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

**Criminal Case No.: HAC 134 of 2019**

**STATE**

**V**

**SETOKI BARI**

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|---|---|---|
| **Counsel** | : | Mr. U. Lal for the State. |
| | : | Ms. A. Bilivalu and Ms. S. Singh for the Accused. |
| | | |
| **Dates of Hearing** | : | 14, 15, 16, 17 March, 2023 |
| **Closing Speeches** | : | 21 March, 2023 |
| **Date of Judgment** | : | 22 March, 2023 |

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# JUDGMENT

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

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

***Statement of Offence***

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

***Particulars of Offence***

SETOKI BARI, on the 25th day of July, 2019 at Burenitu village, Nalawa, Ra in the Western Division had carnal knowledge of "S.N", without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer 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**

4. In respect of the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

(a) The accused;
(b) Penetrated the anus 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 anus 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.

7. The second element is the act of penetration of the complainant's anus by the penis.

8. The third element is of consent. 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 anus 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 accused had penetrated his penis into the complainant's anus 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 anus by the accused penis is sufficient to satisfy the act of penetration.

14. 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 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.

**ADMITTED FACTS**

15. 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.

16. 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**

17. The complainant informed the court that in the year 2019 she was residing at Burenitu village with her son and father. On $25^{th}$ July, 2019 the complainant was alone at home since her son had left for school and her

father had gone to cut cane. The complainant and the accused were in a defacto relationship at the time, at around 7am the accused came to her house.

18. The complainant was inside her house since she had returned from having her shower. She was wearing a panty, t-shirt, and her towel was wrapped around her waist. The complainant was lying on the mattress facing downwards the accused came and sat on the settee beside the mattress. Both were having a conversation the complainant told the accused that she cannot stay with him since he had been with his wife.

19. After a while the accused came and lay on top of the complainant and wanted to have sex. When the accused was on top of the complainant she was struggling trying to get up to make the accused fall off her back. At this time the towel that was tied around the complainant's waist got loose and fell off.

20. When the towel fell off the accused with his left hand removed her panty and with the other hand from behind he wrapped his hand around the complainant holding both her arms. The accused tried to insert his penis into the complainant's anus but he could not. The accused then got hold of the oil bottle which the complainant's son had dropped beside the mattress.

21. By using the oil the accused was able to insert his penis into her anus, after about 7 times of penetrating her anus the complainant said it was painful and if he does not stop she will report him to the police. The complainant said that she did not consent for the accused to penetrate her anus with his penis.

22. The accused stopped wore his clothes and before leaving he said that he will do something to her if she reports the matter to the police. As a result of this threat the complainant reported the matter to the police on the third day since she was scared the accused might do something to her. When the complainant came to know the accused had left for Suva she went to the police. After she reported the matter she was medically examined. The complainant recognized the accused in court.

23. In cross examination the complainant agreed that her relationship with the accused was not accepted by both the families. This was the reason why both the complainant and the accused could not stay together at her family house at Burenitu village or at the accused residence at Cavakuka settlement. The complainant agreed that when the accused was cutting cane in Nawaicoba, Nadi prior to this incident she was staying with the accused and his niece, Tokasa.

24. The complainant agreed her relationship with the accused at Nawaicoba was not good and that both used to fight with each other because the accused wife had started to call the accused. At one time she had torn the accused t-shirt and pulled down his pants and underwear and it was Tokasa who had stopped her. The complainant had reported the matter to the police but did not press charges and had asked that the accused be warned.

25. The complainant denied having sex with the accused on the night before the accused was arrested by the police and she had not left the accused house via a shortcut route on 1st August, 2019. The complainant also disagreed to the suggestion that during her arguments with the accused she used to threaten him that if he does not marry her she will report him to the police.

26. The complainant denied she had made up the allegation against the accused. According to the complainant the accused would come to her village. The complainant agreed that she had told the court in her evidence that before leaving the accused had threatened her.

