

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 365 of 2019

STATE

V

SAMUELA MACEDRU

Counsel : Ms. Unaisi Tamanikaiyaroi for the State
Ms. Litiana Ratidara with Ms. Elanani Soata for the Accused

Dates of Trial : 10-11 March 2021

Closing Submissions : 11 March 2021

Judgment : 18 March 2021

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SL" or simply "S".

JUDGMENT

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the accused, Samuela Macedru, is charged with the following offence:

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

Particulars of Offence

SAMUELA MACEDRU, between the 1st day of January and the 31st day of December 2019, at Koro, in the Eastern Division, penetrated the vulva of **SL**, a child under the age of 13 years, with his finger.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 2 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

- [4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

- [5] As could be observed the accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act.

- [6] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

- [7] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

- [8] Section 207 (2) (b) makes reference to a person penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.
- [9] Section 207(3) of the Crimes Act provides that *"For this section, a child under the age of 13 years is incapable of giving consent."*
- [10] Therefore, in order to prove the first count of Rape, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) During the specified period (in this case between the 1 January 2019 and 31 December 2019);
 - (iii) At Koro, in the Eastern Division;
 - (iv) Penetrated the vulva of the complainant ST, with his finger;
 - (v) At the time the complainant ST was a child under the age of 13 years.
- [11] To further elaborate upon these elements in respect of the count of Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [12] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [13] The fourth element involves the penetration of the complainant's vulva, with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond

reasonable doubt that the accused penetrated the vulva of the complainant with his finger to any extent.

- [14] I believe it is important at this stage to distinguish between the vulva and the vagina of a female. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside the body. Only the opening of the vagina (vaginal introitus i.e. the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina. Therefore, it is clear one has to necessarily enter the vulva before penetrating the vagina.
- [15] The final element is that at the time of the incident the complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was under 13 years old at the time of the alleged incident, and therefore, she had no mental capacity to consent.

The Agreed Facts

- [16] Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), deals with "Admission of facts". The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[17] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

- a. The name of the person charged is Samuela Macedru [“Samuela”].
- b. The name of the complainant is SL [“S”].
- c. Samuela and S are related to each other namely they are cousins.
- d. S refers to Samuela as “Samu”.
- e. Between 10th to 25th August 2019, Samuela and S resided in different homes in Kade Village, Koro Island.

[18] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[19] The prosecution, in support of their case, called the complainant (ST), who was their sole witness. The prosecution also tendered the following document as prosecution exhibit:

Prosecution Exhibit PE1- Birth Certificate of the complainant.

[20] Evidence of the complainant ST

- (i) *During the recording of the complainant’s evidence a screen was placed so that the complainant could not see the accused and her evidence was recorded in a closed court. Court also permitted a Counsellor Advocate from the Fiji Women’s Crisis Centre (FMCC) to sit beside the complainant as a ‘support person’, during the time her evidence was recorded.*
- (ii) *The complainant testified that she is currently 12 years old. She said that her date of birth was 1 July 2008. A copy of her birth certificate was tendered to Court as Prosecution Exhibit PE1.*
- (iii) *Her mother is Joana Kauki, and her father is Vilikesa Tabualagataki. She has 3 other siblings, all sisters. She is second in the family.*
- (iv) *She is currently residing at Wainigasau in Veisari, Lami, at her Aunty Miriama Liku’s house. She is currently schooling at St. Thomas Aquinas Primary School in Lami and is in Class 8. She has been residing in Lami for the past 2 years.*

- (v) *Prior to this she had been living in Kade Village in Koro, with her mum, dad and her siblings. Her dad is from Kade Village.*
- (vi) *The complainant testified that in August 2019 she was 11 years old. She was attending Kade Village School and was in Class 6. During that month, she had been staying with her grandmother Rosalia Naivaluwaqa, as it was the school holidays, after Term 2. The complainant said that her grandmother's house is about 2 minutes distance from her house.*
- (vii) *The complainant said that while she was at her grand-mother's house, she would be watching movies at Tukai Lepani's (Grand-father Lepani's) residence, in the evenings. She said it was a short distance from her grand-mother's house to Tukai Lepani's house. She said that Lisi's house, Ulamila's house and Vilimone's house were situated between the two houses.*
- (viii) *The witness testified that she would usually go to watch movies at Tukai Lepani's house with her friends Ledua and Litia. Ledua resided at her grand-mother's house, while Litia was staying in another house.*
- (ix) *The complainant was specifically asked whether anything happened to her one night in August 2019, when she went to watch movies at Tukai Lepani's house and she said yes. That night too she had gone to watch movies together with Ledua and Litia.*
- (x) *The following questions were then asked from the witness and she answered as follows:*

