intercourse the accused told the complainant that he wanted both of them to be in a relationship. The complainant refused, when asked why she could not be in a relationship with the accused. The complainant said:

“He is my uncle and I am not stupid just to be in a relationship with him.”

35. The complainant stated that she did not consent to have sexual intercourse with the accused on any occasion. After the second incident there was a second family meeting. The complainant and the accused were present with Mereseini and other family members. Uncle Semisi told the accused not to do what he was doing to the complainant. The accused said that he will not do it again.

36. The complainant also told the court that the accused had told her his wife did not want to sleep with him that is why he has to come after her and at no time she was in a relationship with the accused. The complainant maintained that she did not agree to have sexual intercourse with the accused, the accused used to force her and threaten her with whatever he could get hold of.

37. The complainant reported the matter to the police in 2021, the reason for the late reporting is that the accused used to threaten her that he will kill her.

38. In cross examination the complainant agreed that she was drinking with the accused and some others when they all went to Wailoaloa Beach in the car driven by the accused.

39. It was around 3 to 4 am they had left Sabeto for Wailoaloa Beach. At the beach the drinking continued. The complainant was referred to her police statement dated 29th September, 2021, 1st page, 3rd paragraph which was read as follows:

“I can clearly recall sometimes in 2019 between the month of June and November whilst drinking liquor at home in Natova Settlement, Sabeto when my uncle Asaeli Lesu came to me and he forcefully hold my hand and pulled me inside his grey hybrid car and he drove the car out to Wailoaloa Beach, Nadi. Upon reach[ing] Wailoaloa Beach, he parked the vehicle and pulled me out of the car, forcefully pushed me down on the sandy beach and I fell down and he forcefully removed my pants with my clothes.”

40. The complainant agreed there was no mention of her going to relieve herself and the accused following her in her police statement, the complainant replied that she had told the police officer that she had gone to relieve herself. When questioned that it was not probable that the accused had put a cutter on her neck and then was trying to remove her trousers and panty the complainant replied *“because he is strong.”*
41. Before the Masimasi incident the accused had come into the kitchen where the complainant was standing and asked her to go to the shop with him when she refused he forced her. Although her grandmother and younger brother were in their room she was scared to seek their help.
42. The complainant denied the suggestion that she did not seek help because she was fearful the family might find out that she was having a relationship with the accused. The complainant replied *“he always told me if these things come to light you will die.”*

43. According to the complainant she was scared of the accused so she did not tell anyone in the family due to his threats and at no time she was in a relationship with the accused.
44. The complainant agreed that Naboutini Police Post was a few meters away from where she lived. She knew that she had the right to report the matter to the police, however, the accused promised in the family meeting that he will never do what he was doing to the complainant. The complainant maintained that she was not in a forbidden relationship with the accused.
45. At Masimasi she did not give consent for the accused to penetrate her vagina in a dog style position, she stated that she was crying when the accused was doing the above.
46. Mereseini Teresia the cousin sister of the complainant informed the court that the accused, the complainant and the witness with other family members were living in one family house. The accused started living with the family from May, 2019 the accused is the uncle of the witness.
47. When questioned if anything had happened in 2020 the witness said she could not recall, however, between 1st of April and 30th April, 2021 the complainant came to the witness complaining that the accused was touching her and forcing her for them to have sex.
48. Upon further questioning the witness recalled that the first time the complainant complained to her was in 2020 that the accused was sexually touching her.
49. The complainant also told the witness that she was scared of telling the witness or the family earlier because the accused had threatened the

complainant if she informed anyone he will kill her. The witness told her grandmother who told uncle Semisi Qoro and as a result her uncle Semisi called a family meeting on 30th April, 2020.

50. In this meeting apart from the other family members, uncle Semisi, the witness, the complainant and the accused were present. In 2021 there was another family meeting again organized by uncle Semisi. The accused and the complainant were present the meeting was organized to ask the accused to stop having sex with the complainant. According to the witness the complainant had complained to her 4 times about what the accused was doing to her.
51. In cross examination the witness stated that when she told the court about the relationship between the complainant and the accused she did not mean that the complainant and the accused were having an affair.
52. Upon further questioning the witness agreed that she had told the court the complainant was still complaining because the accused and the complainant were in a sexual relationship and the complainant was about to end the relationship.
53. The witness also agreed that the purpose of the family meeting was to discourage the complainant and the accused from continuing the sexual relationship they had started. The witness again denied that the accused and the complainant were having an affair. She was referred to her police statement dated 3rd October, 2021 to page 2, 2nd paragraph, line 6 which was read as:

“My uncle Asaeli Lesu was having an affair with “M.N” since 2019 till last month, October.”

