

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

**Criminal Case No.: HAC 162 of 2022**

**STATE**

**V**

**SAVENACA TAKOLEVU BATIBASAGA**

**Counsel** : Mr. J. Nasa for the State.  
: Mr. F. Daveta for the Accused.

**Dates of Hearing** : 23 and 24 April, 2024  
**Closing Speeches** : 25 April, 2024  
**Date of Judgment** : 26 April, 2024

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**JUDGMENT**

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 30<sup>th</sup> November, 2022:

***Statement of Offence***

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

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

SAVENACA TAKOLEVU BATIBASAGA between the 1<sup>st</sup> of July 2022 and the 31<sup>st</sup> of July 2022, at Namatakula village, Nadroga in the Western Division, had carnal knowledge of “H.L”, a child under the age of 13 years.

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

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

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

### **ELEMENTS OF THE OFFENCE**

#### **RAPE**

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

In this case, the complainant was 11 years at the time of the alleged offending and therefore the consent of the complainant is not an issue in this proceedings.

6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence.
7. The second element is the act of penetration of the complainant's vagina by the penis.
8. The final element of the offence is the age of the complainant. It is not in dispute that the complainant was 11 years in 2022 which establishes that she was below the age of 13 years at the time of the alleged incident.
9. In this trial, the accused denied committing the offence of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis.
10. This court must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for this court to find the accused guilty. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offence, then this court must find the accused not guilty.
11. 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**

12. 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.
13. 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**

14. The complainant informed the court that she was born on 16<sup>th</sup> April, 2011. In July, 2022 she was living at Namatakula village, Nadroga with her grandmother, grandmother's eldest sister, her aunt and aunt's seven children, one of whom is the accused.
15. One Sunday in July, 2022 at about 8 pm the complainant went looking for her grandmother in the village but she could not find her grandmother so she came back home. When she entered the house in the living room she saw the accused sitting on the couch holding his phone. There was no one else in the house except the two of them.
16. The complainant went into the bedroom got a pillow and blanket and went into the living room to sleep beside the T.V. The complainant woke up when she felt something on her, she was lying on her back face up. When she opened her eyes she saw the accused on top of her at this time she noticed her skirt and panty were missing.

17. The complainant felt the accused penis was going in and out of her vagina, she tried to shout but was threatened by the accused that if she shouted he will kill her and her grandmother. At this time, the complainant became unconscious. When she regained consciousness she wanted to go to her grandmother the accused again threatened her that if she told her grandmother he will kill them both.
18. Later on, the complainant went to Suva and it was here she told her mother about what the accused had done. The matter was reported to the police and the complainant was medically examined.
19. In cross examination the complainant agreed that when she went into the house there was no one at home except the accused seated on the settee with his phone. When questioned about the lighting in the sitting room the complainant said that there was light coming from the kitchen. Before sleeping the complainant saw the accused sitting on the settee in the sitting room. Upon further questioning, the complainant said when she regained consciousness she noticed that she was wearing her panty and skirt. The complainant did not know how her panty and skirt were back on.
20. The complainant did not tell anyone about what the accused had done to her the previous night because the accused had threatened her that he will kill her and her grandmother. When questioned what she had told her mother the complainant said *"I told her he raped me."* When she told her mother this, she was crying and her mother cried as well.
21. The complainant denied that her mother had forced and coached her to lodge this report against the accused. Again, the complainant was asked about the lighting in the sitting room at the time, the complainant stated

*“the light in the sitting room was off and I was lying down where the light was shining from the kitchen.”*

22. The complainant was sure that it was the accused due to the light from the kitchen and she also saw the accused sitting on her private part. When it was suggested that it was not the accused but someone else the complainant said *“I saw him with my own eyes.”*
23. The complainant agreed that she had reported the matter late to the police because she feared for her life and her grandmother’s life as well.
24. This was the prosecution case.

#### **DEFENCE CASE**

25. 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 the accused evidence and give such weight as is appropriate.
26. The accused informed the court that the complainant is his cousin and in July, 2022 they were living together at his family house. In the same month he was blamed that he had done something to the complainant.
27. He was taken by the police and questioned about the allegation, he denied the same. The record of interview of the accused dated 30<sup>th</sup> August, 2022 in Itaukei language and its English translation were marked and tendered as defence exhibit numbers 1 and 2. The accused denied committing the offence as alleged by the complainant he maintained that he has been wrongly accused for something he has not done.