Q. What happened?

A. I went and watched movie. Later I wanted to sleep. And I told Ledua and Litia that I am taking the lead back. And I was walking towards my grand-mother's house. And I saw Samu. He told me for us to go together to the village hall. I replied yes. And while we were going to the village hall he told me for us to have sex (veikaba).

.....

Q. When you say 'veikaba' what do you mean?

A. For a male and a female to have sex.

Q. So when Samu had said for you two to go and have sex, what did you say to him?

A. Yes.

Q. What happened after that?

A. After that we went to the hall. He opened the door at the hall and we entered and we went inside. And then I took off my trousers and my undergarments. And I lied down spreading my legs. I was lying facing up. He was sitting down with an open leg and he took one of his fingers and

penetrated inside my vagina (the complainant used the term vagina in English).

Q. *What happened after that?*

A. *He put his finger inside my vagina then he pull it out and he shake his hand.*

Q. *After that what happened?*

A. *Then I told him it's painful. After that he kissed me. After that he stood up. At the same time I also got up and wore my under-garment and my trousers.*

Q. *What happened after that?*

A. *After that we came back outside and he told me not to tell anyone else.*

Q. *After he said that what happened?*

A. *Then he went back to his house, while I went back to my house.*

.....

Q. *When you saw Samu, where did you meet Samu?*

A. *At Lisi's place.*

Q. *Since it was night time, how were you able to say it was Samu?*

A. *Because of the lights.*

Q. *Where were the lights coming from?*

A. *From Lisi's house.*

Q. *From Lisi's house you said you went to the hall? What is the distance? If you had to walk what is the distance? How long did it take?*

A. *One minute.*

Q. *Once you arrived at the hall, you said he had opened the door and you both went inside. What was the lighting condition when you went inside the village hall?*

A. *Light from the moon.*

Q. *Can you describe how the village hall is?*

A. *It has 3 doors and 6 windows.*

Q. *The windows do they have curtains or not?*

A. *Without curtains.*

- Q. *When you say there was light from the moon, how bright was the light?*
A. *There was only less light.*
- Q. *Less light from where?*
A. *Through the windows.*
- Q. *Was there any other light that night?*
A. *No.*
- Q. *Which area in the village hall did you go and lie down?*
A. *On the floor.*
-
- Q. *Was it in the middle, near a wall, close to a door, or window?*
A. *Beside the window.*
- Q. *You said you were lying face up and Samu was lying down with open leg. Can you explain?*
A. *The witness said she doesn't understand this question.*
- Q. *Where was Samu sitting down?*
A. *In the middle in between my knees. He was seated in the middle.*
- Q. *He was sitting in the middle between your knees?*
A. *Yes he was facing me.*
- Q. *Did you see which finger he used?*
A. *His right middle finger.*
- Q. *How many times did he put his finger into your vagina?*
A. *Three times.*
- Q. *Were you able to see his face when he was inserting his finger in your vagina?*
A. *Yes.*
- Q. *How long were you able to see his face?*
A. *For a short time.*
- Q. *Can you estimate the time?*
A. *Don't know.*

Q. *What was the distance between you and Samu at the time? When he was doing this to you?*

A. *Witness said about one footstep from where she's sitting in the witness box.*

Q. *Was there anything covering your view when he was doing this to you?*

A. *No.*

Q. *How were you able to see Samu? What was the lighting condition?*

A. *Light from the moon.*

Q. *At that particular time what was the brightness of the light? Was it dim, normal or bright?*

A. *Normal.*

Q. *With that normal light could you see his face clearly?*

A. *Yes.*

Q. *You said when he had put his finger into your vagina and he shook his hand, it was painful. What was painful?*

A. *My vagina.*

(xi) *The complainant further testified that before that night she had met Samu plenty of times on previous occasions. When asked when and where she had met him before, the witness said at her grand-mother Rosalia's place and also in the middle of the road and in the village. She has known Samu for 3 years.*