54. When questioned that the accused and the complainant were having an affair, the witness denied this, however, upon further questioning the witness stated that the word “affair” in her police statement is something she had not told the police. The witness agreed that she had read and signed her police statement confirming that the contents were hers.
55. In re-examination the witness stated that she had given her police statement in the Itaukei language. She further stated that she did not know if the complainant and the accused were having an affair. The witness explained she does not know how the word “affair” came about in her police statement.

RECENT COMPLAINT EVIDENCE

56. 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.
57. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight would be given to the fact that the complainant told Mereseini in the year 2020 that the accused was sexually touching her and between 1st of April and 30th April, 2021 the complainant told this witness that the accused was touching her and forcing her to have sex.

58. This is commonly known as recent complaint evidence. The evidence given by Mereseini Teresia is not evidence of what actually happened between the complainant and the accused since Mereseini was not present and did not see what had happened between the complainant and the accused.
59. 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 Mereseini that the accused had sexually abused her. She gave relevant and important information about what the accused had done which was sufficient to alert Mereseini that the accused had done something untoward to the complainant.
60. The prosecution further states that the court ought to take into consideration that in the year 2019 the complainant was 16 years of age and when she relayed the incident to Mereseini in the year 2020 and 2021 it was not expected that she will tell her sister Mereseini every detail of what had happened to her. However, the complainant did pass on crucial information and therefore she is more likely to be truthful.
61. On the other hand, the accused says the complainant had made up a story against him after having consensual sexual intercourse. In this case it is the accused who is the victim and not the complainant. The accused and the complainant were in a forbidden sexual relationship and to save herself the complainant lied to Mereseini that the accused had sexually abused her and therefore she should not be believed.
62. 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.

PREVIOUS INCONSISTENT STATEMENT

63. This court also directs its mind to the fact that the defence counsel during the cross examination of the complainant and Mereseini had questioned these witnesses about an inconsistency in their police statement which they had given to the police when facts were fresh in their minds with their evidence in court.
64. This court is allowed to take into consideration the inconsistency or omission 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.
65. 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.
66. 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 witness. 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.

67. The final witness Semisi Qoro informed the court that the accused was his elder brother. The witness called a family meeting after he came to know that the accused was forcing the complainant to have sex with him.
68. The first meeting was in 2020 and the accused said that he will stop what he has been doing to the complainant. After a few months the accused had not stopped so there was another family meeting. The accused again told the witness and the family members present that he will stop what he was doing. After the meeting the witness warned the accused that this will be the last time if he does it again the witness will report the matter to the police.
69. In cross examination the witness agreed the only reason for the family meetings was to address the forbidden relationship between the accused and the complainant.
70. The witness also agreed that such a relationship was an embarrassment to the family and as the uncle of the complainant he was trying to resolve or address the issue by discouraging the accused and the complainant from what they were doing.
71. The reason why the matter was not reported to the police after two family meetings was because he did not know the truth of what was happening, however, it was after the second and third meeting he came to know the truth of what was happening. When suggested that he was not genuine in reporting rape because he did not make this a priority, the witness said he had complained at the police station but was told it was for the complainant to go to the police station and lodge the report.
72. This was the prosecution case.

DEFENCE CASE

73. At the end of the prosecution case, the accused was explained his options. He chose to remain silent but he called one witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent. This court must consider the evidence of the defence witness and give such weight as is appropriate.
74. Sainiana Lesu the niece of the accused informed the court that the accused was her father's younger cousin brother and the complainant was her cousin sister. The witness was not with the complainant at the Wailoaloa Beach at any time.
75. When questioned about the relationship between the complainant and accused the witness said that she used to see the complainant always asking from the accused a lot of things. The family had confronted both the accused and the complainant about their secret relationship and they were asked to stop. The witness and the family members were angry with the complainant for saying that she was raped by the accused.
76. In cross examination the witness said that she was not present at Wailoaloa Beach and Masimasi so she would not know what had happened there. The witness was not present in the family meetings and she cannot be sure that the accused and the complainant were in a relationship because she had not seen them in that situation.
77. This was the defence case.

ANALYSIS

78. The prosecution alleges that one day in 2019 the 16 year old complainant with the accused and some others went to the Wailoaloa Beach. At the beach while the drinking was continuing the complainant wanted to relieve herself.
79. When the complainant was on the way to relieve herself the accused followed. The complainant was about 50 meters away from the others when the accused went to the complainant and put a cutter knife on her neck and told her that he wanted to have sex with her. The complainant refused. The accused kept on putting the cutter knife a 5 cm long blade on her neck made the complainant forcefully lie down and with the other hand the accused was able to pull down and remove her trousers and panty.
80. The complainant did not like this, and she started to cry the accused went on top of the complainant inserted his penis into the complainant's vagina and had forceful sexual intercourse. The complainant tried to stop the accused by pushing him away but she could not and the accused continued having sexual intercourse with her. At this time, the accused also pulled up the complainant's thin strap bra and massaged her breast.
81. After the sexual intercourse the accused threatened the complainant if she told anyone about what he had done he will kill her, cut her into pieces and throw her in the water.
82. Upon hearing this, the complainant got scared. When the complainant went home she did not tell anyone about what the accused had done. However, in 2020 the complainant told her sister Mereseini about what

the accused had done to her and that she did not want to stay in the family house.

