

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

**Crim. Case No: HAC 262 of 2020**

**THE STATE**

**vs.**

**LISALA ROKOVATUNAWA TUIVUYA**

Counsel :                Ms. P. Ram for State  
                                 Ms. L. Ratidara for Defence

Dates of Hearing:      12, 13 July 2022

Closing Submissions: 13, 14 July 2022

Date of Judgment :   15 July 2022

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

**JUDGMENT**

1. The accused was initially charged with one count of Rape on the following information dated 24 September, 2020.

**COUNT ONE**

Statement of Offence

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

Particular of Offence

LISALA ROKOVATUNAWA TUIVUYA on the 22<sup>nd</sup> day of August, 2020 at Navutulevu village, Serua, in the Central Division, penetrated the vulva of MM with his fingers, without her consent

- At a pre-trial conference, the trial was fixed for 11 July 2022. On that date, the State was not ready for trial. The State Counsel moved to amend the information on the basis of a statement given by the complainant at what she described as a ‘witness interview’. The Defence did not object to the application thus the trial was re-fixed for 12 July 2022 on which date, the following information was filed with an additional count of Rape.

COUNT 1

Statement of Offence

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

Particular of Offence

LISALA ROKOVATUNAWA TUIVUYA on the 22<sup>nd</sup> day of August, 2020 at Navutulevu village, Serua, in the Central Division, penetrated the vulva of MM with his tongue, without her consent

COUNT TWO

Statement of Offence

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

Particular of Offence

LISALA ROKOVATUNAWA TUIVUYA on the 22<sup>nd</sup> day of August, 2020 at Navutulevu village, Serua, in the Central Division, penetrated the vulva of MM with his fingers, without her consent

- The accused pleaded not guilty to both the counts. At the trial which lasted for two days, the Prosecution presented the evidence of the complainant and three other witnesses including that of the doctor who had examined the complainant. At the end of the Prosecution case, the accused was put to his defence. Upon his rights being explained, the accused elected to give evidence under oath. At the end of the Defence case, the Court heard oral submissions from both the counsel. The State Counsel also filed an additional written submission. Having carefully considered the evidence presented at the trial and the respective submissions, I now proceed to pronounce my judgment as follows.

4. The Prosecution must prove all the elements of each count beyond a reasonable doubt. That burden never shifts to the accused at any stage of the trial. The accused is presumed innocent until he is proven guilty.
  
5. The Prosecution must prove the following elements on Count 1:
  - (i). The accused, LISALA ROKOVATUNAWA TUIVUYA
  - (ii). Penetrated of the vulva of the complainant, MM with his tongue,
  - (iii). Without her consent and that
  - (iv). The accused knew or had reasons to believe that the complainant was not consenting or he was reckless as to whether she was consenting or not.
  
6. The Prosecution must prove the following elements on Count 2:
  - (i). The accused, LISALA ROKOVATUNAWA TUIVUYA
  - (ii). Penetrated of the vulva of the complainant, MM with his fingers,
  - (iii). Without her consent.
  - (iv). The accused knew or had reasons to believe that the complainant was not consenting or he was reckless as to whether she was consenting or not.
  
7. A slightest penetration is sufficient to prove the element of penetration.
  
8. I would now summarise the salient parts of the evidence led in the trial:

#### Case for Prosecution

##### The Complainant (MM)

9. According to the birth certificate of the complainant (PE1), which is an admitted document, MM is 16 years of age. At the time of the alleged incident, she was 14 years old. MM testified that, in 2020, she was residing at Navutulevu Village in Serua with her father and her elder sister Taraivini Radinituni and her two brothers Nemani Baraki and Tevita Masiverata. Her mother was in Beqa Island.