27. When the complainant was read her police statement dated 30th July, 2019 by the clerk in court the complainant agreed it was not mentioned in her police statement that the accused had threatened her before leaving her house, however, she stated that she had told this to the police officer writing her police statement.

28. The final witness Melaia Busa a Nurse Practitioner informed the court that she graduated in 1993 as a registered Nurse. In 2007 she completed a course in midwifery and in 2011 the witness obtained Advanced Diploma in Nurse Practitioner from Fiji National University. In 2020 the witness completed Bachelor in Nursing from Fiji National University.

29. In 2019 the witness was based at the Waimaro Health Centre the centre did not have a medical officer the witness in her capacity as a Nurse Practitioner with two others nurses were looking after the centre.

30. On 30th July, 2019 the witness had attended to the complainant who was stable and not in distress. Upon examination of the complainant the witness did not find any injury or laceration but when she touched around the anus the patient complained of pain that is why she had noted tenderness on the anus. The witness did not see any bleeding or blood stains on her gloves during the examination of the complainant. The witness explained tenderness is pain upon touch.

31. In cross examination the witness stated that her scope of practice as a Nurse Practitioner was not of a Medical Practitioner.

32. In re-examination the witness said by scope of practice she meant there are some work which can only be done by the medical officers such as major operations.

33. This was the prosecution case.

## **DEFENCE CASE**

34. 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 their evidence and give such weight as is appropriate.

35. The accused informed the court that he is educated up to class 8 and he has three children. In 2019, he was residing at Cavakuka settlement with his children and niece Tokasa. The accused and the complainant were in a defacto relationship in 2019 and he was driving a carrier.

36. The accused further stated that on 25th July, 2019 at 7am he did not go to the house of the complainant at Burenitu village since he was in Waimicia driving his carrier. At 7am on this day he had left his house at Cavakuka settlement. The accused niece Tokasa was with him at their house before he left for Waimicia. After driving the accused reached home late at night. According to the accused the complainant was at Burenitu village at her home. The accused had also stayed with the complainant at Nawaicoba, Nadi.

37. The accused aunt and Tokasa were also staying with him at Nawaicoba, whenever the accused wife and children would call the complainant did not want him to speak to his wife and children. On one occasion the complainant had pulled his clothes which got torn including his pants when she had pulled it down.

38. Whenever the accused wife and children called the complainant argued with the accused according to the accused the complainant had a hatred towards his wife and children especially when they called and spoke with him. She would threaten the accused by saying if his wife calls again she will report him to the police and not only this, the complainant would be jealous if he spoke to his cousins. The other reason for the argument between the two was when the accused did not give the complainant money.

39. Furthermore, the accused was arrested on 1st August, 2019 from his home at Cavakuka settlement and prior to his arrest the complainant was with him and they had sex. The accused also stated that after leaving his house the complainant came with the police and got him arrested. He does not know the reason why the complainant did this to him.

40. The accused said that the complainant had come to visit him at the remand centre and the cell block. He also said that he was afraid of the police and when the complainant threatened him that she will call the police he would get scared. The complainant had lodged reports against him to the police about three times and on each occasion she would get the police to warn him.

41. In cross examination the accused said in 2019 he never went to Burenitu village. The accused was referred to his record of interview dated 1st

August, 2019 to questions and answers 36 to 38 which were read as follows:

*Q. 36. At whose house in Burenitu are they residing?*

*Ans. At my wife's house.*

*Q. 37. Why are you not residing with the rest of your family members?*

*Ans. Because I had an argument with my wife so I went to stay at my place in Cavakuka.*

*Q. 38. When did you left your family members to stay in Cavakuka?*

*Ans. On Tuesday last week 23/7/19.*

42. The accused agreed the above questions and answers were correct and that he had left his wife namely Atelaite Dolo's house in Burenitu on 23rd July, 2019. When asked which version was correct the accused said what he told the court that he had never been to Burenitu in 2019. The accused also said that he only went to Burenitu during the start of his relationship with the complainant in 2018 and that was once only. He did not go to the complainant's house but would park the carrier on the road and it was the complainant who would come to him.