83. After the complainant's family came to know about the above there was a family meeting in which the accused and the complainant were present. This meeting was organized by the complainant's uncle Semisi Qoro. In the meeting the accused promised that he will not do it again but he did not stop.
84. One day in the year 2021, the accused went into the kitchen and forced the complainant to go with him to Masimasi. When the complainant sat in the car the accused drove to Masimasi into the bush.
85. The accused got off the car but the complainant refused to get out. The complainant questioned the accused why they were there. The accused replied that he wanted to have sex he then pulled the complainant out of the car by holding her hand and neck.
86. When outside the car, the complainant was told to bend down and hold on to the car door. The accused removed the complainant's trousers and panty took out his penis and he forcefully inserted it into her vagina. When the accused was doing this, the complainant was crying and she did not know what to do.
87. After the accused finished having sexual intercourse the accused told the complainant that he wanted both of them to be in a relationship the complainant refused. The complainant did not consent to have sexual intercourse with the accused on any of the occasions. After the second incident the complainant again told Mereseini about what the accused had done to her. There was another family meeting wherein the accused once

again admitted what he had done to the complainant, with the help of Semisi Qoro the complainant reported the matter to the police in 2021.

88. On the other hand, the defence says the allegations of force raised by the complainant are not true but a made up story. The defence is asking this court to look at the evidence objectively this is a case of a secret love affair between a niece and a maternal uncle. When the love affair became known by the family members what the complainant did was to take a side step and blame the accused of rape.
89. The accused only had consensual sexual intercourse on both occasions the complainant was part of the equation as an active player but is now blaming the accused which is unacceptable. There were family meetings in which the accused took part and in all honesty he admitted what he was doing because both he and the complainant were in a relationship and there was nothing to hide.
90. Sainiana the cousin sister of the complainant told the truth about what she had observed of the complainant whenever the complainant was near the accused. Sainiana was able to make out that the behaviour of the complainant was not that of how a niece would behave with an uncle but more than that like how a wife would behave with her husband.
91. Moreover, the complainant did not shout or yell or scream because she was consenting to be with the accused, was enjoying his company and both were having a good time in having sex.
92. This is a case of betrayal of trust by the complainant. The chain of events expressed by the complainant will have to be examined closely and at no time the accused could have done anything to the complainant forcefully.

The complainant is trying to avoid humiliation and embarrassment about the fact that she had consented to have sexual intercourse with the accused her mother's brother which is a taboo in the Itaukei culture.

93. Finally, the defence submits that the consent of the complainant is also implicit in her not saying or doing anything to stop the accused, cooperating in a manner for the accused to have consensual sexual intercourse. The defence is asking this court not to believe the complainant.

DETERMINATION

94. 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.
95. The issue in this trial is whether the complainant had consented for the accused to have sexual intercourse with her and massage her breast. The definition of consent as mentioned in the early part of this judgment is crucial to resolve this issue.
96. There are two different versions, one given by the prosecution and the other by the defence. 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.

97. 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).

98. 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.”

99. The defence has also raised that the complainant did not tell the truth in court when she denied consent. In respect of the above contention, I have

directed my mind to the *Jovanovic* direction to remind myself that an accused has no burden to prove a motive or reason for a complainant to lie.

100. The Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) from paragraphs 32 to 34 made a pertinent observation in respect of the above as follows:

In R v Jovanovic (1997) 42 NSWLR 520 Sperling J set out a draft direction that emphasised that:

“It would be wrong to conclude that X is telling the truth because there is no apparent reason, in your view, for X to lie. Sometimes it is apparent. Sometimes it is not. Sometimes the reason is discovered. Sometimes it is not. You cannot be satisfied that X is telling the truth merely because there is no apparent reason for X to have made up these allegations. There might be a reason for X to be untruthful that nobody knows about’.

[33] The same has been stated as follows in NSW Criminal Trial Courts Bench Book at 3-625:

‘If the defence case directly asserts a motive to lie on the part of a central Crown witness, the summing-up should contain clear directions on the onus of proof, including a direction that the accused bears no onus to prove a motive to lie and that rejection of the motive asserted does not necessarily justify a conclusion that the evidence of the witness is truthful: Doe v R [2008] NSWCCA 203 at [58]; Jovanovic v R (1997) 42 NSWLR 520 at 521–522 and 535. The jury should also be directed not to conclude that if the complainant has no motive to lie then they are, by that reason alone, telling the truth: Jovanovic v R at 523.