10. On 22 August 2020, at around 9 p.m., she was at uncle Cagi's house, which is in the same village, with her two cousins, namely, Marica and Ateca. She was using her father's phone that night. Her cousin, Roko came and asked Marica if he could borrow her phone. She gave the phone to Roko. Roko took the phone and went outside. She sat next to Ateca and continued to use Ateca's phone on Facebook. She was waiting at Cagi's house for Roko approximately one hour to return her phone. Finally, at around 10 p.m., she went after Roko around the footpath in order to get the phone back because she didn't want her father to know that she gave the phone to Roko. She was not scared to go alone at night as she knew the village and the people well.
11. She couldn't find Roko around the footpath so she proceeded to the beachfront because she heard people drinking there. When she came to the beachfront, Roko had followed her to the beachfront. She asked for the phone but he kept on taking her right to the place which she described as "Nalilo" where the bushes were, at the corner of the beach, near the cemetery. He covered her mouth, got hold of her and pulled her up to "Nalilo". He asked her to lay down. She was scared and did not do anything. She could hear the phone ringing and saw the lights coming from the phone. She could identify Roko from the lights of the phone when it was ringing. No one was around at that time but she could hear some people talking on the beach.
12. When the sketch plan (PE2), which is an admitted document, was shown, she identified the footpath from Cagi's house to "Nalilo", her house and the place where the alleged incident occurred. When asked as to how she was taken to "Nalilo", she said that he pulled her hand and covered her mouth. From her house to Nalilo, it's a short distance of one minute.
13. She was wearing a white t-shirt, three quarter jeans, skirt and a panty. He took off her three quarter jeans and the panty and started fondling her private part. Then he started licking her private part. He did not ask for her permission before taking off her clothes. To describe her private part, she used the word '*mimi*'. According to the interpreter it 'could be vulva, inner bit'. She further said '*mimi*' is used to pee. After licking her "*mimi*" or private part, he used his finger on her. He inserted his finger into her vagina to and fro. He did it 3 times.

14. He did not ask her permission before putting his finger in to her vagina. He did not ask if he could lick her vagina. She did not indicate to him in any manner that he could lick her vagina. She was crying when he was doing these things. She could see some boys coming to drink where they were. He stopped and ran away. She too got hold of her skirt and ran straight home. She did not say anything to anyone on her way back home. She ran away because she was scared that he might do something else to her. When she was standing at the back of her house, Roko came running and gave her the phone and left. She peeped inside before entering the house.
15. When she came beside the house, her elder sister Taraivini saw her and pulled her inside the house. Taraivini saw the dirt all over her clothes. The clothes got dirty when she was laying down on the soil. Taraivini slapped her because she did not answer the phone. Taraivini took the phone and started questioning where she was. She didn't say anything and later said that she was with Roko. Taraivini asked her what Roko had done to her. She told Taraivini that Roko touched her. After questioning, Taraivini called her dad and told that her clothes were dirty. Dad came and whacked her because she was with Roko. Dad went out to look for Rokob because Taraivini had told him that Roko had touched her.
16. Under cross examination, MM admitted that her house is near the church. She admitted that her house is not depicted in the sketch plan. She admitted that Nalilo area is a place of dense vegetation with a lot of trees and quite distanced from the nearest house. At night, the Nalilo area was pitch-dark. There were no street lights at the beach. She admitted that there were lot of drunkards going from house to house drinking grog on the 22nd of August 2020.
17. She admitted that she knew that her 'mimi' was being licked and touched because she felt it and she did not see the motions and the actions when he was putting the finger inside. She admitted that she did not see in the dark but could only hear the sound of the people coming towards her. She admitted that she saw Roko on that day twice; when he asked her for the phone and when he had returned the phone, she did not see Roko any other point in time apart from those 2 times.

18. When questioned by the court, MM said that she reported the matter to police on the following day (23). She admitted giving three separate statements to the police; firstly on, 23rd August 2020, then on 31st August 2020 and finally on 8th July 2022.
19. Under re-examination MM said that her father's phone is a touch screen phone and that she could recognise Roko from the light of the phone when it was ringing. She could see the face from the light coming from the phone. She said that she saw Roko on that day twice; when he asked her for the phone and when he had returned the phone, she did not see Roko any other point in time apart from those two times. She gave three statements to the police, because she was ashamed to tell all that had happened.

Marica Bulouvela,

20. Marica testified that, in the year 2020, she was residing at Navutulevu village. On 22 August 2020, she was in her uncle -Cagi's house with Ateca and MM. At 10pm, she was babysitting while MM and Ateca were on Facebook. MM was using her father's phone while Ateca was using uncle Cagi's phone. She saw somebody peeping through the window. She opened the window near the door. It was Roko from the same village. Roko wanted to eat something. It is usual for Roko to come and ask for food from her. She gave curry chicken to him. He ate one piece of chicken and gave the plate back. Roko saw MM using the phone. He asked her if MM has data and she said 'yes'. Then he asked her if he could use the phone for 5 minutes to call. She asked MM to give her (dad's) phone to Roko. He just took the phone and left, without telling even MM that he was leaving.
21. MM asked her where Roko was and she said Roko had left. MM came out of the house and went after Roko. Then MM's brother and she went looking for MM. She described the phone as a small touch screen phone.