28. In cross examination the accused agreed the complainant had no problems, conflicts or grudges or ill feelings or ill will against him. His family also had a good relationship with the complainant's mother. In July, 2022 he was always in the village. The accused denied the complainant and her mother can fabricate the allegation against him.
29. The accused denied the complainant would not have made up the allegation against him. The accused stated that he was not in good terms with the complainant's grandmother and he had nothing against the complainant's mother. The accused denied lying to save himself.
30. This was the defence case.

### **ANALYSIS**

31. The prosecution states that the complainant and the accused are known to each other and they are cousins who were living in the same house. In the year 2022 the complainant was 11 years of age. The prosecution alleges that on a Sunday in July, 2022 the complainant was sleeping face up in the living room when she suddenly woke up after she felt something on her.
32. When she opened her eyes she saw the accused on top of her from the light in the kitchen. She also noticed that her skirt and panty were missing. The complainant at this time felt the accused penis was going in and out of her vagina, she tried to shout but was threatened by the accused that if she shouted he will kill her and her grandmother.
33. At this time, the complainant got unconscious when she regained consciousness she wanted to go to her grandmother the accused once

again threatened her that if she told her grandmother he will kill them both. When the complainant went to Suva she told her mother about what the accused had done and the matter was reported to the police.

34. On the other hand, the defence says the allegation is false initiated against the accused by the mother of the complainant. He did not do anything to the complainant as alleged and what the complainant narrated in court is a complete lie and therefore she should not be believed.
35. The defence is asking this court to consider the fact that the complainant was late in reporting the matter to the police. It was only on 28<sup>th</sup> August after one month that she reported the matter which was more than enough time for the complainant to concoct a story against the accused. The mother of the complainant is behind this false allegation she had coached and forced the complainant to blame the accused for something he has not done.
36. Furthermore, the complainant is mistaken in identifying the accused it was not him but someone else. The accused is innocent and he has been wrongly blamed. The accused has maintained his denial from the beginning of the allegation and he even told this to the police. The record of interview of the accused speaks for itself. The identification of the accused by the complainant in the middle of the night is riddled with suspicion.
37. In addition to the above, the defence is saying the complainant had all the time to wake her grandmother by shouting and yelling but she did not. The next day she could have told her grandmother but again she did not shows the complainant cannot be trusted about the allegation. The complainant was 11 years of age who would have taken steps to tell her grandmother about what had happened but she did not.



38. Finally, the defence is asking this court not to believe the complainant what she told the court does not make sense and is doubtful. The defence is also asking this court to take into account the fact that when the complainant regained consciousness she was wearing her panty and skirt? This puzzling aspect of the complainant's story is a mystery. The complainant did not tell the truth that is the reason why there are more questions than answers coming out of the complainant's evidence. On this basis, it is obvious that she is furthering the vested interest and motive of her mother against the accused.

### **DETERMINATION**

39. 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.
40. In this case, 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 offence alleged. It is not for this court to decide who is acceptable between the complainant and the accused.
41. 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).*

42. 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.”*

43. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State [2023] FJCA 251; AU0040.2019 (29 November 2023)* regarding what the accused told the court at paragraph 45 as follows:

*The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief*

(third aspect), and neither actual belief nor rejection of the accused's account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].

44. I have also kept in mind the observations made by Prematilaka RJA, sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State*, AAU 017 of 2022 (26<sup>th</sup> March, 2024) at paragraph 9 as follows:

*In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.*

45. The defence argument apart from denial is that there was a motive on the part of the complainant's mother to force and coach the complainant to report against the accused and the complainant had therefore lied in court.
46. 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.
47. The Court of Appeal in *Rokocika's* case (supra) 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].’*

48. There is no dispute that the complainant and the accused are cousins and both were living in the same house. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant as truthful and reliable.
49. The complainant gave a comprehensive and consistent account of what the accused had done to her. She was also able to withstand cross examination and was not discredited as to the main version of her allegation.
50. The complainant was coherent and articulate about what she had encountered that night and I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty.
51. 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 was because of the threat made by the accused. The accused was much older than the complainant he was 22 years at that and she was half his age. The threat by the accused in my considered judgment had instilled fear in the complainant.
52. For this reason, it was only when the complainant was in Suva with her mother, that she was able to fearlessly tell her mother about what the accused had done and thereafter the matter was reported to the police without any further delay. I also observed that the complainant had a strong view against the conduct of the accused and she had expressed herself clearly about what he had done.

53. The complainant was not shaken as to the basic version of her allegation. The Court of Appeal made a pertinent observation in respect of the above in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

*'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'*

54. I also reject the defence assertion that the complainant's mother had a motive to force and coach the complainant falsely to frame the accused as far-fetched and an attempt by the accused to divert attention away from the allegation. Interestingly, the motivation of the complainant's mother only came about during the cross examination of the complainant by the defence counsel. However, during his evidence the accused did not say anything about the complainant's mother's motive against him.

