

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 81 of 2019

STATE

V

ASIF IQBAL AHMED

Counsel : Ms. P. Lata for the State.
: Mr. R. Kumar and Ms. M. Singh for the Accused.

Dates of Hearing : 11, 12, 13 and 14 April, 2022
Closing Speeches : 15 July, 2022
Date of Judgment : 18 July, 2022

JUDGMENT

(The name of the complainants are suppressed they will be referred to as "S.S" and "S.Z" respectively).

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

FIRST COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2014 to the 31st day of December, 2014 at Nadi in the Western Division penetrated the vagina of “SS”, a child under the age of 13 years, with his penis.

SECOND COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2015 to the 31st day of December, 2015 at Nadi in the Western Division penetrated the vagina of “SS”, a child under the age of 13 years, with his penis.

THIRD COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2016 to the 31st day of December, 2016 at Nadi in the Western Division penetrated the vagina of “SS”, a child under the age of 13 years, with his penis.

FOURTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2016 to the 29th day of February, 2016 at Nadi in the Western Division penetrated the vagina of “SZ”, a child under the age of 13 years, with his fingers.

FIFTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of January, 2017 to the 31st day of December, 2017 at Nadi in the Western Division penetrated the vagina of “SS”, a child under the age of 13 years, with his penis.

SIXTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of June, 2018 to the 31st day of July, 2018 at Nadi in the Western Division penetrated the vagina of “SS”, a child under the age of 13 years, with his penis.

SEVENTH COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and 2 (b) and (3) of the Crimes Act, 2009.

Particulars of Offence

ASIF IQBAL AHMED between the 1st day of March, 2019 to the 31st day of March, 2019 at Nadi in the Western Division penetrated the vagina of “SZ”, a child under the age of 13 years, with his fingers.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of all the offences of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.
4. The accused is charged with seven counts, and there are two complainants. The evidence in respect of each count and each complainant will be considered separately from the other if the accused is guilty of one count, it does not mean that he is guilty of the other count as well. This also applies with the findings of not guilty.

ELEMENTS OF THE OFFENCE

5. To prove the above counts the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainants "S.S" and "S.Z" with his penis and fingers on the dates mentioned in the consolidated information;
 - (c) Both the complainants were below the age of 13 years.
6. The slightest of penetration of both the complainants vagina by the accused's penis and fingers is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, both complainants were below 13 years at the time of the alleged offending and therefore the consent of the complainants is not an issue.

7. The first element of the offence is concerned with the identity of the person who allegedly committed the offences. This element is not in dispute.
8. The second element is the act of penetration of both complainants vagina with the penis and fingers. This element is in dispute.
9. The final element of the offences is the age of both the complainants. It is an undisputed fact that both complainants were below the age of 13 years at the time of the alleged incidents.
10. In this trial, the accused has denied committing the offences of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of both the complainants with his penis and fingers as mentioned in the information.
11. This court must be satisfied that the prosecution has proved all the elements of the offences of rape beyond reasonable doubt in order for this court to find the accused guilty of these counts. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences, then this court must find the accused not guilty of all or either of the counts.
12. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainants to be corroborated. This means, if this court is satisfied with the evidence given by either or both complainants and accept it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainants.
13. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every

witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

14. The first complainant “SS” informed the court that she is now 16 years of age. The accused is a distant relative from her father’s side who was renting a room in the house of her parents about 20 meters away from the house of her grandparents where she was living.
15. In the year 2014 she was a year 3 student. One day while the complainant was alone at home the accused came into her bedroom laid her on her bed removed her clothes and inserted his penis into her vagina. It was painful and the complainant told him not to do this to her, she was pushing him on his chest with her hands. The accused did not stop but continued until he ejaculated. According to the complainant the accused wiped his sperm and went away. The complainant did not tell anyone about what the accused had done to her because she was scared.
16. In respect of the second allegation in the year 2015 the complainant was a year 4 student. One day while she was at home the accused called from near the house fence saying that his wife had called her. After a while the complainant went to the house of the accused.
17. As soon as the complainant went inside the accused closed the door, made the complainant lie on the bed placed his hand on her mouth. The complainant wanted to go home but the accused forcefully removed her clothes, unzipped his pants and penetrated her vagina with his penis.

