

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

**Criminal Case No.: HAC 207 of 2016**

**STATE**

**V**

**SUNIA TUBUNA TUKUTUKU**

**Counsel** : Ms. R. Uce for the State.  
: Ms. V. Diroiroi and Ms. G. Henao [LAC] for the  
Accused.

**Dates of Hearing** : 19, 20 and 23 September, 2019  
**Closing Speeches** : 24 September, 2019  
**Date of Summing Up** : 24 September, 2019  
**Date of Judgment** : 25 September, 2019

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**JUDGMENT**

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

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

**COUNT ONE**

**REPRESENTATIVE COUNT**

*Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

*Particulars of Offence*

**SUNIA TUBUNA TUKUTUKU**, between the 1<sup>st</sup> day of January, 2016 and 31<sup>st</sup> day of July, 2016 at Nadi in the Western Division, penetrated the vagina of “SJ” with his penis, without her consent.

2. The three assessors had returned with a mixed opinion that the accused was guilty by a majority of two is to one.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called two witnesses and the accused exercised his right to silence and did not call any witness.
5. The complainant informed the court that she was in form 4 in the year 2016 when she was raped by the accused. He would usually remove her panty and put his penis in her “pe” meaning her private part for about 3 hours and she would feel pain.
6. The accused is the complainant’s uncle who lives about 12 meters away from her home when she would return home from school the accused would send her to the shop to buy biscuits.
7. When she went to the house of the accused to give him the biscuits he would block her mouth with his hand and take her to his bedroom by pulling her hand.
8. In the bedroom the accused would draw the curtains, take off the complainant’s clothes and make her lie down on the mattress. After removing his clothes the accused would put his penis in her private part.
9. On all occasions the complainant did not shout or call for help because the accused was blocking her mouth with his hand and she did not push the

accused away because he was holding her hands tightly. The accused told the complainant not to tell anyone otherwise he would kill her.

10. After wearing her clothes the complainant went home, at home she did not tell anyone because she was afraid that the accused might kill her. The complainant recalled the accused did this to her on four occasions. The complainant had informed her mother, but her mother did not believe her. She did not tell her father about what the accused had done to her because she was afraid the accused would kill her if she told anyone.
11. Her father reported the matter to the police and she went with her father because the accused had raped her since the complainant was attending school, she told one of her teachers, Mrs. Tawake about what the accused had done to her.
12. According to the complainant rape was a bad thing meaning sexual intercourse and when the accused was removing her clothes he was also blocking her mouth at the same time.
13. On a Sunday in February, 2016 after church, the complainant had met the accused after 10pm, she agreed she went to the house of the accused and had laid naked on the bed in the accused bedroom and after removing his clothes the accused had sexual intercourse with her.
14. In March, 2016 she met the accused by the village pond at around 7pm where the accused invited her to his house. In the accused house the complainant waited for the accused to come into his bedroom. In the bedroom the accused came and asked her to remove her clothes, the complainant removed her clothes and lay on the bed naked after the accused removed his clothes both then had sexual intercourse.
15. After having sexual intercourse the complainant went home. On 3<sup>rd</sup> October, 2016 she had vomited in her classroom and at that time she knew

that she was pregnant. At the Health Center the complainant was asked by the doctor if someone had touched her inappropriately, but she did not tell anything to the doctor, it was her teacher who had explained everything to the doctor.

16. After her pregnancy became known the complainant was worried since her parents would be angry and upset with her including the shame and dishonour she would bring to her family and because of this she had said the accused had raped her.
17. The reason why the complainant stated the accused had raped her was because she wanted to save herself since the news of her pregnancy had become known.
18. The complainant further stated the reason why she removed her clothes was for the accused to insert his penis into her private part.
19. When the complainant was asked to show how it was possible for the accused to hold her tightly with one hand and block her mouth with the other hand and then remove her clothes the complainant replied she could not show how this was done.
20. When asked to explain why she had said the accused had raped her when it was put to her in cross examination that the accused never raped her, the complainant stated because her parents did not buy her baby's clothes and the villagers had started asking whose baby she was carrying.
21. The final prosecution witness was the father of the complainant Eroni Bativunilagi who informed the court that in 2016 the complainant was in Form 4 and was 18 years of age. The complainant was intellectually slow meaning she was slow in grasping things and had a low I.Q., according to the witness he had asked the teachers to keep the complainant in school so that she could learn.

22. He came to know about the pregnancy of the complainant from the village nurse and the village headman and he reported the matter to the police.
23. On the other hand the accused denies committing the offence as alleged. According to the line of cross examination defence takes the position that the accused and the complainant had consensual sexual intercourse at the house of the accused. The defence says to avoid shame in the village and the anger of her parents the complainant cried rape after she became pregnant.
24. The defence also says whatever the complainant said in her evidence is not possible since the accused could not have sexual intercourse with the complainant for three hours with his hand blocking her mouth at the same time. Furthermore, the defence also says it is improbable for the accused to block the mouth of the complainant, remove her clothes and also hold her hands tightly at the same time.
25. After considering the evidence adduced by the prosecution, I am unable to accept the evidence of the complainant as credible and reliable. The complainant did not tell the truth in court when she said that the accused had sexual intercourse with her without her consent.
26. It is unthinkable on the evidence that the complainant would go to the house of the accused on four occasions after being raped on each occasion. Furthermore, the complainant said one thing in her evidence in chief and then contradicted herself in cross examination.
27. The complainant struck me as a person who was not telling the truth the description given by the complainant before the alleged incidents and the manner in which the complainant stated the accused had sexual intercourse with her is improbable. When the complainant was asked to

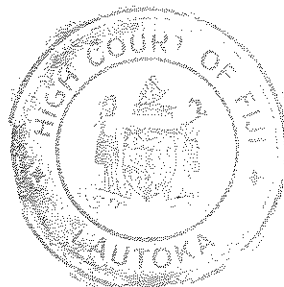
explain or clarify her answers she was not forthcoming the demeanour of the complainant was not consistent with her honesty.

28. I accept the complainant cried rape when she got pregnant and to avoid shame and the anger of her parents the only way out for the complainant was to blame the accused which she did.
29. From the demeanour of the complainant and her response to questions asked I accept the complainant's low I.Q. which was confined to her academic performance did not impede or affect the complainant's ability to understand the questions asked and for her to answer the same in court.
30. On the totality of the evidence the complainant was untruthful and unreliable she made the allegation of rape against the accused to save herself which she succeeded in doing.
31. The inescapable conclusion based on the evidence before the court is that the complainant made a false allegation of rape against the accused after she had consensual sexual intercourse with him over a period of time until she became pregnant.
32. I therefore reject the evidence of the complainant as unbelievable and unreliable the prosecution has not been able to prove its case beyond reasonable doubt. There are many doubts in this case, this court is not satisfied beyond reasonable doubt that the accused between the 1<sup>st</sup> day of January, 2016 and 31<sup>st</sup> day of July, 2016 had penetrated the vagina of the complainant with his penis without her consent. In view of the above, it is unsafe to convict the accused based on the discredited evidence of the complainant.
33. For the above reasons, I overturn the majority opinion of the assessors that the accused is guilty as charged. I accept the minority opinion of the

assessors that the accused is not guilty of the representative count of rape he is charged with.

34. The accused is acquitted forthwith of the charge.

35. This is the judgment of the court.



**Sunil Sharma**  
**Judge**

**At Lautoka**

25 September, 2019

**Solicitors**

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

**Office of the Legal Aid Commission for the Accused.**