

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 304 of 2020

STATE

vs.

- 1. FAIZAL MOHAMMED**
- 2. SHAHANA SHABANA BEGUM**

Counsel: Ms. U. Tamanikaiyaroi with Ms. P. Kumar for the State
Mr. J. Reddy with Mr. R. Singh for both Accused Persons

Date of Hearing: 19th, 20th and 21st July 2022

Date of Closing Submission: 26th July 2022

Date of Judgment: 02nd August 2022

JUDGMENT

1. Two names of the Complainants are suppressed and referred to as "AB" and "BC".
2. The First Accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and one count of Defilement of Young Persons between 13 and 16 years of age, contrary to Section 215 of the Crimes Act. The Second Accused is charged with one count of Rape, contrary to Section 207 (1) (2) (a) and (3) read with Section 45 of the Crimes Act and one count of Defilement of Young Persons between 13 and 16 years of age, contrary to Section 215, read with Section 45 of the Crimes Act. The particulars of the offences are:

Count 1

(Representative Count)

Statement of Offence

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

Particulars of Offence

FAIZAL MOHAMMED *between the 1st day of April 2020 and the 1st day of October 2020 at Nakasi in the Central Division, had carnal knowledge of AB, a child under the age of 13 years.*

Count 2

(Representative Count)

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) read with Section 45 of the Crimes Act 2009.*

Particulars of Offence

SHAHANA SHABANA BEGUM *between the 1st day of April 2020 and the 1st day of October 2020 at Nakasi in the Central Division, aided and abetted FAIZAL MOHAMMED to have carnal knowledge of AB, a child under the age of 13 years.*

Count 3

(Representative Count)

Statement of Offence

DEFILEMENT OF YOUNG PERSONS BETWEEN 13 AND 16 YEARS OF AGE: *Contrary to Section 215 of the Crimes Act 2009.*

Particulars of Offence

FAIZAL MOHAMMED between the 1st day of April 2020 and the 1st day of June 2020, at Nakasi in the Central Division, had unlawful carnal knowledge of BC, a person being above 13 years and under the age of 16 years.

Count 4

(Representative Count)

Statement of Offence

DEFILEMENT OF YOUNG PERSONS BETWEEN 13 AND 16 YEARS OF AGE: Contrary to Section 215 read with Section 45 of the Crimes Act 2009.

Particulars of Offence

SHAHANA SHABANA BEGUM between the 1st day of April 2020 and the 1st day of June 2020, at Nakasi in the Central Division, aided and abetted **FAIZAL MOHAMMED** to have unlawful carnal knowledge of BC, a person being above 13 years and under the age of 16 years.

3. Consequent to the plea of not guilty entered by the two Accused persons, the matter proceeded to the hearing. The hearing commenced on the 19th of July, 2022 and concluded on the 21st of July, 2022. The Prosecution presented the evidence of five witnesses, including the two Complainants. The two Accused persons and four other witnesses gave evidence for the Defence. Subsequent to the hearing, the Court heard the submissions of the learned Counsel for the Prosecution and the Defence. In addition to the oral submissions, both Counsel filed written submissions. Having carefully considered the evidence adduced in the hearing and the respective oral and written submissions of the parties, I will pronounce the judgment as follows.

Burden and Standard of Proof

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

Elements of the Offences

6. I now proceed to discuss the main elements of the two offences as charged in the Information.
7. The main elements of the first Count of Rape are that:
 - i) The First Accused,
 - ii) Penetrated the vagina of the First Complainant with his penis,
 - iii) The First Complainant was below the age of 13 years at the time of the offending.
8. The main elements of the third count as charged in the Information are that:
 - i) The Accused,
 - ii) Unlawfully,
 - iii) Penetrated into the vagina of the Second Complainant,
 - iv) The Complainant was a person of the age between 13 and 16 years of age.
9. The main elements of the second count of Rape are that:
 - i) The Second Accused,

- ii) With the intention of Aiding and Abetting the First Accused to commit the offence of Rape against the First Complainant,
- iii) Aided and Abetted the First Accused.

10. The main elements of the fourth count as charged in the Information are that:

- i) The Second Accused,
- ii) With the intention of Aiding and Abetting the First Accused to commit the iii) offence of Defilement of young person between 13 and 16 years of age,
- iv) Aided and abetted the First Accused.