18. According to the complainant it was very painful she tried to stop the accused with her hand. The accused continued but stopped when he ejaculated. At this time she was about 9 or 10 years old. The complainant did not tell anyone about what the accused had done to her because she would have been scolded.
19. In respect of the third allegation in the year 2016 the complainant was 11 years of age and a year 5 student. The complainant stated that the accused came to her and told her that his wife had called her. After a while the complainant went to the house of the accused he was alone. The accused closed the door made her lie on the bed placed his hands on her mouth unzipped his pants removed her clothes and inserted his penis into her vagina.
20. The complainant did not like what the accused had done to her which was very painful. The complainant was trying to stop the accused with her hands. The accused only stopped after he ejaculated. The complainant did not tell anyone because she was afraid. After ejaculating the accused wiped his sperm and went away.
21. In respect of the fourth allegation the complainant in 2017 was a year 6 student. One day the accused called her saying his wife was calling her after a while the complainant went to the house of the accused when she was inside the accused closed the door he was alone.
22. The accused made the complainant lie on the bed placed his hand on her mouth unzipped his pants, removed her clothes and then inserted his penis into her vagina. The complainant did not like it since it was painful she told the accused not to do it she was trying to stop him with her hands. He only stopped after he ejaculated. The complainant went home but she did not tell anyone because she was afraid.

23. Finally the fifth allegation was on Eid day in June or July, 2018 the complainant was alone at home by this time she was nearing 13 years her date of birth is 10th November, 2005. All her family members had gone to distribute Eid sweets the accused came into her room she got scared when she saw him.
24. The accused made her lie on the bed she was wearing a Salwar Kameez the accused touched her breasts, she told him not to do this. The accused removed her clothes and licked her vagina. The complainant told the accused to stop, he then placed his hand on her mouth unzipped his pants and then inserted his penis into her vagina. The complainant did not like what the accused was doing to her, it was painful. She was trying to stop the accused with her hands but he continued. The accused only stopped when he ejaculated. The accused then left the complainant and went away.
25. According to the complainant the incident started when she was in class 3 and then continued till class 8. It was the wife of the accused who saw the accused and the complainant together and started swearing at the complainant and her mother.
26. The complainant got scared and she went into depression and wanted to kill herself. The other family members also came to know and there was a meeting held at her place. She does not remember who reported the matter to the police, she was medically examined at the Nadi Hospital. The complainant identified the accused in court.
27. In cross examination, the complainant stated that in 2019 she was a Form 5 student, however, in 2014 she was staying at Saunaka, Nadi. From 2014 to 2019 she was staying at her grandfather's house, her parents were staying about 20 meters away. The accused was renting a room in her parents house. The complainant did not love her parents before the

incidents but now she loves her mother who is supporting her after the incidents.

28. From 2014 to 2019 her mother was staying home while her father was the sole bread winner. When further questioned the complainant stated that she only remembered those 5 times the accused had sexual intercourse with her. On the day of Eid in 2018 the complainant was wearing a Salwar Kameez and the accused had also touched her breast.
29. The complainant denied that she was protecting her father by falsely implicating the accused. The complainant told the court that it was the accused and not her father who had sexual intercourse with her. The complainant maintained that she was not protecting her father and that she was telling the truth in court. The complainant denied the suggestions that it was her father who had sexual intercourse with her, she stated that it was the accused.
30. The witness agreed that her father has been charged for the offence of rape on her complaint but denied that it was her father who had sexual intercourse with her on 5 occasions from 2014 till 2018, she maintained that it was the accused.
31. The complainant agreed that she had become pregnant but the baby was not her father's. The complainant stated that she was not lying in court to protect her father and she had told the truth.
32. The complainant agreed that in her evidence she had told the court that she got depressed and wanted to kill herself. The complainant was referred to her police statement dated 15th April, 2019 upon perusal she agreed that she did not tell the police officer writing her police statement that she wanted to kill herself.

