

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

**Crim. Case No: HAC 170 of 2015**

**STATE**

vs.

**KAMLESH LAL**

**Counsel:** Ms. J. Fatiaki with Mr. J. Singh for the State  
Ms. S.Ratu with Ms. K. Maharaj for Accused

**Date of Hearing:** 20<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> April 2022

**Date of Closing Submission:** 25<sup>th</sup> April 2022

**Date of Judgment:** 17<sup>th</sup> June 2022

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**JUDGMENT**

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1. The Accused is charged with one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act and one Count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are that:

**Count 1**

*Statement of Offence*

**ASSAULT WITH INTENT TO COMMIT RAPE:** *Contrary to Section 209 of the Crimes Act 2009.*

*Particulars of Offence*

**KAMLESH LAL** on the 17<sup>th</sup> day of April 2015 at Nausori in the Central Division, assaulted **LENORA KING** with intent to commit rape.

Count 2

*Statement of Offence*

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

*Particulars of Offence*

**KAMLESH LAL** on the 17<sup>th</sup> day of April, 2015, at Nausori in the Central Division, had carnal knowledge of **LENORA KING**, without her consent.

2. The Accused pleaded not guilty to the offences; hence, the matter proceeded to the hearing. The hearing commenced on the 20th of April 2022 and concluded on the 22nd April 2022. The Prosecution presented the evidence of nine witnesses, including the Complainant. The Accused gave evidence for the Defence. Subsequently, the learned Counsel for the Prosecution and the Defence made their closing submissions. In addition to their respective oral submissions, the learned Counsel for the Prosecution and the Defence filed further written submissions. Having carefully perused the evidence adduced during the hearing and the oral and written submissions of the parties, I now proceed to pronounce the judgment.

**Burden and Standard of Proof**

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until he is proven guilty.
4. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

### Elements of the Offences

5. I now proceed to discuss the main elements of the two offences as charged in the Information.
6. The main elements of the offence of Assault with Intent to Commit Rape are that:
  - i) The Accused,
  - ii) Assaulted the Complainant,
  - iii) With intent to commit rape,
7. The main elements of the offence of Rape as charged are that:
  - i) The Accused,
  - ii) Penetrated the vagina of the Complainant with his penis,
  - iii) The Complainant did not consent to the Accused to penetrate her vagina with his penis,
  - iv) The Accused knew or believed or reckless that the Complainant was not –consenting for him to insert his penis in that manner.
8. The first element is the identity of the Accused. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the Accused who committed these offences against the Complainant. There is no dispute about the correctness of the identification. The Accused and the Complainant are known to each other as they had lived together for over ten years and have two sons. The Accused never raised the issue that the Complainant was mistaken in identifying the alleged perpetrator. The dispute is whether this alleged incident happened involving the Accused.
9. Evidence of the slightest penetration of the vagina of the Complainant with the penis of the Accused is sufficient to prove the element of penetration.

10. Consent is a state of mind that can take many forms, from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. A consent obtained through fear, threat, the exercise of authority, use of force, or intimidation could not be considered as the consent expressed freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
11. The Complainant must have the freedom to make a choice. She must not be pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
12. If the Court is satisfied that the Accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, the Court is then required to consider the last element of the offence. That is whether the Accused honestly believed, knew, or was reckless that the Complainant was freely consenting to this alleged sexual act. The belief in consent is not the same as the hope or expectation that the Complainant was consenting.

### **Admitted Facts**

13. The Prosecution and the Defence tendered following Admitted Facts pursuant to Section 135 of the Criminal Procedure Act, they are that:

- a) **Background Information.**

- i) *Kamlesh Lal was born on the 11<sup>th</sup> of January 1979.*
- ii) *Lenora King (hereinafter referred to as the Complainant) was born on the 15<sup>th</sup> of May 1983.*