Admitted Facts

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

- a) *The name of the first person charged is Faizal Mohammed ["Faizal"], aged 35 years old at the time of the alleged offences.*
- b) *The name of the second person charged is Shahana Shabana Begum ["Shahana"], aged 30 years old at the time of the alleged offences.*
- c) *Faizal and Shahana have been legally married for approximately 10 years and reside at Lot 97 Vishnu Deo Road, Nakasi with their three children.*
- d) *Faizal and Shahana operate a Grocery Shop at their residence in Nakasi.*
- e) *The name of the First Complainant is AB ["AB"] who was born on 5th January 2008.*
- f) *The name of the Second Complainant is BC ["BC"] who was born on 02nd June 2004.*
- g) *AB and BC are biological sisters. Their parents' names are Josefina Bibi ["Josefine"] and Faiyaz Ali. AB and BC reside with their parents in Narere, Navosai.*

- h) *Sometime between January and April 2019, Josefine, the mother of AB and BC was employed as a house maid for Faizal Mohammed and Shahana at Lot 97 Vishnu Deo Road, Nakasi. Navosai.*
- i) *Sometime in May 2019, Josefine gave birth to her third child and resigned from working for Faizal and Shahana as a house maid.*
- j) *On 7th October 2020, Fatima was medically examined at MSP clinic by Dr. Losana Burua who rendered a Medical Report on the same day. The existence of the Medical Report of Fatima Bibi dated 12th October 2020 is not in dispute.*
- k) *On 12th October 2020, AB was medically examined at MSP clinic by Dr. Losana Burua who rendered a Medical Report on the same day. The existence of the Medical Report of AB dated 12th October 2020 is not dispute.*
- l) *AB, BC and Faizal and Shahana are known to each other; Faizal and Shahana know AB and BC as the daughters of Josefine.*
- m) *Faiyaz Ali and Faizal and Shahana are known to each other; Faizal and Shahana know Faiyaz as the husband of Josefine and father of AB and BC.*
- n) *Josefine had been employed as a house girl for Faizal and Shahana before the alleged offences occurred.*
- o) *Between April 2020 and October 2020, on more than one occasion BC would get picked up from her home by Faizal and Shahana in their vehicle to go and spend the weekend at their home in Nakasi.*
- p) *There are three bedrooms in Faizal and Shahana's house in Nakasi while their Canteen business is located at the front of the house.*
- q) *A bedroom in Faizal and Shahana's home contains a king size bed and a double bunk bed for their children.*

Prosecution's Case

12. The Prosecution alleged that the First Accused had penetrated the vagina of the First Complainant with his penis on more than one occasions between the 1st day of April 2020 and the 1st day of October 2020. During those instances, the Second Accused, the wife of the First Accused, had aided and abetted the First Accused to commit those offences against the First Complainant. The First Complainant was twelve years old at that time.

13. The Court further heard that the First Accused had unlawfully engaged in sexual intercourse with the Second Complainant, who is the elder sister of the First Complainant, during the period between 1st of April 2020 and 1st of June 2020. The Second Complainant was below the age of 16 at that time. The Second Accused had allegedly aided and abetted the First Accused to commit these crimes against the Second Complainant.
14. The mother of the two Complainants had worked at the two Accused persons' place as a housemaid. The First Accused runs a Grocery Shop in the same building where the two Accused persons live with their three children. The mother of the Complainants had given birth to her youngest child in 2019 and attended to work at the Accused persons' house only on certain days after the birth of that child. Whenever she attended to the work, the mother accompanied the First Complainant as she was tasked to look after her little sister while mother was attending to her work. Meanwhile, the First Accused had requested the mother to send the Second Complainant to work with them, which the mother had agreed upon after consulting her husband. Subsequently, the Second Complainant started to work at the Accused persons' place.
15. According to the evidence given by the two Complainants, they gradually became very close to the two Accused persons as their own family. The Second Accused and the Second Complainant became trusted companions where the Second Accused confided about her personal matters related to her married life. During one of those communion talks, the Second Accused had made a proposition asking the Second Complainant to engage in sexual intercourse with her husband, the First Accused. The Second Accused had told the Second Complainant that they were bored with ten years of married life and wanted to have some fun in it. The Second Complainant was surprised and initially thought it was a joke. However, the Second Accused had persistently persuaded with her proposition and expressed her disappointment telling the Second Complainant that she disappointed her expectation and trust. Due to such continuous requests and the pressure, the Second Complainant eventually consented to the proposition. Upon receiving the consent of the Second Complainant, the Second Accused had taken the Second Complainant to the bedroom, where the First Accused was waiting on the bed. They had assured the Second Complainant that they would look after