PREVIOUS INCONSISTENT STATEMENT

33. This court directs its mind to the fact that the defence counsel during cross examination of the first complainant had questioned this witness about some inconsistency in her police statement which she had given to the police when facts were fresh in her mind with her evidence in court.
34. This court is allowed to take into consideration the inconsistency between what this witness told the court and her police statement when considering whether this witness was believable and credible. However, the police statement is not evidence of the truth of its contents.
35. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
36. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
37. In re-examination the complainant stated that she became pregnant when she was in Form 3 (year 9) and it was during the Covid-19 lockdown that her father was taken by police.
38. The second complainant "SZ" informed the court that she is 15 years of age, the first complainant is her elder sister. Currently she is in year 9

(Form 3) her date of birth is 9th September 2007. The complainant knows the accused was staying next to her house she used to call the accused “Bonny Dada” and she knew the accused from a long time.

39. In February 2016, one day the accused called the complainant to his house to massage his legs. The accused was alone in his house lying on his bed. He called her on his bed and told her to remove her clothes, when she was naked the accused asked her to get close to him. At this time, he inserted his pointer finger into her vagina according to the complainant she knew the finger had penetrated her vagina because it was painful and she felt bad about what the accused had done to her.
40. The complainant told the accused to stop and he stopped. Thereafter, she went home but did not tell anyone about what had happened to her because she was scared that the accused would kill her. At this time she was 8 years old and a year 3 student.
41. After three years in March 2019, the accused called the complainant to again massage his legs and back. When the complainant entered the accused bedroom the accused was alone. After the complainant finished massaging the accused he started touching her body. The complainant was wearing a dress he told her to remove her panty the accused then inserted his middle finger into her vagina.
42. According to the complainant, the accused had inserted his finger into her vagina for a long time. She did not like what the accused was doing to her and she was trying to push him away. The accused stopped told her to get dressed opened the door of his bedroom and told her to go home.

43. The complainant knew the accused had inserted his finger into her vagina because it was painful. At this time the complainant was in year 6, and 11 years old. At home she didn't tell anyone because she was scared.
44. Later the complainant was called to the police station she gave her statement and then went for a medical examination. The complainant identified the accused in court.
45. In cross examination, the second complainant agreed that in February, 2019 she was staying with her parents and siblings at Saunaka, Nadi. From 2014 to 2019 her mother was staying home. During her medical examination it was only her mother who was present and not her aunt Premila.
46. In February, 2016 her mother was at home. In March, 2019 the accused had asked for her mother's permission to allow the complainant to go to his house. The reason she had removed her clothes was because she was scared of the accused.
47. The complainant denied it was her father who had inserted his finger into her vagina on both occasions. She also maintained that she was not protecting her father by blaming the accused.
48. In re-examination, the complainant clarified that by saying that she did not know the accused well she meant that she did not know he was a bad person. In March 2019 the accused had called her to his house.
49. The final witness Dr. Marica Mudunaivalu informed the court that she graduated with an MBBS degree from the Fiji School of Medicine in the year 2017 and has been working for the Ministry of Health as a Medical Officer for the past 5 years.

50. On 14th April, 2019 the witness examined the first complainant at the Nadi Hospital. The specific medical findings were:
- a) Hymen was not intact;
 - b) No bruises or bleeding was noted.
51. The witness stated that after considering the history given by the patient and examination done it was highly suggestive that there was sexual activity involved. The Fiji Police Medical Examination Form of the first complainant was marked and tendered as prosecution exhibit no. 1.
52. The witness had also examined the second complainant on the same day. Her specific medical findings were:
- a) Hymen not intact;
 - b) Foul smelling vaginal discharge.
53. According to the witness her professional opinion was that there was sexual activity because the hymen was not intact. The Fiji Police Medical Examination Form of the second complainant was marked and tendered as prosecution exhibit no.2.
54. In cross examination, the witness stated that there would be bleeding in a child due to recent sexual activity and if there was forced penetration the hymen won't be intact. The witness agreed prolonged finger penetration into the vagina could also result in bleeding.

DIRECTION ON EXPERT EVIDENCE

55. This court has heard the evidence of Dr. Mudunaivalu who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is

within the witness expertise. It is by no means unusual for evidence of this nature to be called the medical reports of both the complainants are before this court and what the doctor said in her evidence as a whole is to assist this court.

56. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the expert I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.
57. I have also kept in mind that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.
58. This was the prosecution's case.

DEFENCE CASE

59. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider the evidence adduced by defence and give such weight as is appropriate.
60. The accused informed the court that he is a Carpenter by profession and he works 6 days a week from 7.30 am to 5.30 pm. His wife stays home

from 2014 to 2018 he worked the entire year it was only in 2019 he had worked for 11 months since he was in remand for one month.

61. In 2014 he was renting at the house of Mohammed Hassan Junior in one bedroom which was partitioned to the house of Junior. Junior was living with his wife, three daughters and one son. The three daughters included both the complainants.
62. Every day the accused would go to the complainants house and drink yagona with their father. On 14th April, 2019 the accused was at a family's house when he received a call from one Premila Shakila to come home. At Premila's house he met police officers and he was taken to the police station. At the police station he was told that there was an allegation of rape against him lodged by both complainants.
63. The accused denied all the allegations raised by the complainants. During Eid celebration he had gone to visit his relatives and had come home around 6pm with his wife. When questioned why the complainants would make these allegations against him the accused said "*there was something between the families that's why they were blaming me*". He also stated that he was not aware what this was.
64. In cross examination, the accused stated that he assumed there was something going on in the complainants family he did not hear since he was a bit far. He denied going to the first complainant's house when she was alone during Eid in 2018. The accused used to speak to the two complainants and meet them as well since it was one house that they were all living in. Both complainants respected him as their paternal grandfather. The complainants did not come to his house when he was alone because his wife used to stay home.

65. The second complainant did massage his ankle at her home after massaging her father's ankle but not at his house. The accused denied he had taken advantage of the complainants. He denied committing the offences as alleged his wife always stays home and he did nothing to the complainant. The complainants have lied in court.
66. The accused does not know why both complainants have made these allegations against him. He denied all the allegations.
67. This was the defence case.

ANALYSIS

68. The prosecution alleges that the accused on five occasions between 1st January, 2014 and 31st July, 2018 forcefully penetrated the vagina of the first complainant with his penis either in her bedroom or in his bedroom. This complainant was born on 10th November, 2005 hence she was under the age of 13 when all the alleged incidents happened.
69. The complainant and the accused are known to each other he is a distant relative of the complainant from her father's side. Both complainants call the accused "Dada" meaning paternal grandfather out of respect for him. At the time of the alleged incidents the accused was renting in the house of the complainants parents. The first complainant was living with her grandparents about 20 meters away.
70. In the year 2014 the first complainant was 9 years of age and a year 3 student. The accused went into her bedroom forcefully laid her on her bed removed her clothes and had sexual intercourse.

71. In the year 2015 the complainant was a year 4 student the accused called the complainant to his house by saying that his wife had called her. As soon as the complainant went inside the house the accused closed the door, made the complainant lie on his bed placed his hand on her mouth. He then forcefully removed her clothes unzipped his pants and had sexual intercourse.
72. In 2016 the complainant was 11 years of age and a year 5 student. The accused once again told the complainant that his wife had called her. When the complainant went in the house of the accused he closed the door forcefully made her lie on the bed placed his hands on her mouth unzipped his pants removed her clothes and had sexual intercourse.
73. In 2017 the complainant was a year 6 student. The accused called her saying his wife was calling her. When she was inside the accused house he closed the door forcefully made the complainant lie on the bed placed his hand on her mouth unzipped his pants, removed her clothes and had sexual intercourse.
74. Finally in June or July, 2018 the complainant was alone at home by this time she was 12 years of age. All her family members had gone to distribute Eid sweets the accused came into her room forcefully made her lie on the bed removed her clothes and then had sexual intercourse.
75. The complainant was scared so she did not tell anyone about what the accused was doing to her, however, it was the wife of the accused who saw the accused and the complainant together and it was here the matter was brought to the attention of the complainant's family.
76. The complainant got scared and she went into depression and wanted to kill herself. When the other family members of the complainant came to

know about what the accused was doing to her there was a meeting held at the complainant's house. The matter was reported to the police and the complainant was medically examined.

