IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Crim. Case No: HAC 37 of 2021

THE STATE

vs.

APENISA TAVIAKAI

Counsel	:	Ms. M.Lomaloma with Ms. E. Thaggard for State Ms. T. Tuiloma with K. Kumar for Defence
Dates of Hearing	:	20, 21 June 2022
Date of Judgment	:	22 June 2022

(Name of the Complainant is suppressed. She is referred to as LS)

JUDGMENT

1. The accused, Apenisa Tavika was charged with two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The Prosecution alleges that the accused on 29 May 2021 and 7 June 2021, at Vuo village, Labasa had carnal knowledge of LS, the complainant, without her consent.

2. The accused pleaded not guilty to the charge. At the trial, the Prosecution presented the evidence of the complainant and her father. The two doctors who had conducted the medical examination were made available for them to be cross-examined at the request of the Defence. At the end of the Prosecution case, the accused was put to his defence. Only the accused gave evidence for Defence. At the end of the Defence case, the Court heard oral submissions from both Counsel. Having carefully considered the evidence presented at the trial, I now proceed to pronounce my judgment as follows.

3. Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. That burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused shall prevail until the charge is proved beyond reasonable doubt.

4. According to the Information, the accused on both counts is charged under Section 207 (2) (a) of the Crimes Act 2009. Under this section, the offence of Rape is defined as follows: *a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent.* In the context of this case, 'carnal knowledge' could be defined as an act of penetration of the vagina of the complainant with the penis of the accused. A slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. A consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

5. The Prosecution must also prove the fourth or the mental element of Rape that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.

6. The complainant was a child of 14 years of age at the time of the offence. She appeared matured as she took stand. Her testimonial competency was tested at the very outset. She understood the questions the Court put to her and the answers she gave were understandable or intelligible. She proved to be competent and passed the competency test.

7. Considering that she is a child witness, I took all protective measures available at my disposal to protect a vulnerable witness. However, none of those measures will influence me in my judgment and I have not drawn any negative inference from them against the accused.

Case for Prosecution

LS (The Complainant)

8. The complainant- LS gave evidence under oath. To shows that she was born 8 March 2008, her birth certificate was tendered marked as PE1. She is 15 years old at the time of her evidence. She and his family has moved to Vuo village in 2021 from Nakelikoso Village, as a result of the incident. In May 2021, LS was staying with her parents and two of her siblings in Vuo village. She remembers 29 May 2021 because that was the day Baraka or Apenisa did something to her.

9. Apenisa was living in a house just beside her house. On that day, she went to Apenisa's house to ask for salt. Apenisa pulled her by her hand into his bedroom and made her lie down on the carpet that was spread on the floor. He then came and pulled down her panty. He inserted his penis into her vagina. A white colour fluid came out. He inserted his penis into her vagina twice for a short time. Her vagina and inner thighs were paining. She was facing upwards and Apenisa was facing her at a close range. He was on top of her, facing down. He pushed him away, stood up, wore her clothes, opened the door and then ran out. He did not ask anything before inserting his penis into her vagina. She did not want Apenisa to do that. She told her twin sister Salanieta of what had happened. This incident happened during the day time. The sunlight was coming through the window when the wind was blowing through the curtains. Her father and Apenisa are brothers. She used to call him 'big uncle'.

10. The second incident occurred at the cassava patch just after one week in June of 2021. She was home that day. Apenisa was calling her. She did not want to go. She went outside to get cucumbers that's when Apensia pulled her by the hand to the cassava patch just beside their cucumber plantation. He made her lie down. She tried to run and try to scream. He blocked her mouth with his hands. He pulled her back by her singlet and made her lie down on the soil. He took off her panty. He then took out his penis and inserted it into her vagina for a short time. A fluid came out. It was disgusting. She said that when he was inserting his penis into her vagina, she was struggling and tried to scream but he blocked her mouth again. This incident occurred during midday. He never told anything to her.