her and do everything for her. The Second Accused had further assured her that she would remain with her until everything was finished. The two Accused had then persuaded the Second Complainant to remove her clothes and lie on the bed. The Second Accused had told the Second Complainant that she could keep her eyes closed if she felt scared. The First Accused came on top of her and started kissing her lips and breast. He then tried to penetrate her vagina with his penis, which he found difficult. Then, the Second Accused moved the left leg of the Second Complainant, making room for the First Accused to penetrate the vagina of the Second Complainant. The First Accused then had sexual intercourse with the Second Complainant for about 20 minutes.

16. According to the Second Complainant, the Second Accused locked the door and kept the key with her when they entered the bedroom. The First Accused engaged in sexual activities with the Second Complainant, penetrating her vagina with his penis on several other occasions between the 1st of April 2020 and the 1st of June 2020. The Second Accused was always present and assisted the First Accused every time the First Accused had sexual intercourse with the Second Complainant. Both the Accused persons had told the Second Complainant that this was their secret and they must keep it between the three. They had further convinced the Second Complainant not to tell anyone about this incident stating that if she did that, they both would go to jail.
17. The Court heard the evidence of the First Complainant, explaining how the two Accused persons had committed these crimes against her between the 1st of April 2020 and the 1st of October 2020. On one of the Saturdays in April 2020, she was taken to their home by the two Accused persons. The First Complainant found the First Accused was watching something on his mobile phone when she was helping the Second Accused to do laundry in the spare room. The second Accused was sitting on the floor. When she approached the First Accused, she found that he was watching a pornography video on his mobile phone. He then asked the First Complainant whether he could do the same thing with her. The First Complainant replied by saying that she is a small girl. The Second Accused approached them, asking what they were doing. The First Accused then showed her the video and asked the Second Accused if he could do that on the First Complainant. The First Accused told the First Complainant that she

could do it as she was at the right age. The First Complainant was hesitant and refused the request, but the two Accused persons insisted to her that it would do nothing and only be fun. Having persuaded the first Complainant to engage in this illicit sexual conduct, the Second Accused accompanied her to their bedroom, where the First Accused was waiting on the bed. The first Accused locked the door and gave the key to the Second Accused.

18. Having obtained her participation in engaging in these sexual activities, they managed to remove her clothes and made her lie on the bed. The First Accused then came on top of her, while the Second Accused sat beside the bed, holding her mobile phone. The First Complainant was unsure whether the Second Accused video recorded this incident on her mobile phone. When the First Accused struggled to penetrate the vagina of the First Complainant with his penis, the Second Accused came and moved the left leg of the First Complainant, making it easy for the First Accused to penetrate the vagina of the First Complainant. The First Accused then penetrated the vagina of the First Complainant with his penis. It had lasted for five minutes.
19. The First Complainant explained to the Court that the First Accused had penetrated her vagina with his penis more than 20 times between 1st of April 2020 and 1st of October 2020. During all those occasions, the Second Accused was present aiding and abetting the First Accused to engage in those illicit sexual activities with the First Complainant.
20. One day in early October 2020, Imran, the brother of the Second Accused, came to the Complainants' house and informed the Complainants' mother that something was happening between the two Accused persons and the Second Complainant. Having found that the two Accused persons were doing the same thing to her elder sister, the First Complainant decided to inform her school teacher about this incident. On the 12th of October 2020, the First Complainant informed her class teacher Nanise Litea about what had happened to her at the two Accused persons' house. Accordingly, the matter was reported to the Police, and the two Complainants were medically examined.

Defence's Case

21. The Two Accused persons, in their Defence, denied these allegations, stating that they had never engaged in such activities as alleged by the two Complainants. The Defence attempted to suggest that this was an act of revenge as they had chased the Second Accused's brother Imran out of their house. I will discuss the evidence presented by Defence in detail in a while.