[34] NSW Criminal Trial Courts Bench Book also states that:

'A motive to lie or to be untruthful, if it is established, may "substantially affect the assessment of the credibility of the witness": ss 103, 106(2)(a) Evidence Act 1995. Where there is evidence that a Crown witness has a motive to lie, the jury's task is to consider that evidence and to determine whether they are nevertheless satisfied that the evidence given is true: South v R [2007] NSWCCA 117 at [42]; MAJW v R [2009] NSWCCA 255 at [31].'

101. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegations.
102. The complainant struck me as an unsophisticated and shy villager who expressed herself clearly and spoke out against the acts of the accused in a clear and concise manner. The complainant was steadfast in what she had encountered and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty. It is also noteworthy that the complainant was 16 years when the first incident took place and that the accused and the complainant were staying in the same house.
103. Experience has shown that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not. The fact that the complainant did not shout or yell or push the accused away in the circumstances of this case does not mean that she was consenting to the forceful acts of the accused.

104. I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed herself clearly that she did not like or agree to or approve of what the accused had done to her.
105. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
106. The complainant did inform Mereseini that the accused was sexually abusing her although not in complete detail of every act does not affect the credibility of the complainant. There was an inconsistency between what the complainant and Mereseini told the court and what they had told the police officer writing their police statement was not significant to affect the evidence of these witnesses.
107. Mereseini gave reliable and credible evidence about what the complainant had told her. I have also taken into account that it was not expected of a teenager who has had an unexpected sexual encounter to tell her family members or the first person she meets everything in detail about what had happened to her particularly when the alleged perpetrator is a close relative.
108. What the complainant told Mereseini was material and relevant to the unlawful sexual conduct of the accused. The decisive aspect of the recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial.
109. I have also taken into consideration the observations of the Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20th August, 2014)* at paragraph 39 as follows:

The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.

110. Moreover, Semisi Qoro the younger brother of the accused was also a credible witness he had organized the family meetings and it was the accused who had admitted to Semisi about what he was doing to the complainant and had assured Semisi that he will stop.
111. The complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

*[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** (supra):*

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder...”

LATE REPORTING

112. Furthermore, it is obvious that there is an issue of late reporting by the complainant to the police. The delay in reporting to police is nearly 2 years from the date of the allegation in 2019. 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 (4th 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.”

113. Firstly, I would like to state that the accused was a person of authority (a matured adult) in the house and he is the maternal uncle of the complainant and both were living in the same house.
114. Secondly, the accused had threatened the complainant that if she told anyone he will kill her. This in my judgment had instilled fear in the mind of the complainant who did not tell anyone about what the accused was doing to her until she could not take it anymore.
115. The late reporting in my view was beyond the control of the complainant she was afraid of the accused and as time went by when the opportunity presented itself the complainant opened up and expressed herself to her cousin sister Mereseini.

116. I accept that the complainant was a victim of circumstances which resulted in a delayed complaint to the police. Considering the age of the complainant and the closeness of the relationship that existed between the complainant and the accused it took a while for the complainant to gather the courage to speak out which she eventually did to Mereseini. The family meeting also contributed to the delay, it was hoped by the complainant that the accused would stop what he was doing but this did not happen.
117. On the other hand, the defence witness gave a version of events which is not tenable or plausible on the totality of the evidence. She was giving a narration in court which did not make sense since she was not present at the Wailoaloa Beach (first incident) and at Masimasi (second incident). Sainiana was also not present during any of the family meetings hence she was not aware of the actual allegation raised by the complainant against the accused. She was speculative and judgmental when she said the complainant was behaving in a manner which was akin to what a wife would be doing to her husband is a vague assertion which lacks reliability and therefore unworthy of belief.
118. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of consent in respect of penile penetration and massaging the breast of the complainant as untenable and implausible.
119. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

120. This court is satisfied beyond reasonable doubt that the accused between 1st June, 2019 and 31st November, 2019 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.
121. This court is also satisfied that the accused at the material time had unlawfully and indecently assaulted the complainant by massaging her breast. In respect of the above count this court is satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant. The acts of the accused in the above counts have some elements of indecency that any right minded person would consider such conduct indecent in nature. Finally, the complainant did not consent to the above mentioned act of the accused.
122. Furthermore, this court is also satisfied beyond reasonable doubt that the accused between 1st January, 2021 and 31st March, 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.
123. In view of the above, I find the accused guilty of two counts of rape and one count of indecent assault as charged and he is convicted accordingly. Due to lack of evidence the accused is acquitted of one count of indecent assault (count three), two counts of rape (counts four and five) and one count of attempted rape (count seven).

124. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

16 April, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.