11. She heard her father's voice calling her. Apenisa stood up, put on his clothes and then he went towards Talevu Jona's place asking, where's LS? where's LS?. When he had left, she got up, put on her panty. Then her father saw her and called her. They went home, and her father started asking what Ta Apenisa did to her because he was suspicious that Talevu Apenisa took her. She did not want to tell her father because, Apenisa, as soon as he stood up at the cassava

patch, told her that if she told anyone, he'll kill her. She was frightened. Then her father took the hose and told her to tell the truth. Then she told the truth to her father all that Apenisa did to her. Father took her to Talevu Jona's place where her father was told to report it to police. The matter was reported to the police and the police came and took her to the hospital. She had a respectful relationship *vis-a`-vis* Apensia because he is her father's elder brother.

12. Under cross- examination, LS said that Apenisa stays in the house next to her house about 5 to 6 meters away and the distance is the same as between Ta Apenisa house and Ta Jona house. The Apenisa's house has windows. He was living with Paula and Taka. She said that when Apenisa pulled her into the room she screamed but he blocked her mouth. When he pulled her panties with both his hands, she did scream but he blocked her mouth again. When he took off his clothes with both his hands, she screamed but he blocked her mouth. When Apenisa inserted his penis into her vagina she felt the pain but was not bleeding. She admitted that she did not relay the first incident either to her father or to her mother when she returned home. She went straight to have a shower.

13. Giving evidence about the second incident, LS said that when Apenisa grabbed her from the cucumber plantation she creamed, but he blocked her mouth. She said she was crying but hid her tears when her father called her. She denied that she had told her father that Apenisa had sex with her 4 times. She also denied that she went to Apenisa's house to get coconut oil despite that the statement to police states so. She admitted that there was little bit blood between her thighs although she, in her examination in chief, mentioned only about the white fluid. She said she forgot when she was being examined in chief that she had blood. She denied that she was following Apenisa to the cassava patch although her statement to police states so. LS said that she was crying while giving the statement to police and that the statement was not read back to her.

Orisi Tuvuki

14. Complainant's father, Orisi gave evidence next. He testified that he and his wife were residing at Mali Island and came to the mainland to look after his children's education. In June 2021, he was staying at Vuo. On 7 June 2021, he was at home in Vuo. His wife had gone for work and he was looking after his children. He called the younger kid, Makereta. She was at a

neighbour's house. He was very concerned about the children because they were girls and they were staying together. She called LS once, twice and thrice and then he saw her running towards home from the cassava patch just beside the house. She didn't look fine to him, as if something wrong had happened. He started questioning her, and upon questioning her, he felt that she was lying. She just answered with a cry. She was crying, and stated that her uncle was the one that had done something to her. She was referring to Apenisa Taviakai, his mother's elder sister's son. Apensia sleeps in another house but all the other things including eating, cooking and washing of his clothes are done in his house.

15. It was very hard to make her answer. Finally, LS told him that her uncle had raped her and used her and also warned her if she's going to relay the incident to anybody, he will kill her. She told him that Apensia raped her twice. He was encouraged by two persons not to do anything to Apenisa because he thought of using his spear gun on him. But then he decided not to contradict the law. He reported the matter to the police on that same day. He and his family had good relationship.

16. Under cross- examination, Orisi admitted that if someone were to scream from Apenisa's house it could be heard by him and Jona from his house. He did not agree if a scream had come from the cassava patch, it would it be heard from his house although the cassava patch was just beside his house. He denied that LS had told her that her uncle Apenisa had had sex with her 4 times. In the conversation, she only mentioned twice.

Dr Goundar

17. Doctor Goundar is a MBBS doctor at the Labasa Hospital with 7th years of practice. The complainant LS was referred to him by the police on 7th of June 2021. He took the history of the patient and filled out a police examination form. He recognised the form he filled out and tendered it in evidence marked as DE1.