## Taraivini

22. Taraivini is the elder sister of MM. She is 16 years old. She testified that in 2020 she was residing in in Navulutlevu village. On 22nd of August 2020, she was at home with her kids, MM and her father. After the dinner, at around 9 p.m., MM told her that she was going to her friend, Marica's house. Since her father was looking for the phone from 9.30-10.00 p.m. She told her son Aminiasi to go and bring the phone from MM. Aminiasi told her that MM was at her uncle, Cagi's house and that MM didn't want to bring the phone. She called her father's phone number and the phone was not answering. Her son told that Roko had borrowed the phone from MM.
23. When she came outside the house, she met MM at about 11pm. MM wanted to hide when she saw her, she looked scared. She got mad when she saw dirt all over MM's white t-shirt and she slapped MM. She took MM to the room, and started questioning her why she had dirt all over her clothes. After asking 5 times, MM answered. MM said she followed Roko to bring the phone, then Roko pushed her and squeezed her mouth. She never said anything other than that. MM was crying.
24. MM returned the phone but she did not know what transpired at that night. She informed her dad that MM had brought the phone back; MM had given it to Roko and Roko had returned it. When she kept on calling on her father's phone 11 to 12 times between 9 pm. to 10 pm., the incoming calls were being rejected. Her dad had called one of the police officers in the village and then called the police station in Navua. She described her father's phone as a touch screen one.

## Doctor Rayape Vuitawake

25. Doctor Rayape testified that she examined MM at Navua Hospital on 23rd August, 2020 and prepared a report. She recognised the report she prepared and tendered it in evidence (PE3). She recorded her medical findings at the appendix-1, perhaps because she did not have time to write her findings under D12. At first, the patient was afraid to talk and then she started to speak. The patient's right arm had a bruise. At the back of the patient's right shoulder, there were some bruises noted and, in the genital area, there was some healing laceration on the right *labia minora* suggesting a blunt force trauma occurred probably less than 24 hours ago. It could have been caused by fingers. Bruises noted on the right upper shoulder could have been caused by debris, like soil and broken branches if the patient was put on to the ground. Injuries that were noted on the right

arm on the front side could have been caused if someone was forcefully holding someone's hand or grabbing someone.

26. Under cross- examination, the doctor admitted that C6, which she was supposed to fill-in upon being satisfied that the patient understood the purpose of the examination, was not filled but was done verbally. She admitted that the injury at the arm could be consistent with an injury if the patient was beaten-up by a belt.
27. That's the case for Prosecution. At the end of the Prosecution case the rights of the accused in defence were explained to the accused. Accused elected to give evidence under oath.

#### The Defence Case

##### Lisala Rokovatunawa- The Accused (Roko)

28. Roko testified that he is a fisherman cum farmer living in Serua. On the 22nd of August, 2020, he went for a rugby competition at Navua, and returned at around 3 to 4pm. After winning the show, villagers were celebrating the victory and followed all the Fijian protocols for the celebration. He started drinking with the boys near the beach at around 7pm, and at around 8 o'clock they were told to go down to the other side of the village, to his uncle's house. When he was going down to the other side of the village, he wanted to use a phone to call her sister who resided on the hilltop because he wanted to borrow some money from his sister to buy drinks. When he was on the footpath near Cagi's house, he could hear a song from a phone and he decided to go and borrow the phone to call his sister. He pulled the curtains of Cagi's house and peeped through the window. He saw MM and a cousin of hers sitting inside the house. The food prepared for the function was at Cagi's house, and he asked for the food and asked if he could use the phone from them. He asked Marica for the phone because she had data and then he said credit. MM gave the phone to him and he came near the Lali House, near the church, and wanted to call his sister but, when he called her 3 to 4 times for 5 minutes, the phone had been diverted. He wanted to return the phone to MM so he came back to Cagi's house but MM was nowhere to be seen. The house was empty. He went across to MM's house and that's when he saw MM outside her home. He gave the phone back to MM, thanked her and went looking for those who were drinking with him. He said the whole village was drinking that night in 8 to 9 drinking parties. He denied the allegations that he had dragged



MM to ‘‘Nalilo’’ and licked her vagina without her consent and also poked her vagina without her consent.