43. The accused denied the allegation raised against him by the complainant he stated that on 25th July, 2019 he did not go to the house of the complainant and on this day he did not have forceful anal sex with the complainant.

**PREVIOUS INCONSISTENT STATEMENT**

44. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel in the cross examination of the accused had questioned these witnesses about some inconsistencies in her police statement and the record of interview of the accused which they had given to the police when facts were fresh in their minds with their evidence in court.

45. This court is allowed to take into consideration the inconsistencies between what these witnesses told the court and their police statements when considering whether these witnesses were believable and credible. However, the police statements (including caution interview) are not evidence of the truth of its contents.

46. 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.

47. 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 witnesses. 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.

48. The final defence witness Tokasa Navuniyaca informed the court that the accused is her uncle. In the year 2019, she was residing at Cavakuka settlement with her husband, their son and the accused and his children.

On 25th July, 2018 at around 6am she was preparing food for the children to go to school. The accused was also getting ready to go for driving in Waimicia.

49. It was after 6am the accused left home to go to Waimicia to do his driving since in the morning he had received calls to take passengers. On 1st August, 2019 the witness had woken up early because she was planning to go to the market to sell her produce. The witness saw the complainant leaving the house. After a little while the police arrived and arrested the accused by this time it was about 7am.

50. After the accused was arrested the witness saw the complainant at Natabua Remand Centre, in court and the cell block bringing food for the accused. In 2018, the witness was living with the accused and the complainant at Nawaicoba, Nadi according to the witness the complainant had the tendency to degrade the accused in front of the family members, she would punch him and tear his clothes and also threatened the accused if he punched her she would report him to the police. On the 25th it was before 9am the witness had gone to Waimicia and she had seen the accused driving and conveying passengers.

51. In cross examination the witness agreed that the accused had left home to drive his carrier after 6am and she would not know where he had gone to. On the 25th the witness came home with the accused at 7pm after selling her produce at Waimicia. According to the witness the accused did not go to Burenitu village in 2018 and 2019.

52. The witness denied the suggestion that on 1st August, 2019 the complainant was never at the accused house. In respect of selling her produce on 25th July, 2019 the witness said she left home before 9am to

go to Waimicia to wait for the 9 o'clock bus so that she can sell her produce to the passengers of the 9 o'clock bus. When she saw the accused at Waimicia it was after 9am and that she did not see the accused between 6am when he left the house till 9am.

53. In re-examination the witness stated that the accused did not go to Burenitu village in 2018 and 2019 because he was banned by the family members from going to Burenitu village because of the complainant's behaviour.

54. When ask to clarify what the witness meant by saying the accused had left home after 6am the witness said that she could only remember the accused leaving home after 6am because at 6.47 am the transport for students usually came and the accused had already left by then.

55. This was the defence case.

**ANALYSIS**

56. The prosecution alleges that in the year 2019 the complainant and the accused were in a defacto relationship. On 25th July, 2019 the complainant was alone at her home, after having her shower she was lying on the mattress facing downwards. The accused came into the house and set on the settee beside the mattress.

57. During the conversation the complainant made it known to the accused that she will not be having a relationship with him. The accused wanted to have sex with the complainant he went and laid on top of the complainant. The complainant did not like this so she started struggling in an effort to stand up and to make the accused fall off her back.

58. During the struggle the towel of the complainant fell off at this time the accused with his left hand removed the complainant's panty and after removing his clothes he attempted to penetrate her anus. At first the accused did not succeed, there was a bottle of oil beside the mattress.

59. After using the oil the accused was able to forcefully penetrate the complainant's anus with his penis since it was painful the complainant told the accused to stop. The complainant did not consent to what the accused had done. Before leaving the accused had warned the complainant that he will do something to her if she reports him to the police. When the complainant came to know that the accused had gone to Suva she went and reported the matter to the police.