77. The prosecution further states that the second complainant in 2016 was 9 years of age and she used to call the accused "Bonny Dada". In February 2016, the accused called the complainant to his house to massage his legs. The accused was alone in his house lying on his bed. He called her on his bed and told her to remove her clothes, when she was naked he inserted his finger into her vagina. She knew the finger had penetrated her vagina because it was painful to her. She went home but did not tell anyone about what had happened to her because she was scared that the accused would kill her.
78. In March 2019, the accused called the complainant to massage his legs and back, after the complainant finished massaging the accused started touching her body. The complainant was wearing a dress the accused told her to remove her panty and then inserted his finger into her vagina. The complainant knew the accused had inserted his finger into her vagina because it was painful. At home she didn't tell anyone because she was scared. Both complainants were medically examined the professional opinion of the doctor was that there was a high likelihood that sexual activity was involved.
79. The prosecution further submits that both complainants told the truth in court they have been a victim of the forceful acts of the accused from the tender age of 9. They were scared, afraid and fearful that is why they did not raise any complaints. When the matter came to light the complainants did not hesitate to expose the accused. The medical reports of both the

complainants support the contention that there was sexual activity involved.

80. On the other hand, the defence says all the allegations are a made up, falsely narrated story in court by both complainants. The truth is that the accused never did anything to the complainants. A close scrutiny of the evidence given by both complainants do not make sense, it is not believable that the accused could have abused both complainants in the manner described by them.
81. The first complainant's evidence is riddled with doubt and is highly improbable. If she was living with her grandparents as per her evidence then she could have told her grandmother or her aunt or to anyone else about what she was going through. She was going to school as well but she did not tell anyone because nothing had happened. The story has been made up with a motivation to save her father who is the one who had raped her. This complainant had alleged that her father had raped her but she is now saving him by framing the accused.
82. The second complainant told the court that the first complainant was living with them in the house of their parents yet the first complainant gave a different version that is she was living with her grandparents. The second complainant also did not tell the truth there is no way the accused could have done anything to this complainant as alleged.
83. Like the first complainant this complainant was also saving her father from blame in fact it was her father who had penetrated her vagina with his fingers on both occasions and not the accused. The accused never did anything as alleged. This complainant also had all the opportunity to tell someone but she did not is highly unusual the simple answer is nothing

happened so there was no need to complain to anyone this complainant also did not tell the truth in court.

84. Defence also submits that the doctor's opinion and the medical reports of both complainants are not conclusive and it does not connect the accused in respect of the hymen not being intact and to the allegations raised by the complainants.
85. The defence is asking this court not to give any weight to the evidence of all the prosecution witnesses.

DETERMINATION

86. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.
87. In this case there are two complainants, the first complainant was 9 years (year 3 student) at the time of the first allegation in 2014 and she was 12 years at the time of the last allegation in 2018. The second complainant was 9 years (year 3 student) at the time of the first allegation in 2016 and 12 years at the time of the last allegation in 2019.
88. The first complainant was an emotional but a thoughtful witness who although took time to answer questions did not shy away from answering the questions asked. She was able to express herself clearly on what she wanted to tell the court. The second complainant was also an emotional witness a bit reserved at times but was able to relate clearly what she

wanted to say. Both complainants were able to understand the questions asked and answered them properly.

89. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of both complainants as truthful and reliable. The complainants gave a coherent account of what had happened to them, they were also able to withstand cross examination and were not discredited.
90. I did notice that both complainants in cross examination were able to answer questions in a straight forward manner and were not evasive. Although they took time to answer some questions it was a natural occurrence due to passage of time and their age at the time of the incidents. In my judgment, both complainants gave an honest narration of what the accused had done to them.
91. I have no doubt in my mind that both complainants told the truth in court their demeanour was consistent with their honesty. The complainants were consistent in their evidence and were able to recall what the accused had done to them.
92. There was an inconsistency between what the first complainant told the court and her police statement, however, this inconsistency was not significant to adversely affect the credibility of the witness. I would have been surprised if the witness had given evidence without any inconsistency bearing in mind due to lapse of time and the age of the complainant at the time.
93. The Court of Appeal made a pertinent observation in respect of the above in *Joseph Abourizk vs. The State, AAU 0054 of 2016 (7 June, 2019)* at

paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'

94. Considering the demeanour of both complainants and the manner in which they were giving evidence they struck me as sensitive and reserved individuals who would not complain but keep things to themselves and also not share their problems or difficulties with any one. In my judgment these were the attributes that had prevented the complainants from not telling anyone about what they were going through. Another important aspect is that the accused was always around coming into their house every day and drinking yagona with their father and their respect for him as a grandfather also contributed towards their silence.
95. Furthermore, complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all.