(xii) *It is an agreed fact that Samu and the complainant are related to each other as cousins. It is also an agreed fact that Samu and the complainant resided in different homes in Kade Village, Koro Island.*

(xiii) *The complainant was asked to describe the person she referred to as Samu. She said: "He is tall. He is white. At the time he had short hair." She also said that Samu was slim in built.*

(xiv) *The complainant confirmed that the same Samu and the Samu she saw that night was the same person.*

(xv) *The complainant identified the accused in the dock as Samu.*

(xvi) *The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.*

(xvii) *The complainant agreed that this case was brought about when her mother discovered the love bites on her neck in 2019. She also agreed that when her mother had asked her, she had said that one Peni, a boy from the village had given her those love bites.*

(xviii) *The complainant further agreed that apart from Peni, she had also mentioned to her mother 3-4 other males that did the same thing that Peni did to her. She*

agreed that the first 2 males she told her mother apart from Peni were her grand-fathers Amena and Bola.

- (xix) The complainant further agreed that there is no electricity in Kade Village, and therefore electricity is powered by solar or by a generator. She also agreed that there were no street lights along the footpaths of the roads in Kade Village.*
- (xx) The complainant was questioned about the statement she made to the police.*
- (xxi) The Defence highlighted certain inconsistencies and omissions in the testimony given in Court by the witness vis a vis her statement made to the Police on 28 October 2019:*

- i. In her testimony in Court, the witness said that Samu had asked her to go together with him to the village hall and that she had agreed.*

However, in her statement made to the Police (Answer to Question No. 66), it is recorded as follows:

“He took me forcefully towards the village hall, opened the door and pulled me inside on the middle of the hall”.

The complainant denied having said so in her Police Statement.

- ii. In her testimony in Court the witness said that she had seen Samu from the light of the moon inside the village hall. However, no mention has been made of this fact in her statement made to the Police.*
- iii. In her testimony in Court the witness said that Samu had asked her to go with him and have sex (veikaba). However, no mention has been made of this fact in her statement made to the Police.*
- iv. In her testimony in Court the witness gave a specific description of the person she had seen that night. She said that the person was tall, was fair in complexion, had short hair and was slim. However, no mention has been made of this fact in her statement made to the Police.*
- v. In her testimony in Court the witness said that she took off her trousers and under-garments and laid down in the village hall. However, no mention has been made of this fact in her statement made to the Police.*

(xxii) *The following further questions were asked from the witness in cross-examination and she answered as follows:*

Q. *Would it be correct to say that you could have been mistaken that it was Samu that night?*

A. *Yes.*

Q. *Would it be correct to say that because there was no light in the village hall and the moonlight which was outside – you could have been mistaken that it was Samu?*

A. *Yes.*

.....

Q. *Is it possible that because of the other 4 names (Tukai Amena, Tukai Bola, Peni and Pita) you have mentioned and the different incidents, you could have been mistaken with regard to the incident naming Samu?*

A. *Yes.*

.....

Q. *It is my instructions that Samu did not do what you said that night. It was not Samu.*

A. *No.*

Q. *It is my instructions that Samu would not have taken any interest in you because of your age difference.*

A. *No.*

(xxiii) *In re-examination, the State Counsel attempted to clarify from the witness the answers given by her in cross examination.*

(xxiv) *Regarding the omissions with regard to her statement made to the police:*

- *When asked as to why she did not tell the police that Samu had asked her to go with him and have sex (veikaba), she answered that she was scared of the police.*

- *When asked as to why she did not tell the police that she had seen Samu from the light of the moon inside the village hall, she said she forgot to say so.*

- *When asked as to why she did not tell the police about the description of the person she saw that night, the witness said: "They did not ask".*

- *When asked as to why she did not tell the police that she took off her trousers and her under-garments and laid down, she said that she was ashamed.*

(xxv) *The complainant clarified that it was Samu she saw that night and not someone else. She also clarified that she was not mistaken with regard to the incident naming Samu and that it was Samu who had done the alleged act to her that night.*

[21] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[22] The accused decided to testify on his own behalf.