55. The accused told the court that he had a good relationship with the complainant and there were no ill feelings or grudges between the two. In view of this evidence, it is difficult to accept why the complainant would falsely implicate the accused.

## LATE REPORTING

56. Furthermore, during trial the defence raised an issue of late reporting by the complainant to the police. It is an admitted fact that the incident was reported to police on 28<sup>th</sup> August, 2022 which is about 1 month from the allegation in July, 2022. 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.”*

57. Firstly, I would like to state that the complainant was afraid of the accused who was twice the age of the complainant and she was living with the accused in his family house.
58. Secondly, when the complainant was away from the accused in Suva then only she was able to tell her mother about what the accused had done to her. The accused had threatened the complainant that he will kill her and her grandmother if she told anyone had no doubt instilled fear in the mind of the complainant. It was when the complainant left the village and arrived in Suva that she opened up to her mother this was the first suitable opportunity for the complainant which she fully utilized.



59. The delay of a month is reasonable considering the circumstances of the complainant. Prematilaka, RJA sitting as a single judge in the Court of Appeal in *Ram Krishna vs. The State*, criminal appeal no. AAU 123 of 2022, (12 April, 2024) made an important observation about the jurisprudence and the reasoning behind late reporting from paragraph 28 to 33:

[28] The Doctrine of Recent Complaint: Anti-Feminist Narratives in Evidence Law by Eoin Jackson says:

*As noted by the academic Wigmore, the origin of the doctrine of recent complaint lies in the medieval expectation that a victim of rape would raise a 'hue and cry' in order to make the community aware that a violation had occurred. Stanchi, writing in the Boston College Law Review, discusses how this can be linked to the historical mistrust of female witnesses, with the promptness of the complaint being equated to an alleviation of some of this mistrust..... For example, Heffernan has noted how the doctrine continues to operate on the assumption that a victim will report an incident of sexual assault as soon as is reasonably possible. This ignores a myriad of factors a victim may be feeling, such as fear, humiliation, and intimidation..... A personal connection to the abuser will naturally hinder victims from promptly reporting the incident, given they may need to weigh up the effect reporting the assault has not just on them, but on the relationships within their broader social and familial circle.....The outdated perception that a victim will immediately report a traumatic incident does not take into account the various psychological and personal factors at play and other complexities, in particular those that arise where the victim is familiar with their abuser..... While it is logical for a victim to consult with someone they perceive to be knowledgeable about the matter at hand, yet the doctrine of recent complaint ignores this in favour of a blanket presumption that an immediate disclosure will be made..... The recent complaint doctrine strictly focuses on the idea of reporting as soon as reasonably possible in the*

*context of the mind-set of the victim, as opposed to enquiring as to whether there are any excuses that would justify an otherwise ‘unreasonable delay’.*

*[29] According to Jackson in recent times, the doctrine has been modified to allow for a ‘reasonable excuse’ justification. This justification would allow for the prosecution to argue that the victim had a reasonable excuse for delaying in making a complaint. In assessing this excuse, the judge could take into account the emotional state of the woman namely that she was not in a psychological state to make a complaint at the first available opportunity, the nature of the relationship between the accused and victim, and the factual context of the charge itself. It would also account for cases where the victim consults with someone they know prior to making a complaint. This justification would allow for a more inclusive version of the doctrine of recent complaint to be embedded into jurisprudence. It would allow for a version of the doctrine grounded in an emphasis and understanding of the complexities that can arise in the aftermath of a sexual assault. It does not remove the time element, but merely adds nuance sufficient to prevent it from being the determining factor when considering the veracity of testimony.*

*[30] Australian Law Reform Commission states that: ‘The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault. Significantly in the context of this Inquiry, the ‘predictors associated with delayed disclosure’ reveal differences in reporting patterns depending upon the victim’s relationship with the abuser. For example, where the victim and defendant are related, research suggests there is a longer delay in complaint. Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, ‘it is likely that evidence about a complainant’s first complaint would answer the type of questions that jurors can be expected to ask themselves’.*