60. On the other hand, the defence says the allegation is a made up story narrated in court by the complainant. The complainant has a habit of making false complaints against the accused and other than this matter the accused has not been charged by the police. Furthermore, during her relationship with the accused she had threatened the accused on numerous occasions that if he continues to talk to his wife and children she will report him to the police. The complainant is jealous of the accused, and she also hates his wife and children when they call him.

61. The complainant has been the cause of the accused misery, she is a self-centered person who has made this false allegation against the accused. The accused is a carrier driver and on this day in the presence of his niece Tokasa he had left home from Cavakuka at 7am to go to Waimicia.

62. A scrutiny of the evidence given by the complainant will show that whatever she told the court does not make sense. The accused was not at the complainant's house as alleged. The complainant before the arrest of the accused had gone to his house through a short cut route and they had

sexual intercourse and not only this, the complainant told the court that she had visited the accused at the police cell and at the remand centre. If this was not enough she had taken food for the accused.

63. Tokasa the niece of the accused had seen the accused leave his house at Cavakuka on the 25th nearing 7am and had also seen the accused driving carrier at Waimicia before 9am.

64. The defence is asking this court not to believe the complainant who did not tell the truth in court in respect of the allegation she has raised. The accused and the defence witness told the truth, the accused was not at the house of the complainant as alleged. This is a case of revenge against the accused by a manipulative person who wanted the accused to marry her and sever all ties with his wife and children. Finally, the defence is asking this court not to give any weight to the evidence of the complainant in regards to the allegation raised.

**DEFENCE OF ALIBI**

65. It is noted that the accused is relying on the defence of alibi. He took the position that on 25th July, 2019 he was not at the house of the complainant as alleged by the complainant. At around 7am on this day the accused was doing his usual driving in Waimicia away from the complainant's village and house.

66. In view of the above defence I have reminded myself of the following:

a) Firstly, the prosecution has to prove the guilt of the accused so that this court is sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the

defence of alibi. Even if this court concludes that the alibi was false, that does not by itself entitle this court to find the accused guilty;

b) Secondly, it is borne in mind that an alibi is sometimes invented to bolster a genuine defence;

c) Even if this court concludes that the defence put forward by the accused has not been made out that does not of itself entitle this court to find the accused guilty. The prosecution must still satisfy this court beyond reasonable doubt of his guilt.

67. The accused has denied any wrong doing his defence is he did not commit the offence as alleged since he was not at the alleged crime scene but somewhere else.

68. From the above, there are three possibilities that arise which is open for consideration:

a) If the alibi is accepted then this court is obliged to find the accused not guilty;

b) If this court rejects the alibi then this court would not necessarily find the accused guilty but must assess the evidence as a whole; and

c) If this court does not accept the alibi, and also does not reject it in the sense that this court regards it as something which could reasonably be true then in such a case this court must find the accused not guilty.

69. Prematilaka, JA sitting as a single judge in Court of Appeal in *Pauliasi Raisele v State [2020] FJCA 49; AAU088.2018 (1 May 2020)* made a pertinent observation in respect of the above from paragraphs 20 to 28 as follows:

*[20] The learned trial judge had in paragraphs 103 and 125 directed the assessors and himself on the lines suggested in Ram and Mateni. He cannot be faulted in that respect.*

*[21] A slightly different approach, however, had been taken in some other jurisdictions such as Australia, Sri Lanka and New Zealand. Section 150(8) of the Criminal Procedure Act 1986 (NSW) states that*

*"evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."*

*[22] In what would be the appropriate direction on alibi in NSW Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring said in R v Amyouni NSWCCA 18/2/88 unrep. BC8802201:*

*"It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury." "One is that they accept the alibi, in which event they would be obliged to acquit The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit."*

*[23] Again in R v Kanaan (2005) 157 A Crim R 238; [2005] NSWCCA 385 Hunt AJA (Adams and Latham JJ concurring) said*