- iii) *In 2015 Kamlesh Lal drove a taxi for a living, and the said taxi was a black caldina registration No. LT 4884 with its taxi base at Ross Street, Nausori.*
- iv) *The Complainant and Kamlesh Lal began a relationship in 2002 and they separated in 2014.*
- v) *The Complainant and Kamlesh Lal have two sons namely Edward Shamal Lal born on 2004 and Clayton Krishan Lal born in 2007.*
- vi) *In 2015, the Complainant lived at Newtown in Nausori with her sons and extended family members.*
- vii) *As of February 2015, Kamlesh Lal was living at Bau Road in Nausori with his partner Roselyn O'Connor.*
- viii) *In 2015, Kamlesh Lal used mobile number 9865759.*
- ix) *In 2015, the Complainant used mobile number 9538192.*

b) 17<sup>th</sup> April 2015

- x) *Kamlesh Lal took the Complainant to the Nausori Police Station in his taxi.*
- xi) *From the Police Station, Kamlesh Lal then took the Complainant to the Nausori Health Centre.*
- xii) *At Nausori Health Centre, Kamlesh Lal assisted the Complainant into the examination room.*
- xiii) *The examining Doctor at Nausori Health Centre was Dr. Salome Daumivalu.*
- xiv) *The Complainant was visited at the Hospital that same afternoon by Roselyn O'Connor.*

**Prosecution's Case**

14. The Prosecution alleges that the Accused had taken the Complainant to his house forcefully on the 17th of April 2015 and then assaulted her intending to rape her. He had then penetrated

the vagina of the Complainant without her consent with his penis. The Complainant and the Accused had been in a *de facto* relationship for over a decade and have two sons from that relationship. However, they had separated in April 2015 and had new partners in their respective lives. The Complainant was having an affair with one Roneel Prakash, a Police Officer serving at Lautoka Police Station in 2015. The Accused was having an affair with one Roselyn.

15. On the day of the question, the Complainant had gone to the Nausori town to send some money to her boyfriend *via* Western Union. While she was walking along the road, the accused came with two persons in his car and forcefully put her into the car. They had tied up her hands and legs with her blouse. She was in the back passenger seat. After a while, the two male persons got off the car, and the Accused had placed something sharp, which she presumed was a knife, on her face and threatened her not to shout and stay calm. He had threatened her to act normal when he parked his car at his house. He then carried her to the house and locked the door. The Accused had punched her on her face, stomach, and ribs. He had slapped her several times. He then dragged her to the room and threw her on the bed. She was lying on her back. He then assaulted her and started to suck her neck and then on her nipples. The Accused removed her skirt and tore apart her undergarment. He then penetrated her vagina with his penis without her consent. Having done it, the Accused had turned her to the other side and assaulted her on her back with a blunt side of a knife. He then again penetrated her vagina with his penis. The Complainant managed to squeeze his testicle, and then the Accused stopped his aggression and started to cry, saying that he wanted her and two sons back in his life.
16. The Complainant explained in her evidence that she agreed to get back with him because she thought that would be the safest way to escape the ordeal she was experiencing. She then heard the Accused was conversing with someone on the phone. She later found it was Roneel on the other side of the call. The Accused had forced her to tell Roneel that she had got back with the Accused. The Accused shouted at Roneel, saying he was having sex with the Complainant. Subsequent to her agreement to get back with him, the Accused had taken her to the bathroom for her to have a shower. She couldn't move as her upper body was very

painful. While she was having her shower, the Accused started to take photos of her naked body from his mobile phone. Since her clothes were torn, the Accused gave her one of his T-shirts and undergarments to wear. She requested him to take her to the Hospital which he agreed. She thought that she would be safe at the Hospital. Then her aunty, Marlene King, called on her mobile phone, which the Accused answered. He then passed the phone to her to answer the call. He was present while she was responding to Aunty Marlene's call. She told Marlene she was okay as the Accused was standing close to her.

