

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

**Criminal Case No.: HAC 113 of 2018**

**STATE**

**V**

- 1. SULUKA TUNAKA**
- 2. JOSEFA SEKOULA**

**Counsel** : Ms. S. Naibe for the State.  
: Ms. V. Narara for the First Accused.  
: Ms. E. Radrole for the Second Accused.

**Dates of Hearing** : 03 and 04 February, 2021  
**Closing Speeches** : 08 February, 2021  
**Date of Summing Up** : 08 February, 2021  
**Date of Judgment** : 09 February, 2021

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**JUDGMENT**

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

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

**FIRST COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**SULUKA TUNAKA**, between the 1<sup>st</sup> day of April, 2017 and the 31<sup>st</sup> day of May 2017 at Sigatoka in the Western Division had carnal knowledge of "LL" without her consent.

## **SECOND COUNT**

### ***Statement of Offence***

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

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

**JOSEFA SEKOULA**, between the 1<sup>st</sup> day of April, 2017 and the 31<sup>st</sup> day of May, 2017 at Sigatoka in the Western Division had carnal knowledge of “LL” without her consent.

## **THIRD COUNT**

### ***Statement of Offence***

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

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

**JOSEFA SEKOULA**, on the 26<sup>th</sup> day of October, 2017 at Sigatoka in the Western Division had carnal knowledge of “LL” without her consent.

2. After the prosecution closed its case, this court had ruled that the first accused had a case to answer in respect of the lesser offence of attempt to commit rape and the second accused had a case to answer for the two counts of rape as charged.
3. The three assessors had returned with a unanimous opinion that the first accused was not guilty of attempt to commit rape and the second accused was also not guilty by unanimous opinion of the two counts of rape as charged.
4. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
5. The prosecution called one witness whereas the first accused remained silent and did not call any witness and the second accused gave evidence and called one witness.

6. The complainant informed the court that in the year 2017 she was 17 years of age and a form 5 student. The complainant and both the accused persons belong to the same church and are members of the same youth group.
7. The complainant treated both the accused persons as her brothers, in April, 2017 there was a youth camp at the village church from Friday till Sunday. The complainant and both the accused persons were part of the youth camp. On Friday afternoon the complainant's aunt Va had sent the complainant and Kini to get some lemons. When they were on their way to get the lemons the first accused approached the complainant and told her that he wanted to talk to her but the complainant refused to talk to him.
8. When the complainant was returning after picking the lemons, the first accused again approached her to talk with him. At this time Kini was sitting beside the road, the second accused also joined the first accused and they wanted the complainant to stay with them by this time the complainant was beside her aunt Va's house.
9. The accused persons forcefully pushed the complainant on the ground, after she fell the first accused removed her pants. The complainant started to push the accused away. After removing her pants the first accused tried to have sexual intercourse with her. The complainant continued pushing the first accused away and was also closing her legs so that the first accused could not penetrate her vagina with his penis.
10. At this time the second accused was standing beside the complainant and the first accused. The complainant could not shout because the accused persons were trying to cover her mouth she was also unable to push the first accused with her hand because he had held her hands tightly.
11. The first accused then told the second accused to have sex with her, the second accused went on top of the complainant and penetrated the

complainant's vagina with his penis, this was the first time anyone had sexual intercourse with her. As a result of what the second accused had done the complainant felt pain in her vagina.

12. The complainant could not escape before the second accused had sex with her because both the accused persons were pushing her on the ground and the second accused kept covering her mouth. The complainant could not push the second accused away because he was too strong for her. During this time Kini was sitting beside the road with her boyfriend Simi about two meters away. The complainant did not call out for help to Kini since Kini was laughing at her.
13. After the accused persons left, the complainant felt pain in her vagina, wore her pants and went to see her aunt Va in the church. In the church she told her aunt that she was having her menstruation, the complainant was afraid to tell her aunt about what had happened to her because she didn't know what would happen to her. The complainant also did not tell her parents because she was afraid they would either beat her or chase her away.
14. In October, 2017 the complainant with her family went for a fund raising in the village church. The complainant was sitting with her friends when the second accused came.
15. When the complainant was walking beside the church the second accused came and pushed her to the ground and removed her pants. The complainant tried to push the accused away but could not because he was strong and covering her mouth. At this time the accused was able to put his penis inside the complainant's vagina. The complainant felt afraid, hopeless and ashamed.
16. After the accused had finished he left, the complainant wore her panty and went to see her mother, she told mother if she could go home but she did

not tell her mother about what had happened to her because she was afraid her mother would beat her up.