18. He testified that Doctor Emele who was the Obstetrics Gynaecologist Registrar on call and CPL Ulamila were present at the medical examination. He did the writing part only while Dr Emele did the physical examination. He said that the medical report contains all findings that resulted from the medical examination of the patient LS. He read section D12 of the form where Doctor Emele's medical findings has been recorded. According to those findings, the

patient had a ‘normal looking genitalia’, ‘no lacerations seen’, ‘no bruise seen’. Upon being questioned by Court, doctor Goundar said that they could not see patient’s hymen. Patient’s vaginal swab had not been taken because the ‘Rape Kits’ were out of stock. When a sexually assaulted patients are produced, the first question they ask the police is for the Rape Kit, so they could use the swabs to identify if there was any specimen that could be taken during the examination.

Dr Emele Nalu

19. Doctor Emele Nalu was called next. She has been practicing as a medical officer for 8 years. She has obtained a Medical Degree (MBBS) in 2014. She said that, to become a specialist in the area of gynaecology, she had to obtain a Post Graduate Diploma for Obstetrics and Gynaecology and also a Masters in Obstetrics and Gynaecology. But she wasn’t a specialist yet, just a medical officer on call.

20. On June 2021, she medically examined LS at the Labasa Hospital and examined the patient’s genitalia. Doctor Goundar noted down the answers given by the patient and her medical findings in the medical report.

21. She joined Labasa hospital Obstetrics and Gynaecology department in 2019 and it was her 3rd year in practice when the examination was conducted. When asked if she was familiar with virginal injuries following incidents of forced sexual intercourse, she said that she had seen one or two cases from the past. She said that vaginal injury or a vaginal tear will take two months to heal. When asked if she was familiar with hymeneal injuries or hymeneal tears following an incident of forced sexual intercourse, she said that she had not come across any case with hymeneal injury form her past experience. She was not sure how long would it take to heal a hymeneal injury.

22. Referring to D12 of the medical form, she confirmed that it contained her findings when she examined LS. She confirmed that the initials at the bottom of each page belong to Doctor Shivneel Goundar. She said that she must have forgotten to initial the report because she was busy on that day with other emergency cases. She confirmed that she did not take down any note on her own. When asked by the Court whether she examined the hymen of the patient to confirm if it was present or not, doctor said that she did not see the hymen at that time. She

agreed that she should have examined the hymen when an alleged Rape victim was referred to her. She could not tell if she would consider it an injury if the hymen was not intact because she didn't document it at the time she examined the patient. The fact that the hymen is intact or not does not say that the patient has been sexually assaulted or not. It's up to the court to decide whether the patient has been sexually assaulted or not. She agreed that some women are born without hymen.

Case for Defence

Apenisa Taviakai (The Accused)

23. Apanisa is 63 years of age. He completely denied the allegations. He testified that his mother and Orisi's mother are sisters. In June 2021, he was staying in Vuo with Paula his wife Taka and one Ananaia. On May, 29 May 2021 he was alone at home. Paula and Taka were away. Ananaia had gone to work. He was just lying down at home from the morning till the afternoon. He did not have any visitors that day. He denied that LS had come to his house asking for salt. He denied that he had pulled her into his room and had forceful sexual intercourse with her. On 7 June 2021, the day the police came to see him, he was just staying at home watching some movies. He did not leave the house at any point. He denied the whole incident allegedly occurred at the cassava patch that LS told of in court. He has no idea as to why his niece should make up a story to put him in trouble.

24. Under cross- examination, Apenisa agreed that he was considered by the complainant as a fatherly figure and that she trusted him.

Analysis

25. There were two conflicting versions at the trial. The Prosecution says that the accused Apenisa Taviakai had carnal knowledge of the complainant on two occasions, firstly on 29 May 2021 and subsequently on 7 June 2021. The Defence denies the allegation and insists that the complainant was lying. Resolution of the dispute turns on who told the truth in Court. However, the accused bears no burden to prove that he did not penetrate the vagina of the complainant on each occasion. The Prosecution must prove all elements of each charge beyond a reasonable doubt.