17. The Accused then took her to the car and then left home. Instead of going to the Hospital, the Accused parked his vehicle near the Police Station, beside the post office. He threatened her not to shout and went to the Police Station. She could see the Accused as he was standing just next to the door and conversing with a Police Officer. The Complainant said that the car window was down and doors were not locked. She did not want to run away or raise the alarm as the Accused was very close to her, and also, he had a knife in the car. She only wanted to go to the Hospital and be safe. She then found the Accused's mobile phone. She started to delete her naked photos taken by the Accused. The Accused returned from the Police Station and then took her to the Nausori Health Centre.
18. The Accused at the Health Centre took her to the Doctor's room. He informed the Doctor that she was assaulted and raped by her boyfriend and needed to be examined. However, the Doctor found the Complainant standing behind the Accused while leaning on the sink, gesturing to the Doctor, indicating that she was unsafe. The Doctor then passed her a piece of paper and a pen to write down what she wanted to inform. She wrote on the paper that it was the Accused who had actually done this to her. The Doctor then requested the Accused to leave the room, but he was hesitant and refused. After several requests and demands, the Accused left the room, leaving the Complainant and the Doctor alone. The Doctor then informed the Police and proceeded to examine the Complainant.

#### Defence's Case

19. The Accused denies this allegation, stating that the Complainant came to his place on her own when he was having lunch with his girlfriend. The Complainant claimed that her

boyfriend had assaulted her. Her top dress was torn, and her skirt and legs were covered with dust and dirt. The Accused then took her inside the house and gave her water. While she was at his place, the Accused received a call from Nausori Police Station. The Police informed him that there was a report lodged against him by Roneel, claiming that he had assaulted and abducted his partner, the Complainant. The Accused had told the Police it was a lie and the Complainant was with him. The Complainant also conversed with the Police, but the Police asked both of them to come to the Police Station. The Accused then requested the Complainant to go to the Police Station. Since the Complainant's t-shirt was torn, he gave her a t-shirt and one of his undergarments to wear.

20. At the Police Station, the Complainant told the Accused to proceed to the Police Station while she was making a call to inquire about the sons and join him later. Accordingly, the Accused went to the Police Station, but the Complainant remained in the car. She did not come to the Police Station. After attending to the Police, the Accused took the Complainant to the Nausori Health Centre. At the Health Centre, the Complainant started to act differently and then made this allegation.
21. During the cross-examination, the Accused adopted rather a different version of the event, contradicting his own version, which he explained in his evidence in chief. He said that the Complainant came to his place on Wednesday as they were having a secret affair after separating. It was not known to their new partners. She used to come to his home, and they talked and had sexual intercourse during those secret meetings. That was how she knew his place. On that Wednesday, the Accused had told her that he couldn't continue this secret affair as he wanted to propose to his new girlfriend, to which the Complainant replied, saying, "if you are not mine, you are nobodies".

#### **Evaluation of Evidence**

22. In view of the evidence presented by the Accused and the Complainant, it appears that the different versions of evidence presented by the Complainant and the Accused. In such circumstances, the Court must consider the whole of the evidence adduced in the trial,



including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible between the Complainant and the Accused.

23. Brennan J in Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) has succinctly discussed the appropriate approach to directing the Jury in a case where there are conflicting versions of evidence given by the Prosecution witnesses 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."*

24. Dunford J in R v Li (2003) 140 A Crim R 288, at 301, adopting the principle enunciated by Brennan J in Liberato (supra) outlined that:

*"Not only was it there in his last passage a reference to "a doubt based on reason" but in two instances, the judge has proposed to the jury the question which of the two cases is correct, what the complainant says or what the*

*appellant says. This was also a material misdirection. The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth; Liberato v The Queen (1985) 159 CLR 507 at 515. They should have been directed the test was whether taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence."*

25. Basnayake JA in Goundar v State [2015] FJCA 1; AAU0077.2011 (2 January 2015), while accepting the principle expounded in **Liberato (supra)** and **R v Li (supra)** held that:

*"The learned judge directed the Assessors to find the appellant guilty or not guilty by considering whose evidence they believe. By so doing the Assessors have been misdirected with regard to the burden of proof, and thereby caused a miscarriage of justice. The Assessors may believe the evidence of Emma and disbelieve the evidence of the appellant. It does not mean that the case has been proved beyond a reasonable doubt. If, after considering the evidence of the whole case, a reasonable doubt is created in the minds of the Assessors with regard to the guilt of the appellant, the appellant is entitled to the benefit of that doubt and entitled to an acquittal. The courts have held in a series of cases that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party"*

26. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to give evidence. Therefore, such evidence presented by the Accused need to be considered when determining the facts of this case.