A complainants reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

96. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint.
97. It is also to be expected that individuals differ in terms of how they react towards what is happening to him or her. Some display obvious signs of distress and some not, the fact that the complainants did not complain does not mean that they cannot be believed. This also applies to the fact that the failure by the complainants to shout or yell does not mean nothing happened. The evidence of the complainants needs to be looked at holistically.

LATE REPORTING

98. It is noted in respect of the first complainant that there is delay in reporting of about 5 years from the first incident in 2014 and about 1 year's delay in reporting from the final allegation. For the second complainant the delay in reporting is about 3 years from the first incident and about a month's delay from the final allegation in March, 2019. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018)* had explained this issue as follows:

*[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-*

“The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

“[26] However, if the delay in making can be explained away that would not necessarily have an impact on the veracity of the evidence of the witness. In the case of Thulia Kali v State of Tamil Naidu; 1973 AIR.501; 1972 SCR (3) 622:

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

99. From the evidence before this court, the circumstances faced by the complainants were such that the accused was respected by them as their “Dada” meaning paternal grandfather. He was renting in the house of the complainants parents and therefore around them in close proximity. Finally, the age of both complainants and their fear of being scolded and the fear of being killed by the accused as mentioned by the second complainant taken cumulatively resulted in delayed reporting.
100. Furthermore, I accept that the first complainant did not love her parents until she found her mother to be supportive of her after what had happened to her. I accept that both complainants were restrained by circumstances beyond their control in failing to tell anyone about what they were going through.
101. It is also noted that whilst giving evidence both complainants were not able to recall exact dates, months and their ages during the years of incidents. This lapse of memory was to be expected considering the circumstances of the complainants and it did not affect the reliability of their evidence. The complainants were steadfast in what happened to them and they had properly conveyed that in court. Any inconsistencies in the complainants evidence and between each other’s evidence were not significant to adversely affect their credibility or shake the core of their evidence.
102. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraphs 15 and 16 as follows:

[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or

disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;”

103. On the other hand, the accused did not tell the truth he gave a version of events which is not tenable or plausible on the totality of the evidence. It is difficult to accept that the accused had nothing to do with the complainants and he did not do anything to them as alleged. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said he did not do anything to the complainants.

104. I do not accept that the complainants had framed the accused to save their father. The first complainant in her re-examination had mentioned

that the allegation of rape against her father had come about when she was in year 9 (Form 3) which would be in the year 2020, which is two years after the final allegation raised against the accused. I also do not accept that the second complainant's father had penetrated her vagina with his fingers. Moreover, if the first complainant was saving her father she would not have complained against him in the first place.

105. The evidence of the doctor also supports the prosecution case. This court accepts the evidence of all the prosecution witnesses as reliable and credible. On the other hand, this court rejects the defence of denial as untenable and implausible on the totality of the evidence. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

106. This court is satisfied beyond reasonable doubt that the accused from 2014 to 2017 and between 1st June, 2018 and 31st July, 2018 penetrated the vagina of the first complainant a child under the age of 13 years with his penis.
107. This court is also satisfied beyond reasonable doubt that the accused between 1st February, 2016 and 29th February, 2016 and between 1st March, 2019 and 31st March, 2019 penetrated the vagina of the second complainant a child under the age of 13 years with his fingers.
108. In view of the above, I find the accused guilty of all seven counts of rape as charged and he is convicted accordingly.

109. This is the judgment of the court.



Sunil Sharma
Judge



At Lautoka

18 July, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Roneel Kumar Lawyers, Nadi for the Accused.