26. The complainant is a child. She is confident and her evidence is straightforward and not evasive. The Defence highlighted some inconsistencies in her evidence *vis-a`-vis* her statement to police. I do not consider them to be material enough to discredit the version of the Prosecution. I must give reasons for saying so. First of all I bear in mind that the witness in this case is a child. She was giving evidence nearly one year after she had made her statement to police. The statement had been given a few hours after a horrific attack. She said the statement was not read back to her. She said she was crying while giving the statement. She said she forgot to tell that she had blood between her thighs after the first incident. She did not tell about blood even in her examination-in-chief. She spoke about blood only when she was questioned by the Defence Counsel. In her evidence under cross-examination, she was sure that there was little blood between her thighs, in addition to the white colour fluid, which she described as disgusting. She had gone straight to have a shower. Wanting to have a shower is consistent with her disgust with blood and fluid.

27. It is natural for a child not tell the full story unless questioned by an adult. It cannot be expected specially from the police investigators in this case, who had even failed to take a vaginal swab, (according to doctor Emele, was the first thing the medics would want in a rape case),- on the pretext that 'Rape Kits' were out of stock, to ask questions to the extent the Defence Counsel did. Under these circumstances, I would be surprised if this child witness told the verbatim in Court, something that cannot be expected even from an adult witness.

28. According to her statement, the complainant had told the police that she went to Apensia's house to get coconut oil. In her evidence, she told that she went there to get salt. She in Court denied that she went to Apanisa's house to get coconut oil despite that the statement to police reads so. What is material is whether she had gone to Apenisa's house that particular day or not. There is no inconsistency in that regard. The inconsistency in respect of the reason why she went there-to get salt or coconut oil- in my opinion, is immaterial when it comes to the crucial issue in this case.

29. In respect of the second incident, the Defence says that there is a contradiction or inconsistency in that, as per her previous statement, she had told police that 'he took the lead and I followed him' whereas in her evidence she said that Apenisa pulled her by hand and denied that she had followed him. Bearing mind that her previous statement to police is not

evidence, I perused her statement only to check if there is a contradiction in this regard. She had told the police the following:

> [H]e started calling my name, he told me to come outside and go with him to our cassava patch. I said that I don't want to, he said he will tell my father about me that I always swear at him, so my father will smack me. So I went with him. He took the lead and I followed him.

30. When the paragraph quoted above is read in context, there is no material contradiction so as to discredit the version of the complainant. It is my considered opinion that there are no material inconsistencies or contradictions in her own evidence or with the evidence of others who gave evidence for the Prosecution. Merely because there is a difference, variation or contradiction in the evidence on a particular point would not make witness a liar. None of the so called contradictions highlighted by the Defence Counsel in her closing is material to the main issue at the trial.

31. It was suggested by the Defence that the complainant did not shout or scream for help although in both incidents her house is situated close by. She said she screamed on both occasions but her mouth was blocked by the accused with his hands. In my opinion, even if she had not shouted, the behaviour of the complainant is quite natural and understandable in the circumstances of this case. There is a big difference in terms of the physique, the strength and the age between the two in the encounter. She must have expected a dreadful reaction if she was bold enough to shout. Faced with such an unexpected situation, it is natural for a child to get frightened and be frozen and to go dumb completely.

32. The Defence appears to argue that the complainant did not complain to anyone until she was grilled by her father with a hose because that incident never happened. According to complainant's evidence, after the first incident, she went home and told her twin sister but she did not complain to her father or mother. Her twin sister was not called to confirm her evidence. No reason was given for that. She is also a child, and the difficulty in getting a child witness to give evidence in a court is quite understandable. The Prosecution should not be blamed for that.

33. It is understandable why she did not complain to her father or her mother. The complainant treated the accused as a fatherly figure. He is her big uncle or Talevu. He was treated with respect. He is virtually residing within the same community. Under these circumstances, it is

possible for her to be frightened to complain to an adult. It is also possible that she must have been shocked to receive this kind of a treatment from the accused and thought that her complaint would not be believed or taken seriously. She must have thought that she had done something wrong. The cultural taboos existing in our society would have discouraged her not to complain. I do not consider the lack of recent complaint to be fatal in the circumstances of this case. It is a fallacy to assume where there is no "hue and cry" immediately after a rape, that there was therefore no rape. Not all victims of rape can be assumed to complain of rape immediately after the event. People react in different ways to unexpected situations and there is no standard behaviour for a person faced with such a situation.