Case for the Defence

[23] Evidence of Samuela Macedru

- (i) *The witness testified that he is 20 years old. His date of birth is 9 April 2000. He is currently residing at Salababa in Waila. He is staying there with his brother's wife and two children. His brother is attached to the Fiji Military Forces and is based in Sinai. He said that he has been staying at this residence since the beginning of the year.*
- (ii) *The witness testified that he is from Kade Village in Koro. Prior to moving to Waila he had been staying in Kade Village. His father, mother and siblings moved to Kade Village in 2014. He has 7 brothers and sisters and he is fourth in the family.*
- (iii) *The witness said that in 2014 he was staying in his father's brother's house in Kade Village. This house is said to be located in the middle of the village and it is a 3 minutes' walk to the village hall.*
- (iv) *However, in 2019, they had moved to the house his father had built. He said this house is located far from the village. The house is located near the beach. From this house to the village it would take 30 minutes to walk, and from the house to the village hall it would take about 45 minutes to walk.*
- (v) *Samuela testified that he is related to the complainant from his mother's side. He explained that he is a cousin of the complainant's mother, Joana Kauki.*
- (vi) *The witness said that he knows the complainant's grand-mother Na Rosa. Her house is situated right beside the main road. It would take about 4 minutes to walk from Na Rosa's house to the village hall.*
- (vii) *The witness testified that the main source of electricity in Kade Village was solar power. Apart from solar power the other source of electricity would be by the use of a fuel powered generator.*

- (viii) *The witness said that in the year 2019 he was staying more frequently in Suva than Kade Village. After returning back to Kade Village from Suva, Samuela's father had told him to stay with him in the house so that he can help his father out with the farm work. He testified further that he didn't usually go out to the village in the nights, because of the long distance to the village.*
- (ix) *The witness totally denied all the allegations made by the complainant against him.*
- (x) *He said that after the village hall was renovated the village headman used to lock the door and take the keys with him.*
- (xi) *The witness said that he has no sexual feelings for the complainant. When asked to explain further he said: "Firstly because of our age difference. And secondly because we have a good relationship with her father."*
- (xii) *The accused was cross examined at length by the prosecution. Several suggestions were also put to him regarding the prosecution's version of the events.*
- (xiii) *The witness agreed that there was no sex education taught in High School from Forms 3-7. He also agreed that he was never taught about the law and about different crimes while in High School. When asked to explain about his understanding of Rape, he said forcing girls to have sex. "Forcing them without permission".*
- (xiv) *The witness agreed that there were some parts during the month of August that he was in Koro (after returning from Suva). He also agreed that during this time he was in Koro, he had seen the complainant in the village and also at Na Rosa's house.*
- (xv) *He also agreed that there were certain times that he would go to the village in the night. The reason for going to the village in the night was to get water because at home there were no taps.*
- (xvi) *Samuela also agreed that he did not know in 2019 that Rape also means inserting a finger into the vagina of a girl. He further agreed that the only time he got to know that putting a finger into the vagina of a girl was Rape, was after the police had arrested him for this case.*
- (xvii) *The following questions were then asked from the witness in cross-examination and he answered as follows:*

Q. You would agree with me that you thought it was okay if someone wanted you to do a sexual act to them? You thought it was okay? You didn't think it was wrong?

A. No.

Q. You would agree with me that you have a lot to lose if you admitted that you inserted your finger into S's vagina?

A. I don't know anything about this.

Q. You didn't know that inserting your finger into S's vagina was wrong or it was Rape?

A. I didn't know because I didn't do it.

Q. I put it to you that you did insert your middle finger into S's vagina in the village hall.

A. I don't know anything about this.

Q. I am suggesting to you that you inserted your finger because S had agreed to go with you to the village hall.

A. I don't know anything about this.

Q. I am suggesting to you that you inserted your finger 3 times and you only stopped when S said it is painful.

A. I didn't know anything about this.

Q. I am suggesting to you that afterwards you kissed S and then you both went back to your own homes.

A. I don't know anything about this.

Analysis

[24] As stated before, the prosecution, in support of their case, called the complainant (ST), who was their sole witness. The prosecution also tendered the Birth Certificate of the complainant as Prosecution Exhibit PE1.

[25] The accused testified on his own behalf.

[26] As I have stated earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charge beyond reasonable doubt.