[31] For example, a Bench of 05 judges of the Supreme Court of Philippines including the Chief Justice in *People of the Philippines, Plaintiff-Appellant vs. Bernabe Pareja y Cruz, Accused-Appellant* G.R. No. 2021223 quoted the following observations from *People v. Gecomo*, 324 Phil. 297, 314-315 (1996)<sup>4</sup> (G.R. No. 182690 - May 30, 2011) in relation to why a rape victim's deferral in reporting the crime does not equate to falsification of the accusation. 'The failure of complainant to disclose her defilement without loss of time to persons close to her or to report the matter to the authorities does not perforce warrant the conclusion that she was not sexually molested and that her charges against the accused are all baseless, untrue and fabricated. Delay in prosecuting the offense is not an indication of a fabricated charge. Many victims of rape never complain or file criminal charges against the rapists. They prefer to bear the ignominy and pain, rather than reveal their shame to the world or risk the offenders' making good their threats to kill or hurt their victims'

[32] The Court of Appeal in *R v D (JA)* [2008] EWCA Crim 2557; [2009] Crim LR 591 held that judges are entitled to direct juries that due to shame and shock, victims of rape might not complain for some time, and that 'a late complaint does not necessarily mean it is a false complaint'. The court quoted with approval the following suggested comments in cases where the issue of delay in, or absence of, reporting of the alleged assault is raised by a defendant as casting doubt on the credibility of the complainant. 'Experience shows that people react differently to the trauma of a serious sexual assault. There is no one classic response. The defence say the reason that the complainant did not report this until her boyfriend returned from Dubai ten days after the incident is because she has made up a false story. That is a matter for you. You may think that some people may complain immediately to the first person they see, whilst others may feel shame and shock and not complain for some time. A late complaint does not necessarily mean it is a false complaint. That is a matter for you.'

*[33] Thus, as much as a late complaint does not necessarily mean that it is a false complaint, it is nothing but fare for the judges to direct themselves that similarly an immediate complaint does not necessarily demonstrate a true complaint. Thus, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint.*

### **TURNBULL DIRECTIONS**

60. Although this is a case of recognition as opposed to identification the defence has taken the position that the complainant made a mistake in thinking that it was the accused who had sexually assaulted her for someone else so she had identified the wrong person in court.
61. The defence contention is that the case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.
62. I have carefully looked at the following circumstances in which the complainant had identified the accused in the sitting room:
  - (a) *How long did she have the person the complainant says was the accused under observation?*

She opened her eyes when she felt something was on top of her. There is no time duration given by the complainant of her observations but she did say there was enough light coming into the sitting room from the kitchen and she was able to see this person clearly.

*(b) At what distance?*

According to the complainant she had seen this person from very close proximity. He was on top of her and was at one time also sitting on her private part. This person had threatened her by saying that he will kill her and her grandmother if she told anyone about what he had done.

*(c) In what light?*

According to the complainant the alleged incident happened in the sitting room with the light from the kitchen and she was able to see this person clearly.

*(d) Did anything interfere with that observation?*

The complainant did not say there was any obstruction or interference she was able to see the face of this person clearly who was on top of her which prompted her to recognize this person to be the accused.

*(e) Had the witness ever seen the accused before?*

The complainant and the accused are cousins and they used to stay together in the same house. The complainant had been living with the accused from 4 years before the incident.

63. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. The complainant did not say for how long the accused was on her and for how long he was penetrating his penis in and out of her vagina. I have given the above directions as a matter of caution after the defence counsel raised

the issue of identification of the accused inside the house by the complainant.

64. Finally, I would like to state that the complainant did not make any mistake in recognizing the accused since she has seen the accused on previous occasions and both were living in the same house. The complainant was living in the house of the accused for 4 years before the alleged incident.
65. In view of the above, this court accepts that it was the accused and no one else and there was no mistake made by the complainant in the recognition of the accused.
66. On the other hand I reject the defence of denial by the accused as not plausible on the totality of the evidence. The defence assertion that the accused had not done anything to the complainant is unworthy of belief.
67. The accused did not tell the truth it was obvious to me that the accused during cross examination by the state counsel was not revealing the truth of what had happened. I do not believe the accused when he said that he did not do anything to the complainant and that the allegation was a lie. The accused also said that he was not in the sitting room at the time of the incident is a false assertion to divert attention away from him.
68. The defence has not been able to create a reasonable doubt in the prosecution case.

## CONCLUSION

69. This court is satisfied beyond reasonable doubt that it was the accused who had between the 1<sup>st</sup> of July, 2022 and the 31<sup>st</sup> of July, 2022 penetrated the vagina of the complainant with his penis, a child under the age of 13 years.
70. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.
71. This is the judgment of the court.

  
**Sunil Sharma**  
Judge



**At Lautoka**

26 April, 2024

### **Solicitors**

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

**Messrs Daveta Advocates, Lautoka for the Accused.**