34. After the second incident she relayed the incident only when she was grilled by her father with a hose pipe. There seems to be a good reason for her to refrain from complaining about the second incident. The accused had threatened to kill her if she told the incident to anyone.

35. The complainant's conduct and manner of giving evidence in court is consistent with her honesty. Having considered the overall evidence of the complainant, and her demeanour, I am satisfied that the complainant was telling the truth in Court.

36. To be on the safe side, I looked at the other evidence adduced by the Prosecution to satisfy myself beyond reasonable doubt that the complainant told the truth in Court, although no corroboration of complainant's evidence is required to prove a charge of Rape.

37. Complainant's father Orisi (PW2) was called by the Prosecution to support the version of the complainant. I observed his demeanour. I am convinced he gave truthful evidence. There is no material contradiction between his evidence and his previous statement to police. He insisted that he never told the police that he heard from the complainant that she was raped four times by the accused. His evidence confirmed that the complainant was in distressed condition after the second incident. By observing her conduct and demeanour, Orisi realised that something had gone wrong with her. His evidence is important because it speaks of complainant's conduct after the second incident which is consistent with that of a rape victim. He also confirmed how close the relationship had been between the accused and his family which was not denied by the accused. In that context, he had no reason to disbelieve her daughter or to make up a false complaint against his cousin and put him in trouble. I accept the evidence of Orisi as truthful.

38. Doctor Goundar and Doctor Emele had been listed as Prosecution witnesses. However, the State did not wish to call them obviously for the reason that the medical report did not support the version of the Prosecution. On a request by the Defence, both the doctors were called by the Prosecution for them to be exposed to cross examination.

39. The Defence heavily relies in the medical report (DE1) and the testimony of the two doctors. Based on their evidence the Defence argues that there was not an iota of evidence to support the version of the complainant that she was raped.

40. Only doctor Emele had done the physical examination of complainant's vagina while doctor Goundar was making notes of her findings. This is somewhat a peculiar practice compared to other medical investigations conducted in other hospitals in respect of alleged rape victims. Although Dr. Goundar said that, as a matter of practice at the Labasa Hospital, the presence of a VOG was required at the examination, doctor Emele confirmed that she was not a VOG but a normal doctor with a MBBS. She had done only one or two cases from the past with virginal injuries following incidents of alleged forced sexual intercourse.

41. Although she said that a vaginal injury or a vaginal tear will take two months to heal, she was not sure how long it would take to heal a hymeneal injury. She had never examined the hymen of the complainant to confirm if it was intact or not. She frankly admitted that she had not come across any case of hymenal injury from her previous experience. When asked by the Court whether she examined the hymen of the patient to confirm if it was present or not, doctor said that she did not see the hymen at that time. However, there is no observation to that effect has been recorded in the medical form. She appears to have taken the view that the presence or absence of hymen is not crucial to decide the issue if a forceful sexual intercourse had taken place or not. However, she agreed that she should have examined the hymen when an alleged rape victim has been referred to her. She also could not tell whether she would have considered a hymenal tear or injury an injury because she didn't document it at the time she examined the patient. She has not expressed her professional opinion at D14 and, in the summary and conclusions (D16), she had not mentioned if her findings were consistent or not with the history provided by the patient. In D16, she has merely narrated what the complainant had informed her.

42. In assessing the expert evidence of doctor Emele I particularly had in mind the guidance provided by Green J (as he then was) in ***C v Cumbria University NHS Trust*** [2014] EWHC 61. Although that guidance was given in a different context, the following passages from paragraph 25 of his judgment are relevant here:

> In making an assessment of whether to accept an expert's opinion the court should take account of a variety of factors including (but not limited to): whether the evidence is tendered in good faith; whether the expert is "responsible", "competent" and/or "respectable"; and whether the opinion is reasonable and logical…..
>
> A "responsible" expert is one who does not adopt an extreme position, who will make the necessary concessions and who adheres to the spirit as well as the words of his professional declaration (see CPR 35 and the PD and Protocol).
>
> Logic/reasonableness: By far and away the most important consideration is the logic of the expert opinion tendered. A Judge should not simply accept an expert opinion; it should be tested both against the other evidence tendered during the course of a trial, and, against its internal consistency.
>
> For the avoidance of doubt, I am not in a position to comment on his qualities as a doctor and do not do so. But, for reasons which I will explain below, I found his approach as a witness to be careless and partisan in a way which was inconsistent with his role and duties as an expert.
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> Experts must be rigorous in ensuring that they root their opinions in the evidence, not try to make the evidence fit their opinions. To help equip expert witnesses with the vital skills and awareness to fulfil their duty to the court in complex personal injury actions and to avoid the pitfalls into which it is so easy precipitately to fall.

43. Without examining the patient's hymen, it is not for a doctor, in my opinion, to make a comment in his /her findings that the patient had a 'normal looking genitalia' especially in the context of an alleged rape case. In my opinion, she fell short of a standard expected of an expert on the field of gynaecology. It is common knowledge that a woman may bleed when she has penetrative sex for the first time because of her hymen stretching or tearing. There is evidence in this case that the complainant had blood after the first alleged incident. In that context, the non-examination of hymen in my opinion is a crucial irresponsibility on the part of a doctor.

44. The medical examination has been conducted nine days after the 1st alleged rape incident. The credibility of doctor's opinion that it takes two months for a vaginal injury or a vaginal tear to heal was called into question by her own evidence that she was not sure how long would it take to heal a hymeneal injury. Therefore, her finding that 'no lacerations seen', 'no bruise seen' carries less weight and is not conclusive. In the circumstances of this case, the

absence of injuries in the body or vagina, in my opinion, does not necessarily suggest that the complainant was never raped or that the sexual intercourse was consensual. I reject the medical findings of the doctor. They did not create any doubt in the version of events of the Prosecution case.

45. Before I depart from my discussion on the medical evidence, I must make a comment on the practice adopted by the medics at the Labasa Hospital because it raises a serious credibility issue when it comes to evidence. Evidentiary rules at common law enables a witness while under examination to refresh his or her memory by referring to any writing made by himself at the time of transaction concerning which he is being questioned or soon afterwards, or to a writing made similarly by another person and read by the witness immediately or soon after the writing is made.

46. This evidentiary rule at common law as it then existed has been codified in some commonwealth jurisdictions such as India and Ceylon (as it then was). Section 159 of the Indian Evidence Act, 1872 provides as follows:

> A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.
>
> The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.
>
> Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non – production of the original.

47. Referring to this Section, the Indian Supreme Court in ***State of Andhra Pradesh V. CheemaLapati Ganeshwara Rao*** AIR 1963 SC 1850: (1963) 2 CRI LJ 671 explained the rational basis of this rule as follows:

> Section 159 expressly enables a witness while under examination to refresh his memory by referring to any writing made by himself at the time of transaction concerning which he is being questioned or soon afterwards, or to a writing made similarly by another person and read by the witness immediately or soon after the writing is made.
>
> Where a witness has to depose to a large number of transactions and those transactions are referred to or are mentioned in either in the account books or in other documents there is nothing wrong in allowing the witness to refer to the book and documents while answering the question put to him in his examination. He cannot be expected to remember every transaction in all its details and Section

> 160 specifically permits a witness to testify to the fact mentioned in the documents referred to in section 159 although he has no recollection of the facts themselves, **if she is sure that the facts were correctly recorded in the document.** Therefore, it is not correct to contend that the approver should have been allowed to refer to the account to books only when he was in a difficulty and not generally (emphasis added)

48. This rule should be equally applicable to the experts and to the doctors in the present case. Doctor Emele who had conducted the medical examination has not made any notes on her own. Notes have been taken down by doctor Goundar. I find no fault with that and is permissible under the rule mentioned above. However, when it comes to giving evidence by referring to notes made by somebody else to refresh the memory of a witness, the court has to be satisfied that the note or the record that is being perused by the witness is a correct reflection of the findings of the witness. There is no doubt that the notes have been taken down by doctor Goundar contemporaneously with the medical examination. However, doctor Emele did not say that she read the notes made by doctor Goundar and verified its accuracy at the time of the examination concerning which she was questioned, or so soon afterwards when the transaction was fresh in her memory. Therefore no adoption of its content by the witness as her own contemporaneously. She frankly admitted that she forgot to put her signature on that medical report that day because she was a bit busy with other emergency cases.