17. After the October incident the complainant got sick and was admitted to the hospital here she came to know that she was pregnant. The complainant told her parents that she was pregnant, upon hearing this, her parents got angry with her. The complainant told them to accept her pregnancy because she did not know that she was pregnant. As a result she did not complete her education, however, after the incidents the complainant's relationship with both the accused persons was normal.
18. In cross examination by the first accused counsel the complainant agreed in April, 2017 she had met the first accused in the vacant house on her own without any force and she had gone to meet the accused with one Savenaca.
19. The complainant had met the first accused only once and he did not try to have sex with her, they had a chat and then she left.
20. In cross examination by the second accused counsel the complainant agreed that she had developed a friendship with the second accused overtime. She had gone with the second accused to the vacant house in April, 2017 both had sex and after having sex the complainant wore her clothes when both left they met Kini and Simi at the roadside. Next day the complainant met the second accused in the church and they spoke to each other like normal friends and both continued to meet each other on other occasions.
21. The complainant agreed that in April, 2017 she had consensual sexual intercourse with the second accused. On 26<sup>th</sup> October, 2017 the complainant met the second accused for a "soli" gathering at the church she denied having consensual sexual intercourse with the second accused that day, however, she had gone with the accused to the main road and then back to the church.

22. The complainant agreed that after the April incident she had lied to her aunty Va about having her menstruation but denied that both the allegations she made against the second accused was a lie.
23. The complainant agreed the first allegation came to light after 9 to 10 months and about 4 months after the second allegation after it was discovered that she was pregnant.
24. The first accused chose to remain silent and did not call any witness. From the line of cross examination the first accused took the position that he did not commit the offence of attempted rape as alleged. The allegation is not true when he met the complainant in April, 2017 at the vacant house they only had a chat and nothing else happened. It is incorrect of the complainant to say that both the accused persons had pushed the complainant to the ground and he had attempted to rape her.
25. The chain of events narrated by the complainant is not probable by any means. The complainant could have informed her aunt and her parents about what the first accused had done to her but she did not because nothing had happened. The delay of 9 to 10 months to report the allegation is also worth considering why the complainant who was 17 years old would wait for that long to make such a serious allegation.
26. The second accused gave sworn evidence and also called a witness. He informed the court that in April, 2017 there was a youth camp at the church, on his way to the church he met the complainant and Kini, while talking Simi, Kini's boyfriend came, at this time he requested the complainant if they could talk. The complainant asked him where she was supposed to go, the accused said to the blue house. The complainant agreed so both went towards the blue house sat under a tree and talked.

27. After a while the complainant started kissing the accused and then both kissed and touched each other, she removed her clothes and laid on the ground and then they had sexual intercourse. After this, both wore their clothes and sat down for a while and then both went to where Kini and Simi were.
28. According to the accused when they were talking the complainant was asking him whether he was being true to her and both were laughing. The next day the accused met the complainant in the church they spoke to each other, the complainant kept asking him if he was being true to her and their relationship.
29. On 26<sup>th</sup> October, 2017 there was a fund raising organized at the church, during this night whilst the fundraising was going on the accused met the complainant who was standing at the back of the church with Save and some other youth group members. The accused went to the complainant and called her, both went into the nearby bush while standing they started kissing each other, the complainant touched his penis and sucked it as well then they had sexual intercourse.
30. Thereafter the accused dropped the complainant to where Save and other youth group members were. The accused denied both the allegations made against him, he said that the allegations were not true and on both occasions the complainant had consented to have sexual intercourse with him.
31. The final witness for the second accused Savenaca Tikoisuva informed the court that on 26<sup>th</sup> October, 2017 there was a fundraising for the church in the night the witness was standing in the church compound talking with Kini and the complainant. After a while the second accused came and called the complainant for them to go and talk. The complainant left the witness and Kini and went to talk with the accused.