29. Under cross –examination, Roko said that approximately 25 people were drinking with him. He had to leave the drinking party because the drinks had finished and the boys wanted to go down to his uncle’s house and wait for the other sponsor to bring the alcohol. None of the boys in his drinking party had a mobile phone to call her sister. He did not specifically know that it was MM’s phone because they were all using it. MM is related to him as his cousin. He denied that he specifically asked for MM’s phone.
30. That was the case for Defence.

#### Analysis

31. The Prosecution substantially relied on the evidence of the complainant. To support the version of the complainant, three other witnesses were called. If I am satisfied that the Prosecution has proved all the elements of the offence of Rape on each count as charged beyond reasonable doubt, a verdict of guilt must be entered. If a reasonable doubt is created in my mind as to the guilt of the accused, I must find the accused not guilty.
32. The Defence contended that the Prosecution failed to establish the identity of the accused at the material time of the alleged offending. In view of that, I would first venture into analyse the reliability of the evidence of the complainant on the issue of identity of the accused.
33. It is admitted that the accused and the complainant are known to each other as they are distantly related and that they were residing in the same village, namely, Navutulevu, at the material time.

34. It is also admitted that on 22 August 2020, before the alleged incident, the accused had gone to see the complainant at Cagi's house to ask for complainant's mobile phone and that the complainant had given her mobile phone to the accused to use. According to the complainant's evidence, there is a time gap of approximately half an hour between the times the accused was last seen by the complainant at Cagi's house and the time of the alleged incident occurred at "Nalilo". There is a considerable distance between those two places. The question is whether the Prosecution has proved the identity of the accused beyond reasonable doubt as at the time and the location of the alleged rape incident which occurred at 'Nalilo'.
35. According to the evidence of the complainant, the accused had borrowed complainant's father's phone at around 9.30 pm to make a call and after that he had vanished. She was awaiting his return for nearly half an hour with her cousins at Cagi's house for him to return the phone. Finally, she went out alone that night looking for the accused in order to get the phone back. She couldn't find Roko around the footpath so she proceeded to the beachfront because she heard people drinking at the beachfront. As she was proceeding along the footpath from her house leading to the beach front, the perpetrator whom she described as Roko had followed her. He had taken her to the place which she described as "Nalilo" to commit these alleged offences. That place is full of vegetation with bushes. There were no street lights at the beach front. She admitted that this place was pitch-dark at night and he could only hear the sound of the people at the beach. She also admitted that there were a lot of drunkards going from house to house drinking grog on the 22nd of August 2020.
36. I now consider the Turnbull Guidelines enunciated in *R v Turnbull* [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552 to satisfy myself that the complainant was not mistaken as to the identity of the accused in view of the possibility that even an honest witness could be mistaken. Turnbull guidelines have been accepted as the law in Fiji [ *Semisi Wainiqolo v The State* [2006] FJCA 70; AAU0027.2006 (24 November 2006); and in *Mesake Sinu v The State* [2013] FJCA 21; AAU37.2009 (13 March 2013)]. The guidelines are contained in the following passage by Widgery LCJ:

First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or

identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

37. This is rather a case of recognition. The Turnbull guidelines equally apply to cases of disputed recognition as was the case here. In *R v Thomas* [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the Turnbull guidelines against the circumstances in which the sighting occurred.
38. I considered the quality of identification evidence, and directed myself as to the dangers of convicting on such evidence, having regard to the principle set down in *R. v. Turnbull*. It is necessary to examine closely the circumstances in which the identification by the complainant came to be made. According to the complainant's evidence, she had identified the accused in a pitch-dark night from the light coming from the phone when it was ringing. That was the only light available for the complainant to identify the perpetrator that night. The complainant said and her sister and Marica confirmed that the phone was a touch screen one. However, it was not elicited from the complainant for how long the phone kept ringing and the number of times it was ringing; how long the complainant had the perpetrator under observation; how bright the light was; the distance between the screen of the phone and the face of the perpetrator and also the distance from where the observation was made.
39. Since the accused was known to the complainant beforehand, his voice and the body language could have helped her to confirm the fact that the perpetrator was the accused.