27. Lord Reading CJ in Abramovitch (1914) 84 L.J.K.B 397 held that:

*"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is*

*guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitle to be acquitted, inasmuch as the crown would then have failed to discharge the burden impose upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases; it always remains on the prosecution."*

28. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not mean that the Prosecution has established that the Accused is guilty of the crime. Still, the Prosecution has to satisfy that it has established, on its own evidence, beyond a reasonable doubt, that the Accused committed these offences as charged in the information.

#### **Credibility and Reliability of Evidence**

29. Kulatunga J in **State v Solomone Ourai (HC Criminal - HAC 14 of 2022)** has explained the test of determining the testimonial trustworthiness of the witness on the basis of credibility and reliability of the evidence, where his Lordship held that:

*"In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible*

*cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526); 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288J”*

30. Consequently, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or the accuracy of the evidence.

#### **Evidence of the Accused**

31. Keeping in mind the above-discussed legal principles, I now proceed to analyze the evidence of the Accused. In determining the credibility of the evidence given by the Accused, I would proceed to consider his evidence based on probability.
32. According to the Accused, the Complainant did not want to talk to him when he tried to call her on the morning of the 17th of April 2015, once on her mobile phone and then on the landline. They had been separated by then and moved on with their lives with new partners. The Complainant, in her evidence, confirmed that she hung up the phone when the Accused called her on the morning of 17th of April 2015. However, having refused even to receive a call from the Accused, the Complainant had chosen to find refuge and help from the Accused a few hours later, claiming that her boyfriend assaulted her. Interestingly, the Complainant was living surrounded by her relatives, who could have promptly attended to her. Marlene, the Aunty and Tevita, the cousin, promptly attended to the Complainant when they heard about this alleged incident which the Accused did not challenge or suggested otherwise. Therefore, the evidence given by the Accused claiming that the Complainant came to his place, looking for refuge and protection in a chaotic physical condition, claiming that her boyfriend had assaulted her, is improbable.

33. Moreover, the Accused stated that the Complainant came to his house wearing a torn t-shirt and a blue mini skirt. Her face was red. However, he had given her not only a t-shirt but one of his undergarments. There was no need to give her undergarments if she only came to his place wearing a torn t-shirt. According to the Accused, she had only complained about assault and not of raping by her boyfriend.
34. On the contrary, the Complainant said that the Accused tore her undergarment before penetrating her vagina with his penis. That was the reason she wanted to ask him for an undergarment. On that account, the Accused's claim that the Complainant came to his house wearing a torn t-shirt, seeking refuge and help, and then he gave her one of his undergarments to wear, is improbable.
35. The Accused never put to the Complainant suggesting that she had visited the Accused's place before the alleged incident as they had a secret relationship. Furthermore, he did not ask the Complainant to comment whether she had sexual intercourse with the Accused during those secret visits. However, during the cross-examination, the Accused explained that the Complainant used to visit his place secretly and had an intimate relationship with him. He further said the Complainant made this false allegation because she did not want the Accused to go ahead with his plan to marry his new girlfriend. In addition, the Accused did not suggest to the Complainant when she gave evidence whether she answered the call came to the Accused's phone from Nausori Police Station. However, the Accused said in his evidence that the Complainant too spoke to the Police Officer who called from Nausori Police Station, informing him that Roncel had lodged a complaint against the Accused alleging that he had abducted the Complainant.
36. I consider the demeanour and deportment of the Accused while giving evidence. He was evasive and not forthright in answering the question posed by the learned Counsel for the Prosecution. Instead, he questioned back the learned Counsel for the Prosecution. His narration of the event was not descriptive and coherent.

37. The above-discussed factors have certainly affected the credibility and veracity of the evidence given by the Accused; hence, I do not find that they are true or may be true. On that basis, I find the evidence presented by the Accused has not created any doubt about the Prosecution case.