*"[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt."*

*"[135].... An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove or eliminate that reasonable possibility: Regina v Youssef (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:*

*The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time."*

*[24] In Sri Lanka in Yahonis Singho v. The Queen (1964) 67 NLR 8 at 9-11 T. S. Fernando J. said*

*'If the evidence of an alibi is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does mere, it destroys the prosecution case and establishes its falsity. As the jury*

*convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane's evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection.'*

*[25] Yahonis Singho was quoted with approval in Mannar Mannan v Republic (1987) 2 SLR 94 where, however, the proviso under section 334(1) of the Code of Criminal Procedure Act was applied and the conviction was upheld which was affirmed by the Supreme Court in Mannar Mannan v Republic (1990) 1 SLR 280.*

*[26] Blackstone's Criminal Practice 1993 at page 1773 states*

*'Although there is no general rule of law that in every case where alibi is raised the judge must specifically direct the jury that it is for the prosecution to negative the alibi, it is the clear duty of the judge to give such a direction, if there is danger of the jury thinking that an alibi, because it is called a defence, raises some burden on the defense to establish it (Wood (No.2) (1967) 52 Cr App R 74 per Lord Parker CJ). See also Johnson [1961] 1 WLR 1478 and Denney [1963] Crim LR 191.'*

*[27] It is well established that it is for the prosecution to negative an alibi as in the case of self-defence or provocation [See Killick v The Queen (1981) 147 CLR565; [1981] HCA 63; 37 ALR 407, R v Johnson (1961) 46 Cr App R 55; 3 ALL ER 969 and R v Taylor [1968] NZLR 981 at 985-6] because by raising an alibi , the accused was not undertaking to prove anything, and that onus remained on the Crown to remove or eliminate any reasonable doubt which may have been created by the alibi claim or any reasonable possibility that the alibi was true [ see R v. Small (1994) 33 NSWLR 575; 72A Crim R 462 (CCA)]. If the alibi evidence is so cogent as to engender in any reasonable mind a doubt of the accused's guilt, the conviction must be quashed and a verdict of an acquittal entered, however cogent the prosecution evidence would otherwise be [see Palmer v R (1998) 193 CLR1; [1998] HCA 2; 151 ALR 16]*

*[28] I think that it is in the light of these decisions that one should reconsider as to what the appropriate direction particularly on the intermediate position on alibi defence should be in Fiji. However, it is within the domain of the Full Court of the Court of Appeal to make a pronouncement, if considered appropriate, at least for future guidance.*

**DETERMINATION**

70. 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.

71. 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 an honest 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 allegation.

72. The complainant was resolute and unwavering in what she had encountered on the 25th July, 2019. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty.

73. I accept that it was the accused and no one else, who had penetrated the complainant's anus with his penis without her consent. The accused and the complainant were in a defacto relationship and they knew each other very well.

74. The allegation is about a broad day light happening and the close proximity of the accused and the complainant before, during and after the allegation cannot be ignored. The defence by attacking the character of the complainant was diverting attention away from the main issue.

75. 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 consent to what the accused had done to her.

76. There was an inconsistency between what the complainant told the court and her police statement, however, the inconsistency was not significant to affect the credibility or the thrust of the complainant's evidence.

77. 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 paragraph 16 as follows:

> *[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;"*

78. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State, AAU 0054 of 2016 (7 June, 2019)* at paragraph 107 in the following manner 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 is some details unrelated to main incident because power of observation, retention and reproduction differ with individuals…'*

79. I would have been surprised and suspicious if the complainant had told the court everything in accordance with her police statement after three years of the incident. I also accept the observations made by Melaia Busa the Nurse Practitioner that the complainant had complained of pain when she touched the complainant's anus.

80. I have also directed my mind to the fact that the complainant was unable to immediately report the matter to the police. I accept that she was threatened by the accused that he will do something to her and it was only when she came to know that the accused had gone to Suva that she was able to muster courage to go to the police station.