[27] Accordingly, it is the duty of the prosecution to prove that the accused, between the 1 January 2019 and 31 December 2019, in Koro Island, penetrated the vulva of the complainant with his finger, and at the time the complainant was a child under the age of 13 years.

- [28] As I have again stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [29] Based on the said agreed facts it is confirmed that the accused is related to the complainant as they are cousins (He is like her older cousin). He testified that he is the cousin of the complainant's mother.
- [30] It is also been agreed that the complainant refers to the accused as Samu; and that the accused and the complainant resided in different homes in Kade Village, Koro Island, during the material time.
- [31] I have summarized the evidence of the complainant and the accused, which was led during the trial. At the time she testified in Court the complainant was 12 years of age. As per her Birth Certificate her date of birth is 1 July 2008. Therefore, in August 2019, she was 11 years of age. As such it is proved that at the time the complainant was a child under the age of 13 years.
- [32] The accused has testified in Court and totally denies the charge against him. The defence takes up mistaken identity as a defence.
- [33] It is therefore appropriate at this stage to refer to the landmark case of *R v Turnbull* (1977) Q.B. 224, [1977] 63 Criminal Appeal Reports 132, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552. In this case the English Court of Appeal enunciated special guidelines to assess the quality of disputed visual identification. Lord Widgery CJ articulated the said guidelines in the following words:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what

distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger."


- [34] The *Turnbull* guidelines have been accepted as the law in Fiji. This has been specifically stated by the Fiji Court of Appeal in *Semisi Wainiqolo v The State* [2006] FJCA 70; AAU0027.2006 (24 November 2006); and in *Mesake Sinu v The State* [2013] FJCA 21; AAU37.2009 (13 March 2013).
- [35] In *Rusiate Savu v The State* [2014] FJCA 208; AAU0090.2012 (5 December 2014); the Fiji Court of Appeal held that the Learned Magistrate was in error when he concluded that the *Turnbull* guidelines did not apply to that case as it was not a situation of identification on a fleeting glance but one of recognition.

"Clearly, the learned trial Magistrate misdirected herself when she said the *Turnbull* guidelines are not appropriate here as this was not fleeting glance case but was of recognition. The *Turnbull* guidelines equally apply to cases of disputed recognition as was the case here. In *R v Thomas* [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the *Turnbull* guidelines against the circumstances in which the sighting occurred (*Wainiqolo* (supra) at [18]).

- [36] These principles were also considered by the Fiji Court of Appeal in *Isoa Koroivuki & Another v The State* [2017] FJCA 47; AAU0082.2012 (26 May 2017); and confirmed by the Fiji Supreme Court in *Isoa Koroivuki & Another v The State* [2017] FJSC 28; CAV7.2017 (26 October 2017).
- [37] Based on the above authorities, I have closely examined the following circumstances, among others, when evaluating the evidence given by the complainant on identification of the accused in relation to charge of Rape;
- a) Duration of observation of the accused person;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the complainant knew or had seen the accused before;
 - f) For how long had the complainant known or seen the accused before;
 - g) If not known or seen before or only known or seen occasionally, is there any special reason to remember the accused person;
 - h) Duration between original observation and identification; and
 - i) Is there any material discrepancy between description given to the Police by the witness when first seeing the accused and his actual appearance.
- [38] Considering all the evidence led during the trial, I am satisfied that the prosecution has established beyond reasonable doubt that it was the accused Samuela, who the complainant refers to as Samu, and who she had met near Lisi's house in the month of August 2019, at Koro Island. I am also satisfied that it was the same Samuela who had taken the complainant to the village hall that night. What must be emphasized is that the accused Samuela was not a total stranger to the complainant. They were related and known to each other for a long period of time.
- [39] Therefore, in my opinion, the defence version cannot be accepted as truthful and credible.
- [40] Having analysed all the evidence, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable.

- [41] The complainant has provided acceptable explanations for the inconsistency and omissions in her evidence, which were highlighted by the defence, specifically with regard to her police statement.
- [42] It must also be mentioned that in terms of the provisions of Section 129 of the Criminal Procedure Act, "Where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted".
- [43] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charge of Rape with which the accused is charged.
- [44] In the circumstances, I find the accused guilty of the charge of Rape with which he is charged.
- [45] Accordingly, I convict the accused of the charge of Rape.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 18th Day of March 2021

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.