### Evidence of the Prosecution

38. I will now proceed to analyze the evidence of the Prosecution. The Court heard the submissions made by the learned Counsel for the Defence, stating that the Doctor's findings during the medical examination of the Complainant do not corroborate the evidence given by the Complainant regarding the assault she received from the Accused.

39. The Complainant claimed that her hands and legs were tied up by the two accomplices of the Accused when they forcefully pulled her into the car using her blouse. The Doctor had not found any marks on her legs or hands during the medical examination. Doctor Salome explained that it could not always be expected to have something on the hands or legs if they have been bound because it could depend on the force, how tight the hands were tied up and how long they were tied up.

40. In evaluating the evidence given by Doctor Salome, I find assistance from the directions given by the Court of Appeal of England in R v Dawson (81 Cr App R 150 CA at 153, 154) in respect of evaluating the expert opinion given by the Doctor's evidence, which this Court adopted in State v Ratuwaga [2021] FJHC 180; HAC135.2019 (10 March 2021). The Court of Appeal in Dawson (supra) found that:

*"You must remember this, that a doctor, and you may have thought that Dr. Green was a splendid example of fairness, is speaking from a scientific point of view. He was saying, 'I cannot as a scientific certainty rule out that which you postulate, namely partial asphyxia, recovery and then a heart attack,' but, he said, 'I incline strongly against that view.' You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific*

*certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr. Green as a scientific certainty, might, with propriety, satisfy you so that you felt sure. Do not be misled. There is no such thing as certainty in this life, absolute certainty. You ask yourselves the simple question upon the whole of the evidence do I feel sure? Take account of course of the doctor's evidence. It is the most important evidence on this aspect. He is really the only one qualified to speak here. Take account of his reservation fully. That direction, in our judgment, correctly draws the distinction between what might be described as scientific proof on the one hand and legal proof on the other. It is, with respect, an admirably lucid and succinct way of dealing with a problem which often arises in connection with scientific evidence. It is, of course, part of cross-examining counsel's duty to invite expert witnesses to consider alternative hypotheses and, after examining them in detail, to conclude by asking, 'Can you exclude the possibility?' The available data may be inadequate to prove scientifically that the alternative hypotheses is false, so the scientific witness will answer, 'No, I cannot exclude it,' though the effect of his evidence as a whole can be expressed in terms such as, 'But for all practical purposes (including the jury's) it is so unlikely that it can safely be ignored.' This is in substance what Dr. Green said."*

41. In this case, Doctor Salome specifically said that it could not always expect to have marks on the hands or legs due to tying up with clothes as it depends on the force used, how the hands were tied up, how long they were tied up, and the nature of the object used to tie up the hands etc. Besides that, the Doctor had observed swelling on her face, bruises on her back, abrasions on the back calf muscle of her legs and knee, an old bleeding mark on her ear, tenderness on her head, and injuries in her genital areas, suggesting recent sexual injuries caused by penetration. Moreover, the Doctor had also found certain suction marks on her neck. These injuries corresponded with the Complainant's evidence explaining the nature of the assault that she received from the Accused.

42. Considering the evidence given by the Complainant, Doctor Salome, and Marlene King, I find the absence of any marks on the legs and hands of the Complainant due to her being tied up has not affected the credibility of her evidence.
43. The Court further heard the submissions of the learned Counsel for the Defence, urging the Court to consider that the Complainant had not taken any steps to complain or alarm the Police Officers when she was taken to the Police Station by the Accused on their way to the Health Centre. The Complainant, in her evidence, specifically stated that she only wanted to escape and go to the Hospital as she felt that she would be safe at the Hospital. The Accused had threatened her not to raise any alarm when he went to the Police Station. The Accused remained in the visible vicinity of the Complainant when he went to the Police Station. The Complainant knew the Accused had a knife in his car. The Complainant further said that she did not want to alarm anyone even after she found the Accused mobile phone. She only wanted to delete the naked photos of her on the phone. Doctor Salome confirms that the Complainant was in pain, complaining that she could not sit and was leaning towards the sink when she came to her room. This evidence suggests that the Complainant only wanted to get to the Hospital and feel safe away from the Accused. She did not wish to complain about the incident but somehow escape from the ordeal that she was facing and feel safe. She had not asked the Doctor to complain to the Police. The Doctor had actually informed the Police of her own volition. Therefore, I find it is safe to accept the explanation given by the Complainant regarding this issue. Thus it does not affect the credibility and veracity of the evidence presented by the Complainant.
44. Furthermore, I found certain contradictions *inter se* and *per se* in the evidence given by the Prosecution witnesses, mainly concerning the incidental and ancillary events that took place during that day. One of such is the evidence given by Roneel, explaining that he initially gave a call to the Complainant, for which she answered him stating that she had moved back with the Accused. He had then called her again. Then the Accused answered him and swore and threatened him. According to Roneel, he made these calls while still at the Police Barracks at Lautoka Police Station. However, the Complainant did not mention receiving such a call from Roneel. According to the Complainant, she overheard a telephone

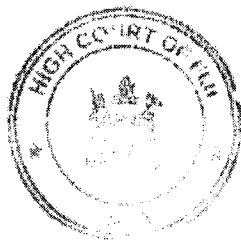



conversation between the Accused and Roneel and did not know who actually made that call. The Accused then forced her to tell Roneel that she had moved back with the Accused. Further to that, Vandana Kumar, the Police Officer who recorded the statement of Roneel, stated that Roneel received a call while they were in the town.

45. Besides these contradictions, this evidence establishes that there was a communication between the Accused and Roneel regarding the Complainant. Then Roneel had reported to the Police that the Accused had threatened him and abducted his girlfriend. It is apparent that people could not have the capacity to remember, register in their minds and recall all the events that took place seven years ago in April 2015 with the same and similar accuracy between them. In addition, I do not find any substantial variance in the events and incidents the witnesses explained in their evidence. The Accused had communicated with Roneel. Subsequently, Roneel had lodged a complaint against the Accused. The Accused, in his evidence, stated that he received a call from Nausori Police Station informing him about this report made by Roneel. Vandana Kumar said that she recorded the report lodged by Roneel. It was later sent to Nausori Police Station. There is no considerable variance between the evidence of the Accused, the Complainant, Marlene King and Tevita King regarding the telephone conversations they had among themselves and their respective movements during that day. As a consequence of these reasons and considering the human nature of remembering, observing and recalling events, these contractions and omissions have not affected the credibility of the evidence given by the Complainant.
46. Doctor Salome was the first person to whom the Complainant had related this matter. The Court heard the evidence of Doctor Salome explaining the history given by the Complainant during the medical examination. Indeed, the evidence regarding the history provided by the Complainant is not evidence of facts to establish the truth of the events contained in the history. It is evidence of the consistency of the Complainant.
47. The Complainant explained that she had to agree with the Accused, stating that she would get back with him because she felt that was the only way of avoiding further harm and escaping from the Accused. She then told Roneel that she had moved back with the Accused

without informing him of the actual ordeal she was facing at that time. When she received the call from Marlene, the Accused had settled down, and both were getting ready to go to the Health centre. Instead of telling Marlene what she was facing, she promptly and shortly told Merlin that she was okay. Taking into consideration the circumstances she faced at that time, she reacted and behaved with promptness and spontaneity.

48. Furthermore, the Complainant's narration of the event in her evidence was descriptive and coherent. She was not evasive but showed distress while elaborating on the events she had encountered that day.
49. Given the reasons discussed above, I find the Complainant's evidence is credible and reliable, and I accept it as the truth. Accordingly, I hold that the Prosecution has proven beyond reasonable doubt that the Accused had assaulted the Complainant with intent to rape her and then penetrated her vagina with his penis without her consent.
50. In conclusion, I find the Accused is guilty of one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act and one Count of Rape contrary to Section 207 (1) (2) (a) of the Crimes Act and convict to the same accordingly.



  
.....  
Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

17<sup>th</sup> June 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.