32. According to the witness the complainant and the accused were in a relationship after a little while both came back.
33. After carefully considering the evidence adduced by the prosecution, the defence raised by the first accused and the evidence adduced by the second accused, this court is unable to rely on the evidence of the complainant as truthful and reliable.
34. The complainant was not consistent in her evidence she said one thing in her evidence in chief and then contradicted herself in cross examination. The demeanour of the complainant was not consistent with her honesty the narration of all the incidents by her were not probable and convincing.
35. In respect of the first accused the complainant gave a description of how both the accused persons had pushed her to the ground, the first accused had removed her pants and tried to penetrate the complainant's vagina with his penis near her aunt's house.
36. However, the complainant made a turnaround in cross examination when she agreed that the first accused only had a chat with her and nothing else happened in the vacant house. The complainant had said in her evidence that the incident had taken place near her aunt's house but in cross examination she agreed that she had gone into the vacant house in the village to chat with the first accused.
37. I do not accept that Kini was laughing at the complainant when the first incident as alleged by the complainant never happened in an open area near the complainant's aunt's house.
38. I do not accept that the complainant told the truth when she said she was afraid of her aunt and her parents so she did not tell them about the incidents.



39. In respect of the second accused the complainant did not tell the truth as well. Again what the complainant told the court is not believable. I accept the evidence of the second accused as honest and truthful when he said that he had consensual sexual intercourse with the complainant in April and in October.
40. The complainant was a free agent who was not under any threat from any of the accused persons and she had all the opportunity to make a complaint to Kini, her aunt and her parents but she did not leads me to the inescapable conclusion that the complainant did not want to make any complaints until she became aware of her pregnancy. I reject the assertion by the complainant that she was afraid of her aunt and her parents.
41. The complainant had the courage of lying to her aunt that she was having her menstruation indicates the extent to which the complainant can lie for her selfish reasons or to exculpate herself.
42. Furthermore, the complainant also did not tell the truth about the October incident involving the second accused. If the complainant had been raped in April by the second accused then it is difficult to comprehend why she would go with the accused alone to an isolated place in the night.
43. It is obvious to me that the complainant's pregnancy motivated her to blame the second accused which she did. Another interesting factor to note is that the complainant told the court that after the incidents she continued to talk with both the accused persons and everything was normal between them. The complainant also used to visit the second accused and his family does show that there was a relationship in existence between the complainant and the second accused till the issue of pregnancy came up.
44. I have also directed my mind to the issue of delay in reporting by the complainant. There is a delay of about 10 months from April 2017 till February 2018 in respect of the first allegation and about 4 months from

October 2017 till February, 2018 in respect of the second allegation. 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.”*

45. The reason given by the complainant for the delay in reporting by the complainant is that she was afraid of her aunt and her parents that they will beat her or chase her away from the house. I did not accept this reason as believable.
46. The complainant was a form 5 student of 17 years in my judgment she had enough understanding to tell someone (other than her aunt or her parents if the incidents had indeed happened) such as a friend or a school teacher but she did not give credence to the defence argument that the reporting of the allegations is only after the complainant came to know of her pregnancy.
47. Furthermore, the complainant was never under any threat by any of the accused persons not to tell anyone about what they had done to her on the contrary they all continued to meet each other and life went on as normal. I do not accept that there were any compelling circumstances that prevented the complainant from reporting the matter after the first alleged incident.
48. Based on the above, there is a reasonable doubt in the prosecution case hence it is unsafe to find both the accused persons guilty on the allegations made by the complainant.

49. This court is not satisfied beyond reasonable doubt that the first accused between the 1<sup>st</sup> of April, 2017 and the 31<sup>st</sup> of May, 2017 had attempted to have forceful sexual intercourse with the complainant.
50. This court is also not satisfied beyond reasonable doubt that the second accused between the 1<sup>st</sup> day of April, 2017 and the 31<sup>st</sup> day of May, 2017 and on the 26<sup>th</sup> day of October, 2017 had carnal knowledge of the complainant without her consent.
51. For the above reasons I agree with the unanimous opinion of the assessors that the first accused is not guilty of the lesser offence of attempt to commit rape.
52. I also agree with the unanimous opinion of the assessors that the second accused is not guilty of the two counts of rape as charged. On the evidence before the court it was open to the assessors to come to this opinion.
53. In view of the above both the accused persons are acquitted of all the charges.
54. This is the judgment of the court.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
09 February, 2021

**Solicitors**

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

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