Evaluation of Evidence

22. It appears that the Prosecution and the Defence have presented conflicting versions of events. In such circumstances, the Court must consider the whole of the evidence adduced in the trial, including the evidence of the Accused, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is credible and believable between the Complainant and the Accused.
23. Brennan J in Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) has succinctly discussed the appropriate approach in directing the Jury in a case where there are conflicting versions of evidence given by the Prosecution witnesses and the Defence witnesses. Brennan J held that:

"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused

contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

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

"Not only was it there in his last passage a reference to "a doubt based on reason" but in two instances, the judge has proposed to the jury the question which of the two cases is correct, what the complainant says or what the appellant says. This was also a material misdirection. The issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth; Liberato v The Queen (1985) 159 CLR 507 at 515. They should have been directed the test was whether taking into account the whole of the evidence, including what had been said by the appellant in his recorded interview, and the witnesses called in his case, they were satisfied beyond reasonable doubt of the truth of the complainant's evidence."

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

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

that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party”

26. The Accused is not required to give evidence. The Accused does not have to prove his innocence as his innocence is presumed by law. However, in this case, the two Accused persons not only decided to give evidence but also adduced the evidence of four more witnesses for the Defence. Therefore, such evidence presented by the Accused need to be considered when determining the facts of this case.

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

“If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden imposed upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The onus of proof is never shifted in these cases: it always remains on the prosecution.”

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

Credibility and Reliability of Evidence

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

"In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the credibility or veracity and the other is the accuracy and reliability. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]"

30. Consequently, the Court should first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy.
31. Premathilaka JA in Matasavui v State [2016] FJCA 118; AAU0036.2013 (30 September 2016) outlined the factors that are allowed to take into consideration in evaluating the reliability and credibility of the evidence given by a witness, where his Lordship held that:

"[23] I will now consider whether the misdirection complained of could have affected the end result. Before acting upon the testimony of a witness the following questions should be posed by court. Both go to the credibility of the witness.

(i) Is the witness truthful?

(ii) Is the witness's testimony reliable?

[24] A truthful witness could sometimes be unreliable or his or her version could be distorted due to the intervention of extraneous factors. Therefore both tests are important. In determining whether a witness is truthful and reliable the court would be assessing the testimonial trustworthiness of the witness. Such assessment would have to be based on an objective application of several tests of credibility, such as the tests of promptness/spontaneity, probability/improbability, consistency/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions (inter se & per se), interestedness/disinterestedness/bias, the demeanour and deportment in court, and the availability of corroboration where relevant."

32. Accordingly, the Court must consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant in determining the credibility and reliability of the evidence given by a witness.

Evidence of the Accused

33. Keeping in mind the above-discussed legal principles, I now proceed to analyze the evidence of the Defence. The Defence gave perplexing accounts of events, creating several significant contradictions/omissions *inter se* and *per se* in the evidence presented by the six witnesses of the Defence.
34. The First Accused, in his evidence, said that the First Complainant had never visited his place alone. However, she had been to his home during functions where he had invited the whole

family of the Complainants. However, during her evidence in chief, the Second Accused claimed that she did not know the First Complainant. According to the Second Accused, the First Complainant had never been to their house. However, the third and fourth witnesses of the Defence (Parents of the two Complainants) stated that the two Accused persons used to pick the First Complainant, especially during the lockdown period of April to October 2020. During those visits, she spent weekends at the two Accused persons' house. The third witness of the Defence said that she worked only two days per week at the two Accused persons' home after giving birth to her child on the 29th of March 2019. When she went to work at the two Accused persons' house, she used to accompany the First Complainant and the new baby girl. The First Complainant looked after the baby girl while she was attending her work at the two Accused persons' house. According to the Second Accused, the third witness of the Defence had stopped working at their house after she got pregnant.

35. It is comprehensible that the evidence given by the two Accused persons and the third and fourth witnesses of the Defence are in direct conflict with each other on the issue of whether the First Complainant had been to the two Accused persons' house. Under such circumstances, examining the evidence adduced by the other witnesses during the hearing is essential. The fifth Defence witness, the daughter of the two Accused persons, admitted during the cross-examination that the mother of the Complainants used to attend to work at her place with her baby girl. This evidence of the daughter contradicted the Second Accused's claim that the mother of the Complainants did not work after she got pregnant. Nevertheless, she denied that the First Complainant came to her house. The Defence's last witness, the housemaid of the two Accused persons, specifically stated that she had seen the First Complainant at the Accused persons' home, contradicting the claim made by the two Accused persons.
36. In view of the evidence given by the two Accused persons, it appears that they tried to describe that their relationship with the family of the two Complainants was merely based on an employee-employer relationship. According to the First Accused, the mother of the Complainants worked for them until she got pregnant and then the Second Complainant came to work only on weekends upon the request made by her mother. According to the two

Accused persons, they had no further interaction or relationship with the two Complainants' family. However, the Complainants' father suddenly called the two Accused persons in early October 2020, informing them that they were bored at home and wanted to go to Pacific Harbour for a picnic. He had asked the two Accused persons to take them to Pacific Harbour since they have a car. It is highly improbable that someone who had no such close relationship requested the employer of his wife and elder daughter to take them to Pacific Harbour for a picnic because they were bored at home.

37. It is noteworthy that the Defence's learned Counsel made no effort to invite the father of the two Complainants during his evidence, whether he had requested the two Accused persons to take them to Pacific Harbour because they were bored at home. Be that as it may, the picnic to the Pacific Harbour by the two families is a material testimony to establish the close relationship the two Accused persons had with the Complainants.
38. The Second Accused admitted that the First Complainant's description of explaining the inside layout of their home was accurate. Moreover, photograph number seven clearly shows the key on the lock of the door of the bedroom. This evidence confirms that the First Complainant had been in the house of the two Accused persons to obtain such accurate knowledge about it.
39. Considering the contradictory nature of the Defence's evidence and the reasons discussed above, I find it unsafe to accept the evidence given by the two Accused persons stating that the First Complainant had never been to their home as credible evidence. Moreover, I do not find the Defence had managed to create any reasonable doubt whether the First Complainant had been to the two Accused persons' home as she claimed in her evidence.
40. I shall now proceed to discuss another notable contradiction in the evidence presented by Defence. The Second Accused stated in her evidence that the mother of the two Complainants requested her, explaining their hardship, whether they could give some work to the Second Complainant in their place. After several requests made by the mother of the Complainants, the First Accused had agreed to provide the Second Complainant with a job as the Second

Accused's helping hand. The Second Complainant worked only on the weekends. On the contrary, the third witness of the Defence said that it was the First Accused who requested them to send the Second Complainant to work for them. The Defence provides no explanation in respect of this contradiction. This contradiction adversely affects the testimonial trustworthiness of the evidence presented by Defence.

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

Evidence of the Prosecution

42. I will now proceed to analyze the evidence of the Prosecution. The Court heard the submissions made by the learned Counsel for the Defence, stating that two Complainants had adequate opportunities to complain to someone about this allegation, but they had chosen not to do that. Therefore, such delay in complaining creates a doubt about the credibility of the allegation made by the two Complainants. Accordingly, Defence alleges that the lack of promptness and spontaneity of the two Complainants in reporting this matter had affected the credibility of their testimonies.
43. The First Complainant was twelve years old, and the second was sixteen in 2020. It is essential to note that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for many reasons, such as age, immaturity, *etc.* Children may not fully understand what they are describing and may not have the words to describe it. They may be embarrassed to talk about incidents of sexual nature or use words they think are wrong and therefore find it difficult to speak. Accordingly, evidence of the child witness must be evaluated by referencing factors appropriate to his/her strengths and weaknesses related to age, mental development, understanding and ability to communicate. (*vide; Nalawa v State [2021] FJCA 188; AAU014.2016 (25 June 2021).*)

44. Being mindful of the younger age of the two Complainants, I shall now proceed to determine whether the delay in reporting these alleged crimes had affected the credibility of the evidence given by the two Complainants.
45. Gamlath JA in State v Serelevu [2018] FJCA 163: AAU141.2014 (the 4th of October 2018) has extensively discussed the issue of delay in reporting, where His Lordship found "the totality of the circumstance test" is the correct approach in evaluating the delay in reporting to determine the credibility of the evidence. An unexplained delay does not necessarily or automatically render the Prosecution's case doubtful. Whether the case becomes doubtful depends on the facts and circumstances of the particular case.
46. According to the two Complainants, the two Accused persons were very closed to them as their own family. This closeness is evident from the two Accused persons volunteering to take the Complainants' family to a picnic at Pacific Harbour. The Complainants had called them uncle and aunty. The two episodes of these sexual offences are taken place with the reluctant consent of the two young Complainants obtained through pressure, psychological force, misrepresentation of facts and creating an environment where they were not in a position to refuse the proposition made by the two Accused persons. The two Accused persons were not abusive but friendly towards the two Complainants during the period material to these offences. The First Complainant testified that she eventually agreed to engage in sexual intercourse with the First Accused after a protracted persuasion by the two Accused persons. The Second Complainant explained that the Second Accused had continuously told her that she had let her down by declining the proposition she made to the Second Complainant. Therefore, the delay and the reasons for the delay must be evaluated, taking into consideration the nature of the relationship between the two Accused persons and the two Complainants and the manner the two Accused persons had persuaded the two Complainants to obtain their participation in these alleged sexual intercourses.
47. The First Complainant explained that the two Accused persons had told her not to tell anyone about this incident. They had told her they would go to jail if she told anyone. When Imran

raised the alarm about something terrible was taking place, the First Complainant still decided not to inform her mother. She said she was scared of being assaulted by her mother if she told her about this. She also felt sorry for the two Accused persons as they would go to jail if she told her mother about what they had done to her.

48. The Second Complainant had denied this allegation when her mother confronted her. The Second Complainant said that she was scared of her mother, and if her school found it out, her schooling days would be over, and people would make fun of her.
49. Taking into consideration the nature of the relationship and the manner the two Accused persons had obtained their participation, I find the reasons and explanations given by the two Complainants for not reporting this matter promptly and spontaneously are reasonable and probable; hence, I accept it. On that basis, I do not find the lack of promptness and spontaneity have adversely affected the credibility of the evidence given by the two Complainants.
50. The two Accused persons alleged that the two Complainants made up this false allegation because they wanted to avenge. The learned Counsel for the Defence attempted to adduce evidence of particular experience of sexual nature of the Second Complainant with another person, which the Court disallowed under Section 130 (2) (a) of the Criminal Procedure Act. It was intolerable to witness that the learned Counsel for the Defence, irrespective of continuous warning and directions given by the Court, continuously attempted to adduce such evidence of the Second Complainant without obtaining the leave of the Court pursuant to Section 130 (2) of the Criminal Procedure Act. Unfortunately, this appalling conduct of the learned Counsel for the Defence exceeded the limit of fairness and professionalism; hence, the Court had no option but to stop him from asking such questions.
51. The learned Counsel for the Defence submitted in his submissions that the brother of the Second Accused, Imran, had instigated this revengeful conspiracy against the two Accused persons. However, there is no evidence adduced during the hearing to support or even suggest such an allegation of revengeful conspiracy instigated by Imran. The Court heard no evidence establishing that Imran was chased out from the two Accused persons' house after he

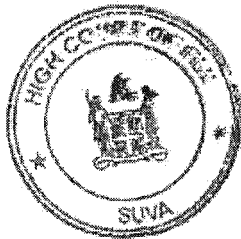
approached the Complainants' mother with an audio recording. The mother and father of the Complainants stated that they disbelieved Imran at that time. The following day, they had gone to a picnic with the two Accused persons' family, confirming that Imran had not succeeded in instigating the Complainants against the two Accused persons.

52. The First Complainant felt distraught after finding that the two Accused persons had been doing the same thing to her elder sister. She then decided to expose these episodes of displeasing events. Therefore, I do not find any *mala fide* motive of the Complainants to invent a false allegation against the two Accused persons.
53. The Doctor's evidence supported the claim of the two Complainants that they had been engaged in penetrative sexual intercourse with the two Accused persons on more than one occasion. Furthermore, the two Complainants narrated the event in their evidence descriptively and coherently. They were not evasive but showed distress while elaborating on the events they had encountered.
54. Accordingly, it is my option that the two Complainants' testimonies have stood the test of probability, consistency, want of contradictions, and are enhanced by the corroboration in the form of medical evidence.
55. Given the reasons discussed above, I find the two Complainants' evidence credible and reliable, and I accept them as the truth. Accordingly, I hold that the Prosecution has proven beyond reasonable doubt that the two Accused persons had committed these offences as alleged in the Information.

Conclusion

56. In conclusion, I find the First Accused guilty of one count of Rape, contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act and one count of Defilement of Young Persons between 13 and 16 years of age, contrary to Section 215 of the Crimes Act and convict to the same accordingly.

57. I further find the Second Accused guilty of one count of Rape, contrary to Section 207 (1) (2) (a) and (3) read with Section 45 of the Crimes Act and one count of Defilement of Young Persons, between 13 and 16 years of age, contrary to Section 215, read with Section 45 of the Crimes Act and convict to the same accordingly.



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

At Suva

02nd August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Jiten Reddy Lawyers for both Accused Persons.