However, there is no evidence that the perpetrator had a conversation during this whole incident for her to confirm that it was her cousin Roko. The perpetrator had asked her to lay down. However, she did not say that she recognised Roko's voice from those two words. She admitted that she did not see any of the acts being committed on her body and the person committing those things. She did not at least say that the ringtone she heard was the same as that of her father's phone, although that evidence, if given, would not have been conclusive given that the ringtones are freely available to anyone. She did not say that the phone was ringing several times while she was under the perpetrator's grip so as to conform to her sister's evidence that she made 11- 12 unanswered calls during that period. She noticed her sister's missed calls only when the phone was returned. The complainant's description of the accused that he was a 'broad' and 'a bit tall man' did not conform to the actual description of the accused in the dock. Under cross-examination and re-examination, the complainant admitted that she saw Roko that day only twice-when he asked her for the phone and when he returned the phone. She did not see Roko any other point in time apart from those 2 times. In the circumstances the identification/recognition was made, I am unable to rule out the possibility of a mistaken identity.

40. The complainant's identification evidence should be viewed in the light of her evidence that she heard the sound of people in the beach and her admission that there were a lot of drunkards going from house to house drinking grog on that day. In that context it is not reasonable to single out the accused as the perpetrator in view of the weak identification evidence led by the Prosecution.
  
41. The complainant seemed confident that it was her cousin Roko that she recognised. However, the Prosecution must prove beyond reasonable doubt that the complainant's confidence was well founded in the circumstances of this case and on the strength of the evidence led in the trial. I am of the view that the Prosecution fell short of that standard. Therefore, it is dangerous to act upon the complainant's identification evidence to find the accused guilty. Prosecution failed to prove the identity of the accused at the material time beyond a reasonable doubt.

42. There is no dispute that the accused had come to the complainant's house to return the phone to the complainant when she had returned home after the alleged incident. This conduct on the part of the accused is highly unlikely if he had raped the complainant a few minutes ago.
  
43. There is another cogent reason that compels me to find the accused not guilty. That is something to do with the consistency of the conduct of the complainant. She did not complain to anyone voluntarily after the alleged incident, not to mention a complaint of sexual nature in relation to the charges levelled against the accused. She had an ample opportunity to relay the incident to her elder sister Taraivini or her father. Taraivini started questioning to know where she was. The complainant didn't say anything, but later, after asking 5 times, she answered and said that she followed Roko, he pushed her and squeezed her mouth. Taraivini asked her what Roko had done to her. She told that Roko touched her. She never said anything other than that. Her father came and whacked her hands because she was with Roko. The father, who had relayed the incident to a police officer, was not called by the Prosecution to explain on what basis the complaint was made. There is no recent complaint evidence in this case to support the version of the Prosecution.
  
44. In relation to the complainant's conduct, it is also noteworthy that after obtaining the phone from the accused near her house upon her arrival, she did not just enter the house. She peeped into the house before entering the house to check if anyone was there.
  
45. Based on the information first filed on 24 September, 2020, by the Office of Director of Public Prosecution with one count digital Rape, it can reasonably be assumed that the complainant had initially told the police that she was raped digitally only. She admitted giving three separate statements to the police; firstly on, 23rd August 2020, then on 31st August 2020 and, finally, on 8th July 2022, nearly two years after the incident and two days before the trial started, presumably after the 'witness interview' referred to by the State Counsel. Quite surprisingly, the Defence Counsel had nothing to question about those three statements to test the complainant's credibility. It is not my duty to dig into those witness statements in a context where those statements were never used to test the credibility of the complainant. However, on the basis of the State Counsel's application for

a postponement to amend the information in view of the complainant's last statement at the so called 'witness interview', and the subsequent filing of the information with an additional count of tongue penetration, it can reasonably be assumed that the complainant had made a belated complaint, after nearly two years, about her being penetrated with the tongue also.