49. In the case of ***R v Van Beelen*** (1972) 6 SASR 534), the Supreme Court of South Africa observed as follows:

> One of the factors a court must consider when determining whether to allow a witness to revive his or her memory by reading a document is **whether the witness wrote or adopted the document at a time when the facts were fresh in his or her memory.** The court must determine this as a question of fact and while the length of time between the events in question and making the document is relevant, it is not determinative (*Evidence Act 2008* s32; (emphasis added)

50. In view of the legal position discussed above, it is not safe to cat on the medical evidence adduced in this case.

51. The accused is closely related to the complainant. There is no apparent reason for her to make up these allegations. Even the accused has no idea as to why the complainant should make up a false allegation against him. I am convinced that the complainant told the truth in Court.

52. The Defence is not burdened to prove anything in this case. However, upon his rights being explained, the accused elected to give evidence under oath. Even though I prefer the evidence for the Prosecution, I must not convict unless I am sure beyond reasonable doubt of the truth of that evidence. Therefore it is incumbent upon me to analyse the evidence of the Defence to see if a reasonable doubt has been created in the Prosecution case.

53. Accused was the only witness for Defence. I examined his evidence to see if it is believable, bearing in mind that he has nothing to prove in this case. His evidence is one of complete denial. He denied inserting his penis into complainant's vagina on both the occasions.

54. The accused had no idea as to why this serious allegation has been levelled against him by her niece, the complainant. In the absence of an apparent motive, it is hardly possible for a girl of her age to fabricate a case of this nature. I am unable to accept his denial. The accused, in desperation, was trying to save his own skin. I reject the evidence of the Defence and accept the version of events of the Prosecution.

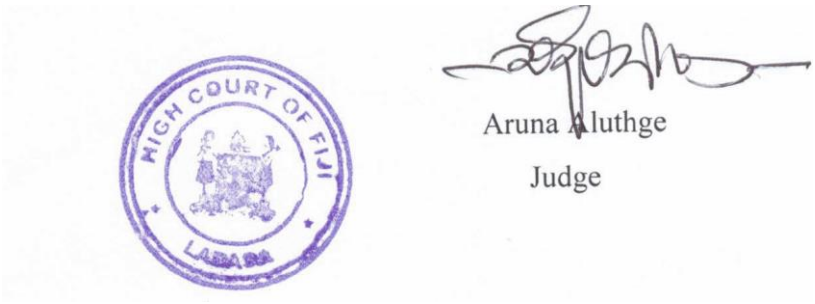
55. Having satisfied with the credibility of the version of the Prosecution, now I proceed to see if all the elements of Rape as charged have been satisfied on each count. The Prosecution proved that it was the Accused that has committed this offence. Evidence of the Complainant and that of her father clearly established the identity of the Accused. The Accused is known to both of them for a long time and the accused himself admitted that the complainant knew her. Both the alleged incidents took place in broad day light.

56. The complainant said that the accused inserted his penis into her vagina on both occasions. Her evidence proved that a penetration of her vagina had taken place.

57. There is clear evidence that the complainant did not consent to the sexual intercourse on both occasions. In the first incident she was forcibly pulled into his room and in the second incident she was pulled to the cassava patch. He pulled her panty down. She struggled and screamed. She pushed him and ran home after the attack. She did not want the accused to do all that. I am convinced that the sexual intercourse on both occasions was not consensual. When the accused was being pushed and resisted and when she screamed he must have known that the complainant was not consenting to a sexual intercourse. The fourth element of Rape is also

satisfied. The Prosecution proved all elements of the offence of Rape on each count as charged beyond reasonable doubt.

58. I find the accused guilty of Rape on each count. The accused is convicted accordingly.



22 June 2022
At Labasa

Counsel:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence