

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

**Criminal Case No.: HAC 46 of 2020**

**STATE**

**V**

**ILIESA LAGAVAKATINI**

**Counsel** : Ms. P. Lata for the State.  
: Ms. U. Baleilevuka for the Accused.

**Dates of Hearing** : 01, 02, 03, 04 August, 2022

**Closing Speeches** : 09 August, 2022

**Date of Judgment** : 10 August, 2022

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**JUDGMENT**

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*(The name of the complainant is suppressed she will be referred to as "A.R")*

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

**FIRST COUNT**

***Statement of Offence***

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

### ***Particulars of Offence***

**ILIESA LAGAVAKATINI** on 29<sup>th</sup> day of February, 2020 at Nadi in the Western Division had carnal knowledge with “A.R”, without her consent.

### **SECOND COUNT**

#### ***Statement of Offence***

**SEXUAL ASSAULT**: Contrary to section 210 (1) (a) of the Crimes Act, 2009.

#### ***Particulars of Offence***

**ILIESA LAGAVAKATINI** on 29<sup>th</sup> day of February, 2020 at Nadi in the Western Division unlawfully and indecently assaulted “A.R”, by touching her breast and kissing her neck.

### **THIRD COUNT**

#### ***Statement of Offence***

**ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE**: Contrary to section 211 (1) of the Crimes Act, 2009.

#### ***Particulars of Offence***

**ILIESA LAGAVAKATINI** on 29<sup>th</sup> day of February, 2020 at Nadi in the Western Division unlawfully took “A.R”, an unmarried girl under the age of 18 years out of the possession and against the will of her mother namely ASINATE SUKABULA who had the lawful care of the said “A.R” with intent to have carnal knowledge.

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 counts 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.

## **ELEMENTS OF THE OFFENCE**

### **RAPE**

4. In respect of the first count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Penetrated the vagina of the complainant with his penis;
  - (c) Without her consent;
  - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
5. In this trial, the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
6. The first element of the offence is concerned with the identity of the person who allegedly committed this offence. This element of the offence is not in dispute.

7. The second element is the act of penetration of the complainant's vagina by the penis. This element of the offence is also not in dispute.
8. The third element is of consent, this element is in dispute. Consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
9. If this court is satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
10. To answer the above this court will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
11. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then this court must find the accused guilty as charged.
12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.

13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.

### **SEXUAL ASSAULT**

14. To prove count two the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant "A.R" by touching her breast and kissing her neck.
15. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed this offence. This element is not in dispute.
16. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.
17. The final element of assault is the unlawful use of force on the complainant by touching her breast and kissing her neck.

In this regard this court has to consider:

- (a) whether the force used in touching the complainant's breast and kissing her neck were sexual in nature; and

- (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
18. In this trial, the accused has denied committing the offence of sexual assault. It is for the prosecution to prove beyond reasonable doubt that it was the accused, who had unlawfully and indecently assaulted the complainant by touching her breast and kissing her neck.
19. If this court is satisfied beyond reasonable doubt that the prosecution has proved all the elements of the offence of sexual assault as explained above, then this court must find the accused guilty. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then this court must find the accused not guilty.

**ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE**

20. To prove count three the prosecution must prove the following elements of the offence of abduction of person under 18 years of age with intent to have carnal knowledge beyond reasonable doubt:
- (a) The accused;
  - (b) Takes or caused to be taken the complainant out of the possession and against the will of her mother who had the lawful care of the complainant;
  - (c) The complainant was an unmarried girl under 18 years of age;
  - (d) With intent to have carnal knowledge.

21. "Taking" need not be by force. It could be either actual or constructive. It is immaterial whether the girl consents or not. In a 'constructive taking' it is not necessary to take the complainant out of the possession of her mother physically. It is sufficient that the accused, by some act, by some words or by some conduct, caused the complainant to leave her mother. Evidence of "substantial interference with the possessory relationship of mother and the complainant" is sufficient to constitute the element of "taking".
22. Furthermore, intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. This court has to decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
23. Moreover, it is a sufficient defence for the accused if he shows that he had reasonable cause to believe and did in fact believe that the complainant was above the age of 18 years. In this regard, this court is mindful that the accused is not required to prove this defence beyond reasonable doubt. It is sufficient for him to show in evidence that he had such a belief.
24. The prosecution alleges that the accused took the complainant out of the possession and against the will of her mother to have sexual intercourse with her. The complainant was 16 years at that time.
25. As a matter of law, I direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court

is not required to look for any other evidence to support the account given by the complainant.

26. In this case, the accused is charged with more than one offence, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

### **ADMITTED FACTS**

27. In this trial, the prosecution and the defence have agreed to certain facts titled as Admitted Facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
28. 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**

29. The complainant informed the court that in the year 2020 she was 16 years of age and a year 12 student. On 28<sup>th</sup> February, 2020 at 6 pm she left home to attend a youth service. At around 10 pm she came to Nadi Town with her two friends to look for a transport to go home.
30. It was about 11pm a car registration LH1421 came by, the complainant did not know the driver (the accused in this case) but she boarded the



vehicle. In the car she saw an Itaukei boy sitting in the front passenger's seat. The complainant told the accused that she will be getting off at Korovuto opposite the school.

31. When they went past Navo the complainant fell asleep she woke up after the vehicle had gone past Korovuto. The complainant asked the accused where he was taking her, he said to Sonaisali to have some fresh air. The complainant said no because her mum will be looking for her. The accused did not stop the car this made the complainant afraid and she kept telling the accused to go back. The other passenger got off at Sonaisali.
32. The accused drove further and stopped the car at Sonaisali Bay, both got out of the car. After a while the complainant's mother came in a car the accused told the complainant to get inside his car. When she was inside he locked the door of the car and put up all the tinted windows and told her not to talk. The complainant was trying to shout but could not. The accused spoke to her mother and told her to reverse her car so that he could go. Thereafter, the accused opened the driver's door to get in, the complainant was not able to see her mother from inside the car because all the windows were tinted.
33. The accused drove the car to Malamala, her mother was following them in their car but along the way her mother's car could not keep up with the speed at which the accused drove his car. It was around midnight the car was taken into the bushes of Malamala in the interior. After parking the car the accused came to the back seat where the complainant was sitting.
34. He started to touch her breast and kiss her neck and then he removed her clothes. The complainant felt uncomfortable she told the accused not to touch her but he continued. In the process he removed her panty and

skirt. The accused then removed his pants and underwear and inserted his penis into her vagina.

35. The complainant was pushing the accused and telling him not to do it and she was crying. The accused continued the complainant did not feel good so she kept pushing him and he was grabbing her hands. The complainant further explained at this time the door of the car was open, her legs were in that direction and her head was towards the closed door. The accused had sexual intercourse with her for three minutes.
36. After the accused stopped and went outside, she wore her pants and underwear and went to the driver's seat to drive the car so that she could escape. The accused came and told her to go to the back seat.
37. The accused then drove the car, the complainant was not okay and she was afraid that her mother would be worried about her. By this time it was about 1.30 am the next day.
38. On the way home, the car was stopped by police officers they asked the accused if he took any girl with him. One officer came and opened the vehicle door and she came outside. The complainant was taken to Nadi Police Station, her report was taken and she was taken to the hospital for a medical check-up. She accompanied her mother to Nadi Police Station from the place where the accused was arrested. The complainant identified the accused in court.
39. In cross examination, the complainant denied that she knows the accused and she had not met him in 2019. The complainant also denied meeting the accused after a long time that night. However, she agreed that while in the car she was conversing with the accused. She denied the accused had asked her if she could go with him to Sonaisali Beach. The

complainant did not get off with the other passenger because the accused had said that he will drop her home.

40. After the passenger left, the complainant agreed that the accused drove towards Sonaisali beach, she did not shout for help because no one was around. They were at the beach for about 15 minutes during this time the complainant told the accused that she was schooling. The accused wanted to have sex with her but she refused. For three times she asked the accused to take her back and each time he refused. Finally, she told the accused that her mother will complain to the police and his response was *"I don't care, I can handle it"*.
41. The complainant stated it was after she went into the accused car her mother came. The accused locked the door of the car by using the central locking system and the windows were already up, she could not open the door. The accused was talking to her mother while the door was closed and he only opened the driver's door to say move back and then he sat in the car.
42. When it was suggested to the complainant that when the door was opened she could have shouted to her mother, the complainant said *"he was saying something to threaten me, I cannot recall the exact words but he was saying things to threaten me."*
43. The complainant stated that she was not lying in court she denied spending one hour with the accused outside the vehicle at the beach talking, hugging and kissing. The complainant agreed the accused was standing with her outside the car when her mother came scolded and got angry on both of them. The complainant denied, at this time she had told the accused to get into the vehicle and both would go away from her

mother. When asked why she did not go to her mother, the complainant said, *“actually I was in the car, locked in the car and he was outside.”*

44. Upon further questioning the complainant agreed they had driven past Yako Village. She denied that the accused had placed the mats of the car on the ground beside the parked car at Malamala and that they started kissing, hugging and fondling each other. At Malamala the accused had parked the car where there were no houses nearby.
45. The complainant denied that she had sucked the accused penis for about 2 minutes, however, the accused tried to insert his penis into her vagina but he could not. On the way back the complainant told the accused that she would sit at the back seat to rest her legs. Whilst retuning home the car was stopped at the Nawaicoba Police Post, her mother was there. Her mother scolded her by saying *“when I came to Sonaisali, why did you not get out of the car”*.
46. The complainant denied the suggestion that she had made the allegations against the accused because she was scared of her mother. The complainant did not try to punch or scratch the accused, but was only pushing him.
47. In re-examination the complainant stated that at Sonaisali Beach, her mother had only scolded the accused who was outside the car. She also stated that the accused was able to insert his penis inside her vagina but not really inside. In respect of the scolding by her mother at the Nawaicoba Police Post the complainant told her mother that because the car was locked and the window was up, she could not get out of the car. The complainant did not make the allegations against the accused because she was scared of her mother. She does not know the accused.

48. The mother of the complainant, Asinate Sukabula informed the court that the complainant is her daughter and she had her care since her husband was abroad. She received a message from her daughter's friends that the complainant had boarded vehicle registration no. LH1421. When the complainant did not come home the witness went in a car to look for the complainant. The accused car was located later that night.
49. The witness got out of the car and approached the accused by asking if her daughter was inside the car, he said no and also swore at her, thereafter he got in the car and left. She was not able to see the complainant in the car. The windows of the car were up and it was dark and she was unable to see anyone inside the car. The witness followed the accused car but lost it on the way.
50. The matter was reported at the Nawaicoba Police Post. Later the witness saw the complainant at the police post who looked scared. The witness had not allowed or given permission for the accused to take her daughter with him.
51. In cross examination, the witness stated that from Nawaicoba Police Post she took the complainant to Nadi Police Station. The witness did not ask the accused to open the doors of the car for her to check inside since the accused just said the complainant was not with him, got into his car, told the witness to move her car back, reversed and went away.
52. According to the witness the accused was the only one outside the car. At Nawaicoba Police Post she asked the complainant why she had not come out of the car the response was the accused had locked all the doors and she was not able to come out. When she met the complainant, the complainant was crying and was not able to share anything with her.

53. The final witness PC 3241 Koresi Toasi informed the court that in the night of 28<sup>th</sup> February, 2020 he was at Nawaicoba Police Post when a report was received that an Itaukei girl of 16 years had been forcefully abducted from Nadi Town in motor vehicle registration no. LH 1421.
54. As a result the witness with his colleagues erected a road block at Nawaicoba Police Post. At about 3.15 am the vehicle was stopped which was coming from Sigatoka end. The witness arrested the driver who is the accused in this case and the girl was handed over to the Criminal Investigation Department. According to the witness the accused smelt of liquor.
55. In cross examination, the witness said the girl in the car was okay.
56. This was the prosecution case.

#### **DEFENCE CASE**

57. 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 and also called one witness. This court must also consider this evidence and give such weight as is appropriate.
58. The accused informed the court that he knows the complainant they would usually meet at the bus stand after she came back from school. On 28<sup>th</sup> February, 2020 the accused was in his car with his cousin Meli in Nadi Town. At about 10 pm after shopping they were going home at the temple end of Nadi Town he saw the complainant standing at the bus shelter with two other girls.

59. When he stopped the car, the complainant and one of her friends got in the complainant sat behind him in the back seat and her friend sat behind the passenger seat. The complainant and the accused were happy to see each other, the complainant asked to be dropped at Korovuto Secondary School junction. The complainant did not sleep in the car at any time both continued to converse about their relationship until the complainant's friend got off the car at the junction where the complainant was supposed to get off.
60. The accused asked the complainant if they could go somewhere and talk she agreed, since Meli was going to his village the accused drove to the Foodhall Supermarket at Sonaisali. After arranging Meli's transport the accused and the complainant went to Sonaisali beach after she agreed to go and have a conversation. The accused was not aware that the complainant was under the age of 18 years.
61. At Sonaisali beach the accused parked the car and both got out and were conversing and hugging each other. The accused again asked the complainant if she was agreeing to have a conversation there and she agreed. From where they were standing about 10 steps away to his right was the Double Tree Resort entry with security officers and 5 steps away to his left was a cemetery which also had a security officer and 15 steps away from where they were standing were houses.
62. After one hour of conversing, kissing and hugging the headlights of another car was seen. At this time, the complainant ran and got into the car at the back seat. The accused also went to the car and opened the driver's door as he was about to get inside the car the complainant's mother came and asked where her daughter was. The accused looked inside the vehicle and told the complainant that her mother was here she

should get off. The complainant replied by saying “*no, just get in the car, let’s go because I am afraid of my mother*”.

63. The accused did not at any time swear at the complainant’s mother but requested that they reverse their car because they were blocking his car. Furthermore, the accused stated that he did not lock the car doors, the windows were always up because of air conditioning and dust. The accused further stated that it is a well-known fact that even if the door of the car was locked the back seat door can be opened by unlocking manually.
64. In the car the accused for the second time asked the complainant if she wanted to go with her mother. The complainant said no because she was afraid of her mother. After coming out of the Sonaisali road the accused took a right turn towards Sigatoka going past Nawaicoba Police Post, Yako Village and went into the Malamala road to Loqi settlement.
65. At Loqi settlement the accused parked the car at the junction to the house of the complainant’s uncle Masenijaina. The car was 20 steps away from the house, the complainant knew they were near her uncle Masi’s house. Both got out of the car at this time the accused took out the car mats and spread it on the ground for them to sit and talk. They started talking, hugging, kissing and touching each other.
66. The accused touched the complainant’s vagina and she touched his penis this was happening by consent. Thereafter, both agreed to have sex. The complainant stood up to remove her clothes, she was wearing a white panty with tights and blue skirt. After the complainant removed her clothes both were standing kissing and caressing each other. At this time



the complainant agreed to suck his penis. She sucked his penis for 3 minutes thereafter they laid down on the ground.

67. After 3 minutes of trying to insert his penis into the complainant's vagina which eventually went in a bit because it was painful to her she requested him to stop. The accused stopped and after wearing their clothes they hugged each other and got in the car. The complainant told the accused that she wanted to sit at the back and rest because she was tired.
68. At Nawaicoba Police Post the car was stopped by police officers, he was asked his name and whether there was a young girl in the car. The accused said yes, she is sitting in the back seat. The accused was arrested and taken to the Nadi Police Station.
69. In cross examination, by the state counsel the accused denied that he knew the complainant was 16 years old at the time, however, he agreed that in his evidence he had said that he was in a relationship with her. According to the accused the relationship was of 3 to 4 years but they had only met four times because he lives far from her house.
70. They would meet by accident at the bus stand when she came back from school or when he came back from work he would wait for her at the bus stand. The complainant would be in school uniform and at most they would talk for an hour but all along he did not know her age. The accused stated that he was not lying. He knew the complainant was a young girl but he did not know she was under age.
71. The accused denied that on the 28<sup>th</sup> February, 2020 it was the first time the complainant had met him. He maintained that they knew each other and were related as well. The accused denied that the complainant had

boarded the car alone but with one of her friends. The complainant did not sleep in the car at any time, everyone in the car were conversing.

72. The accused stated that he did not tell the complainant that they will be going to Sonaisali to get some fresh air but both had agreed that they were going there to converse. This was at his request but when she boarded the car at the bus stop she had said that she wanted to be dropped at Korovuto.
73. When asked to explain further what he meant when he had said he was conversing with the complainant about furthering their relationship the accused said "*we were talking what we can do communication wise and how we would meet*". When it was put to the accused that the complainant did not want any relationship with him the accused said that the complainant was lying.
74. The accused also denied that he told the complainant's mother that the complainant was not in the car. The accused stated that he had looked in the car and told the complainant that her mother was there but the complainant said she's afraid of her mother. He did not lock the doors of the car and also that he did not threaten the complainant not to get out of the car.
75. When it was suggested that in any event the complainant would have gone back to her mother since she could not be with him the accused said she had agreed to be with him and to go with him. The reason for driving quickly out of Sonaisali was because the complainant wanted to go away quickly from her mother.

76. The accused agreed that he touched the complainant's breast and kissed her neck and had sexual intercourse with her but it was with her consent. The complainant did not push him anytime that night in fact they were hugging each other. The complainant is making the allegations against him because she is afraid of her mother. When the accused was questioned the mother of the complainant had come to get her daughter but he did not release the daughter, the accused said the complainant did not want to go because she was afraid of her mother.
77. In re-examination the accused stated he knew the complainant was afraid of her mother by looking at her behaviour she kept telling him to get in the car and for them to leave.
78. The final defence witness Meli Kabutakula informed the court that on the night in question he was with the accused. At 10 pm there were three young girls standing at the Nadi Temple bus stop. When the car was stopped two girls boarded the vehicle. They requested if they could be dropped at Korovuto.
79. When the girls got in the car they introduced themselves and then he came to know that the complainant was related to the accused. On the way the girls were conversing with the accused, at Korovuto all of them got out. The friend of the complainant left. The witness got out drank water and then went to the car he was shocked to see the complainant also get in the car. At Sonaisali he got off.
80. The witness further stated that after the Korovuto junction the complainant continued conversing with the accused until they reached Sonaisali. The complainant did not sleep in the car at any time.

81. In cross examination, the witness stated that he knows the accused for 30 years now and they have been raised in the same village and they are close to each other. He meets the accused every day. The witness maintained that two girls had boarded the car. When the complainant boarded the car after getting off at Korovuto junction he did not ask her why she was boarding the car again.
82. He heard the accused and the complainant talking about dropping him and going somewhere. This was the only thing he heard during the journey from Nadi Town to Sonaisali. Apart from this, the accused and the complainant were laughing and joking with each other. When asked what was the joke about the witness said he heard *“its comfortable cruising in this car”* but he did not hear the complete joke because he was not paying attention. He had kept calling his transport that was waiting for him. The complainant did not sleep in the car and he had told the truth in court.
83. In re-examination the witness said he heard the accused and the complainant conversing from Nadi town.
84. This was the defence case.

### **ANALYSIS**

85. The prosecution alleges that at about 11 pm on 28<sup>th</sup> February, 2020 the 16 year old complainant and her two friends were at the bus stop near the Nadi Temple waiting for a transport to go home. The accused driving car registration LH1421 came by, he was going towards the direction where the complainant was going. She boarded the car alone and told the accused to drop her at Korovuto opposite the school.
86. In the car other than the accused there was an ITaukei boy sitting in the front passenger's seat. On the way the complainant fell asleep when she

woke up the car had already gone past Korovuto. The complainant asked the accused where he was taking her, he said to Sonaisali to have some fresh air. The complainant did not want to go and she told this to the accused. The other passenger got off at Sonaisali.

87. When the accused did not stop the car the complainant was afraid and she kept telling the accused to go back. The accused drove further and stopped the car at Sonaisali Bay, both got out of the car. The complainant told the accused that she was schooling and for three times she told the accused that she wanted to go home. When the accused refused the complainant went into the car. The accused locked the door of the car and put up all the tinted windows and threatened her not to talk.
88. Thereafter, the complainant's mother came the complainant tried to shout but could not. The accused told the complainant's mother that her daughter was not with him. Thereafter, the accused drove the car to Malamala. It was around midnight the accused stopped the car into the bushes in the interior.
89. The accused came to the back seat where the complainant was sitting. He forcefully touched her breast and kissed her neck and then removed her clothes. The complainant felt uncomfortable she told the accused not to touch her but he continued. In the process he forcefully removed the complainant's panty and skirt.
90. The door of the car was open and the complainant's legs were towards the open door the accused removed his pants and underwear and had forceful sexual intercourse. The complainant was pushing the accused and telling him not to do it and she was crying. The accused had sexual intercourse with the complainant for 3 minutes. The complainant did not consent to all that the accused had done to her.

91. The prosecution further states that before leaving the bus stop the complainant's friends had informed the complainant's mother that her daughter was coming home in a vehicle registration no. LH1421. When the complainant did not come home Asinate the complainant's mother went in another car to look for her daughter.
92. At Sonaisali, Asinate got out of the car and approached the accused by asking him if her daughter was inside the car, he said no and also swore at Asinate. He got in the car and left in a hurry. Asinate did not give her permission for the accused to take her daughter with him.
93. On the other hand, the defence says the allegations raised by the complainant are lies and a made up story. The defence is asking this court to look at the evidence objectively. The accused did not do anything wrong he knew the complainant from 3 to 4 years and they were in a relationship. The accused and the complainant met after a long time so they agreed to have a conversation about their relationship. The conversation started in the car and continued at Sonaisali bay and at Loqi settlement.
94. The complainant was not alone from the bus stop to Korovuto junction one of her friends had also come on board. Meli the accused's cousin was sitting in the front passenger's seat. The complainant's friend got off at Korovuto junction but the complainant wanted to be with the accused so he drove the car to Sonaisali for Meli to catch a vehicle to his village. Thereafter, they went to Sonaisali bay to have a conversation and then through Malamala road to Loqi settlement.
95. The accused did not do anything to the complainant without her consent for instance after the complainant agreed he drove her to Sonaisali bay. At Sonaisali the complainant was outside the car with him talking, kissing

and hugging when the complainant saw the headlights of another vehicle she ran into the accused car. If there was any force or pressure by the accused the complainant could have gone towards the oncoming vehicle for assistance. The accused was outside when the complainant's mother came.

96. The accused in the presence of the complainant's mother had asked the complainant when she was in the car if she wanted to go with her mother but the complainant refused. The accused had no choice but to reverse the car and leave because the complainant wanted to be with him. The complainant had asked the accused to go because she was afraid of her mother and her mother was angry. Furthermore, the accused did not know the complainant was under 18 years despite his 3 to 4 years relationship with her.
97. The defence further states the accused drove the car to Loqi settlement near the complainant's uncle's house since she was familiar with the area. The accused took out the car mats and spread it on the ground they started talking, hugging, kissing and touching each other.
98. The accused touched the complainant's breast and kissed her neck with her consent after this both agreed to have sex. The complainant stood up to remove her clothes, she was wearing a white panty with tights and blue skirt. The complainant consented for the accused to have sexual intercourse.
99. The accused did not force or pressure the complainant at any time and what he told the court was the truth. At Sonaisali the accused did not threaten the complainant to go inside the car. The car was not locked she could have opened the door and gone to her mother but she did not. The

complainant did not even shout or yell or make any movement in the car to alert her mother. The complainant was not restrained to do anything she was free to do what she wanted.

100. Moreover, in close proximity of Sonaisali bay was a resort and a cemetery which had security officers the complainant was standing outside with the accused for an hour all she could have done was to run to the security officers and told them but she did not. The only reason why the complainant has raised these allegations is because she was afraid of her mother. She never expected her mother to see her with the accused.
101. Finally, the defence submits this is a case of betrayal of trust by the complainant. The chain of events expressed by the complainant does not make sense since at no time the accused did anything without the consent of the complainant.
102. The accused was forthright and honest in what he told the court. The consent of the complainant is also implicit in her not saying or doing anything to stop the accused, cooperating in a manner that allowed the accused to touch her breast, kiss her neck and have consensual sexual intercourse. The defence is asking this court not to believe the complainant.

### **DETERMINATION**

103. 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.



104. The issue in respect of counts one and two (as per the evidence and the admitted facts) is whether the complainant had consented for the accused to touch her breast and kiss her neck and also have sexual intercourse with her.
105. After carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and consistent account of what the accused had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main version of her allegations.
106. The complainant was steadfast in what she had encountered that night and early morning of the next day. I have no doubt in my mind that she told the truth in court. Her demeanour was consistent with her honesty.
107. Experience has shown 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 complainant did not shout or yell when in the car at Sonaisali or run away when she was standing outside the car with the accused or do anything in the car to alert her mother does not mean that she was consenting to be with the accused.
108. Furthermore, looking at the circumstances of the complainant such as late night, being alone with a stranger who was refusing to drop her home it cannot be expected that she would run away or shout or yell when there was no one in sight. The defence assertion that the complainant was familiar with the area at Loqi settlement does not exculpate the accused from his forceful conduct.

109. I accept the evidence of the complainant that in the middle of the night she was taken to Sonaisali and then to the interior of Loqi settlement. I also accept that the complainant did not know the accused. As soon as she entered the car at the bus stop she had made it clear to the accused that she wanted to be dropped at the Korovuto junction.
110. I accept that the complainant was already in the accused car before her mother came and that the accused had threatened her not to say anything to her mother. I also accept that the accused had locked the car doors and wound up the car windows to stop the complainant from going to her mother.
111. I agree with the complainant that she had not consented to what the accused had done to her I also observed that the complainant had a strong view against the conduct of the accused on her and she had expressed herself clearly that she did not want to be with him in the first place. I accept the complainant did not consent for the accused to touch her breast or kiss her neck and have sexual intercourse with her.
112. The accused told the court that he was in a relationship with the complainant and he had met the complainant in her school uniform yet he did not know she was below 18 years is unbelievable.
113. Furthermore, the defence contention that the complainant was not doing anything to push the accused away or run away from him showed consent is rejected by this court as untenable on the totality of the evidence. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

114. In respect of count three the complainant's mother Asinate had promptly located the accused car and she had asked the accused to release her daughter but the accused did not. I accept that Asinate had not permitted the accused to take the complainant with him. The accused had unlawfully taken the complainant out of the possession and against the will of her mother who had the lawful care of the complainant with intent to have carnal knowledge.

115. The complainant was not shaken as to the basic version of her allegations and all the prosecution witnesses were consistent in their evidence as well. 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 the Indian Supreme Court in *State of UP v. MK 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...'*

116. On the other hand, the accused did not tell the truth he gave a version of events which is too good to be true or put simply did not have any iota of

truth. I do not accept that the complainant had consented for the accused to do all that he did to her.

117. It appeared to me that the accused was rehearsing what he had planned to tell the court. He gave specific measurements without a second thought, in my judgment to portray a picture that there were people around and the complainant could have run to them in the middle of the night. In addition to this, the accused was also presenting himself as a responsible individual that whatever he did he would first ask for the complainant's consent is also rejected as improbable and far-fetched.
118. Meli the cousin of the accused made it obvious that this witness was supporting the accused without realizing that he was at odds with the evidence of the accused.
119. Meli did not tell the truth when he said the accused had stopped the car at Korovuto junction where the complainant, her friend and the witness had got out of the car. Meli went further to say that he drank water whereas the accused did not say anything about all this.
120. Meli also did not tell the truth when he said that he was not paying any attention to the conversation between the accused and the complainant because he was time and again talking to someone over the phone about his transport to his village. Whereas the accused in his evidence said that he had arranged for a vehicle to take Meli to the village. In any event, Meli was not anywhere near the scene of the crime so there is no need for me to go into his evidence. It is also noted that most of what the accused told the court was not put to the complainant and therefore did not comply with the rule in *Brown vs. Dunn*.

121. It cannot be ignored that from the time the accused drove the complainant from the bus stop he was in control of the car as the driver. It was the accused who had driven the complainant to Sonaisali bay and then to an isolated spot at Loqi settlement through Malamala road late at night. The complainant had even attempted to escape by going onto the driver's seat to drive the car gives credence to her evidence that she did not consent and wanted to escape from the accused. It is obvious to me from the conduct of the accused that he was forcefully doing what he wanted to do. The accused also knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
122. Moreover, I also accept the complainant had boarded the accused car alone at the bus stop. The accused took advantage of the complainant by not waking her at Korovuto junction. He did not tell the truth when he said he drove to Sonaisali to have a conversation with the complainant. I do not give any weight to the evidence of the accused that the complainant had consented to what he had done to her and that she did not want to go to her mother because she was afraid and yet he was driving the complainant to her home from Loqi settlement.
123. This court accepts the evidence of all the prosecution witnesses as reliable and credible and rejects the defence of consent raised by the accused and also that the accused did not know the complainant was under 18 years as not worthy of belief. In law the consent of the complainant is not a defence for a charge of abduction.
124. Finally, in respect of the offence of sexual offence after taking into account all the evidence this court is not satisfied that the touching of the breast over the clothes of the complainant and kissing her neck was sexual in

nature. In view of the above, the accused is found not guilty of the offence of sexual assault but guilty of the lesser offence of indecent assault.

125. The defence has not been able to create a reasonable doubt in the prosecution case in respect of counts one and three and lesser offence of indecent assault in count two (see section 160 (2) Criminal Procedure Act).

### **CONCLUSION**

126. This court is satisfied beyond reasonable doubt that the accused on 29<sup>th</sup> February, 2020 had sexual intercourse with the complainant without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
127. Furthermore, this court is satisfied beyond reasonable doubt that the accused on the same date unlawfully and indecently assaulted the complainant by touching her breast and kissing her neck. In respect of the above offence this court is also satisfied beyond reasonable doubt that the accused had acted unlawfully that is without lawful excuse and indecently in what he did to the complainant.
128. The acts of the accused have some elements of indecency that any right minded person would consider such conduct indecent in nature. The complainant did not consent to the above mentioned acts of the accused.
129. Finally, this court is satisfied beyond reasonable doubt that the accused on the same date had unlawfully taken the complainant an unmarried girl under the age of 18 years out of the possession and against the will of her mother who had the lawful care of the complainant with intent to have carnal knowledge. This court rejects the statutory defence raised by

the accused as unbelievable. The prosecution has been able to rebut the defence raised by the accused beyond reasonable doubt that the complainant was under 18 years at the time.

130. In view of the above, I find the accused guilty of rape as per the first count, lesser offence of indecent assault as per the second count and abduction of person under 18 years of age with intent to have carnal knowledge as per the third count and he is convicted accordingly.

131. This is the judgment of the court.



**Sunil Sharma**  
**Judge**



**At Lautoka**

10 August, 2022

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs Baleilevuka & Associates, Nadi for the Accused.**