46. When asked as to why she made three statements to police, her explanation was that she was ashamed to tell the full story to police. I am unable to accept this explanation for the following reason. In view of the information initially filed, the complainant must have complained of being digitally raped when the things were fresh in her mind. If she was not ashamed to tell the police initially that she was digitally penetrated, I am unable to comprehend why she should have been ashamed to tell the full story that includes the penetration with the tongue to the police in the first instance.
47. In passing, it should be mentioned that conducting of witness interviews, especially immediately before the trial, is not advisable and in many jurisdictions prohibited as such a practice tends to undermine a fair trial and the ascertainment of the truth which is the cardinal obligation of the criminal justice process. Although, it may be permissible in a child sexual abuse case to have a pre-trial session under the judicial supervision for the purpose of testing the testimonial competency of a child witness or to make a child witness familiarize himself / herself with the court environment, witness interviews aimed at filling the gaps or strengthening the prosecution case must be avoided.
48. Having considered the totality of the evidence of the complainant and her demeanour in court, it is my considered view that the complainant is not consistent in her evidence and also that her conduct is not consistent with that of an honest rape victim.
49. Prosecution called the doctor who had examined the complainant on the 23 August 2020. She has not recorded her medical findings under section D-12 and failed to fill-out some other vital parts of the report, because she was busy with other emergency cases. She refreshed her memory by referring to the notes she had put on the diagram in Appendix-1

of her report. It is not clear if she had conducted the medical examination with due diligence in that hurry.

50. The State Counsel argues that the doctor's medical evidence is consistent with the evidence of the complainant. In the medical report, some bruisers at patient's right arm and the back of the right shoulder have been noted by the doctor. However, the complainant in her evidence did not say that she offered any resistance to the perpetrator or received injuries at the alleged incident. She did not complain of any pain in her genital area either. The complainant admitted that she was whacked by her father but denied having received any beating on her body other than her hands. Although the doctor's observation of the healing laceration on the right *labia minora* of the complainant's vulva is somewhat consistent with the evidence of the complainant, I am not inclined to consider that consistency to be sufficient to find the complainant to be credible because of the reasons given above to reject her evidence.
51. It has to be accepted that in Fiji there is no need to corroborate the evidence of the complainant to prove a charge of rape. The evidence of the complainant if believed is sufficient to bring home a verdict of guilt. However, in view of the shaken evidence of the complainant in this case, it is dangerous in my opinion to act upon her evidence and find the accused guilty in the absence of strong support evidence.
52. The accused does not have anything to prove in this case. Still, he opted to give evidence on oath and exposed himself to cross- examination. He denies all the allegations. The accused does not deny that he came to Cagi's house that night and borrowed the mobile phone of the complainant to make a call to her sister and that he left that place and took some time to take the call because her sister's phone had been diverted. It is also his evidence that he came to the complainant's house to return the phone because when he went to Cagi's house to return the phone, he did not see anyone there. Marica said she went out looking for complainant with complainant's brother. Cagi had already gone out grogging. It is not clear if Ateca remained at home with her baby. The proposition of the State Counsel that Ateca was home is only speculative.

53. Accused's evidence is consistent in many parts with that of the complainant except for the events that took place after he had taken the phone away from the complainant. According to Marica's evidence, the accused was in habit of coming to her place in search of food. Therefore, accused's arrival at Cagi's place that night cannot be taken as a pre-planned arrival. There is evidence that both Marica and the complainant were on 'facebook' using their own phones when the accused arrived at Cagi's place. Therefore, the proposition of the Prosecution that the accused's request for a phone with data was aimed at the complainant's phone in order to lure her into the jungle to commit these offences does not hold water. It is not unbelievable evidence of the accused that none of the members of the drinking party had a mobile phone that night. His evidence that there were a lot of drinking parties in the village that night was confirmed by the complainant herself. His evidence has not been impeached by the Prosecution on material particular. Even if I totally reject the evidence of the Defence, the overall burden is on the Prosecution to prove the charges beyond a reasonable doubt. Prosecution has failed to discharge that burden.
54. When considered the totality of evidence, a reasonable doubt is created in my mind as to the guilt of the accused. The Prosecution failed to prove their case beyond a reasonable doubt. I find the accused not guilty on each count.
55. The accused is acquitted accordingly.



A handwritten signature in black ink, appearing to read 'Aruna Aluthge'.

Aruna Aluthge  
Judge

15 July 2022

At Suva

Counsel:

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