81. The fact that the complainant's police statement was taken on the 30th July, 2019 does not mean that she had time to fabricate her complaint. In any event 3 or 5 days delay in the circumstances of the complainant is not unreasonable (see *State v Serelevu (2018) FJCA 163; AAU 141 of 2014 (4th October, 2018*). The Nurse Practitioner Melaia Busa had also observed tenderness on the anal wall of the complainant which she said was painful to the complainant upon touch. I accept the evidence of both the prosecution witnesses as reliable and credible.

82. 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. I

reject the defence assertion that the accused did not do anything to the complainant as unworthy of belief. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said on the day in question he did not go to the house of the complainant.

83. In his evidence the accused told the court that on 25th July, 2019 the complainant was at her home. How did the accused know this if he did not go to the house of the complainant as alleged? Moreover, in his record of interview the accused told the police that he was staying at the house of his wife Atelaite Dolo in Burenitu Village and it was on 23rd July, 2019 he had moved out after he had an argument and he went to stay at his house in Cavakuka.

84. I accept that when the accused was caution interviewed the facts of this case were fresh in his mind and the accused had told the truth to the police officer interviewing him. I give weight to what the accused told the police officer in his record of interview as mentioned above. The accused did not tell the truth when he also said he never went to Burenitu village in 2019 where the complainant lived. Tokasa also did not tell the truth when she said the accused did not go to Burenitu village in 2019. How Tokasa can so confidently say this is beyond me.

85. The accused gave a narration of events which was well thought out to divert attention away from the main allegation. Tokasa only saw the accused leave the house on the day in question but if the accused had gone to the house of the complainant as alleged she would not know. According to Tokasa the accused had left his house on the 25th after 6 am and before 6.47 am in my considered judgment is more than enough time to go to the house of the complainant and then go back to his usual work as a driver at Waimicia. If the complainant can walk over from her village

to the accused house as asserted by the accused then the driving distance would be short.

86. The defence had also raised that the complainant during the Nawaicoba incident had reported against the accused. When one considers the facts before this court the alleged perpetrator of the assault on the accused was the complainant. Tokasa said she was the eye witness to the incident yet the complainant went and reported the matter to the police does not make sense.

87. It was obvious to me that the accused and Tokasa had concocted a story to belittle the complainant to make the accused look like a victim in comparison to the complainant. I have also noted that when Tokasa was giving evidence she was volunteering information even before she was asked by the defence counsel gave me the impression that this witness was "parroting" what she had thought of before coming to court.

88. I do not accept that the allegation was made up by the complainant to falsely implicate the accused. On a review of the entire evidence before this court particularly the defence of alibi raised and the evidence of the accused and his defence witness I rule that the prosecution which has the burden to disprove the defence of alibi raised has been able to rebut the defence of alibi beyond reasonable doubt.

89. This court is satisfied beyond reasonable doubt that on the 25th July, 2019 the accused was at the house of the complainant and on this day he had penetrated the anus of the complainant with his penis without her consent.

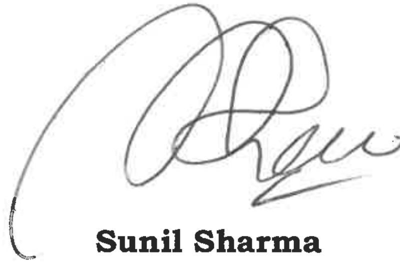
90. The defence has not been able to create a reasonable doubt in the prosecution case in respect of the offence as charged.

## CONCLUSION

91. This court is satisfied beyond reasonable doubt that the accused on 25th July, 2019 had penetrated the anus of the complainant with his penis 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.

92. In view of the above, I find the accused guilty of one count of rape as charged and he is convicted accordingly.

93. This is the judgment of the court.



**Sunil Sharma**
**Judge**

**At Lautoka**
22 March, 2023

**Solicitors**
**Office of the Director of Public Prosecutions for the State.**
**Office of the Legal Aid Commission for the Accused.**