

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No. HAC 62 of 2020

STATE

V

ILIAPI LILO

Counsel : Mr. J. Nasa for the State.
: Mr. P. Gade for the Accused.

Dates of Hearing : 18, 19 May, 2023

Closing Speeches : 26 May, 2023

Date of Judgment : 26 May, 2023

JUDGMENT

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

1. The Director of Public Prosecutions charged the accused by filing the following amended information dated 9th June, 2022:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

ILIAPI LILO between 15th day of April 2016 and the 2nd day of May 2016 at Lautoka in the Western Division, had carnal knowledge of “M.R”, a 10 year old child.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

ILIAPI LILO on the 17th day of April 2017, at Lautoka in the Western Division, had carnal knowledge of “M.R”, a 10 year old child.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

ILIAPI LILO on the 5th day of November 2017, at Lautoka in the Western Division, had carnal knowledge of “M.R”, an 11 year old child.

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 for the offences of rape as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

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

ELEMENTS OF THE OFFENCE

5. To prove all the above counts the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "M.R" with his penis;
 - (c) "M.R" was below the age of 13 years.
6. The slightest of penetration of the complainant's vagina by the accused's penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case, the complainant was 10 and 11 years of age respectively at the time of the alleged offending and therefore the consent of the complainant is not an issue in this case.

7. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
8. The second element is the act of penetration of the complainant's vagina with the penis.
9. The final element of the offence is the age of the complainant. It is an undisputed fact that the complainant was 10 years in 2016 and 11 years in 2017 which establishes that she was below the age of 13 years at the time of the alleged incidents.
10. In this trial, the accused denied committing the offences of rape he is charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis as mentioned in the information.
11. This court must be satisfied that the prosecution has proved all the elements of the offences of rape beyond reasonable doubt in order for this court to find the accused guilty as charged. If on the other hand, this court has a reasonable doubt with regard to any of those elements concerning the offences, then this court must find the accused not guilty.
12. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the 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

13. 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.
14. 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

15. The complainant informed the court that in the year 2016 she was 10 years of age born on 19th October, 2006. Her parents were separated and she was living with her mother and siblings, during the school holidays the complainant used to visit her father and stay at her father's house at Tomuka, Lautoka. She is the second eldest daughter after Kasanita Tabua Ranitu. The complainant knows the accused who is her uncle by virtue of his marriage to her paternal aunt and is her father's neighbour.
16. Between 15th April, 2016 and 2nd May, 2016 the complainant had gone to her father's house to spend her school holidays. One day the accused called her into his house for them to watch movies. When the complainant entered the house she noticed that no one was there so she asked the accused where the rest of the family members were.
17. The accused said they were not at home and then he told her to go into the room. When the complainant went into the room the accused put on a pornographic movie. The accused removed the complainant's shorts and

panty and laid her on the bed, whilst standing the accused removed his clothes and penetrated his penis into her vagina for about 5 to 10 minutes.

18. When the complainant went home she did not tell anyone about what the accused had done to her because the accused had told the complainant if she told anyone he will beat her.
19. Thereafter on 17th April 2017 the complainant was on her way to attend to her cousin's birthday party the accused called her into his house. When inside the house she was told to sit on the mat. The accused touched her body made her lie down, removed her tights and panty, removed his clothes and then penetrated his penis into her vagina for about 10 minutes. After this the accused told the complainant to wear her clothes and to play with other children.
20. The complainant did not tell anyone about what the accused had done to her because she was scared the accused would beat her.
21. Finally, on 5th November, 2017 the complainant was sitting with her friends outside her father's house when she saw the accused signaling to her to follow him to the toilet. When the complainant went into the toilet she saw the accused had already removed his pants and he asked the complainant to go to him.
22. The accused removed the complainant's shorts and panty and told her to sit on his penis for about 10 minutes. The complainant did as she was told and according to the complainant the penis of the accused had penetrated her vagina. After this the accused told her to go home. The complainant was afraid of what the accused had told her that he would beat her if she told anyone about what he had done. After this incident the

complainant stopped going to her father's house because of what the accused was doing to her.

23. It was in the year 2019 the complainant told her elder sister Kasanita about what the accused had done to her she did not tell Kasanita earlier because she was afraid of the accused. The complainant recognized the accused in court.
24. In cross examination the complainant agreed that in 2016 her parents were separated and there was tension between her parents families. The wife of the accused is the sister of the complainant's father and there was tension between the complainant's mother, the accused and his wife.
25. Between 15th April and 2nd May when the complainant entered the accused house he was watching a normal English movie. The complainant agreed while watching the movie there was a kissing scene and she maintained that on this day the accused had done all the things she had told the court. The complainant stated that it was the accused who had put his penis into her vagina.
26. The complainant agreed on 17th April, 2017 there was a birthday party near her father's house. The complainant denied going to the house of the accused to ask for a dress belonging to one of his daughter's.
27. The complainant also denied that when the accused turned around to inform her that none of his daughter's dresses would fit her she was standing without any towel and that she was fondling her private part with her fingers.

28. The complainant denied the suggestion that at this time the accused had walked towards her and had fondled her private part with his fingers. The complainant maintained that the accused had done all the things she had told the court.
29. In respect of the third count the complainant agreed that the accused had signaled to her to meet him inside the toilet which was outside his house. When she entered the toilet the accused was already sitting on the toilet pan and his pants were up to his knees.
30. The complainant at this time denied she had removed her pants and panty and had told the accused that she wanted to pee. The complainant also denied that the accused had at this time fondled her private part. When it was suggested to the complainant that she did not sit on the penis of the accused the complainant said "*no, I sat on his penis*". The complainant denied that her mother had told her to come up with these false allegations against the accused. The complainant maintained that what she told the court had happened.
31. The final witness Kasanita Ranitu the elder sister of the complainant informed the court that on 20th August, 2019 she was told by the complainant that the accused had raped her. She was told the complainant was taken inside the house and the accused would make her lie on the bed naked. The accused played a pornographic movie and asked her to follow everything that happened in the movie.
32. The witness also stated that the complainant told her the accused once took her to the room and had sexual intercourse and when she hesitated he blocked her mouth and he would threaten her not to tell anyone. The

witness was scared to immediately tell her mother so she text her best friend and then she told her mother about the above.

33. In cross examination the witness agreed that due to the separation of her parents, there was tension between her mother and the accused. The witness was aware that her mother had influenced the complainant to come up with the allegations against the accused.

RECENT COMPLAINT EVIDENCE

34. Complainants of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A complainant's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
35. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for this court to determine what weight is to be given to the fact that the complainant told her sister Kasanita after three years of the first incident in the year 2019 that the accused had sexual intercourse with the complainant.
36. This is commonly known as recent complaint evidence. The evidence given by Kasanita is not evidence of what actually happened between the complainant and the accused since this witness was not present and did not see what had happened.

37. This court is, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told Kasanita the accused had raped her by taking the complainant inside his house. The accused made her lie on the bed naked and he played a pornographic movie and asked her to follow everything that happened in the movie.
38. On another occasion the accused took the complainant into the room and had sexual intercourse with her when she hesitated he blocked her mouth and threatened her not to tell anyone.
39. The prosecution is also asking this court to consider the fact that the complainant was 10 and 11 years respectively and she did not tell anyone about what the accused was doing because the accused had threatened the complainant.
40. The information given by the complainant to her sister was sufficient to alert Kasanita that something wrong had happened to the complainant. The prosecution also says the complainant did tell her sister about what the accused was doing to her although late in time but when the opportunity presented itself she did not hesitate to complain therefore she is more likely to be truthful.
41. On the other hand, the accused says the complainant did not tell the truth to her sister she made up a false story against the accused. The complainant was influenced by her mother who had a grudge against the accused due to a family dispute as a result of her separation from the complainant's father. The accused did not do anything to the complainant as alleged.

42. Although the complainant was 10 or 11 years of age at the time she knew right and wrong. It took the complainant a little over 3 years to tell her sister a story which did not make sense and therefore she should not be believed.
43. It is for this court to decide whether the evidence of recent complaint helps in reaching a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is a matter for this court to decide whether it accepts the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
44. This was the prosecution case.

DEFENCE CASE

45. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
46. The accused informed the court that in 2016 he was residing at Tomuka, Lautoka he knows the complainant who is his niece (wife's brother's daughter).
47. In 2016 the complainant's parent's got separated this resulted in both families (mother's side and father's side) not having a good relationship. According to the accused both families were engaged in "*heated arguments or talks between the ladies the relationship was not good.*"

48. In Tomuka the accused had a lean to house which was an open house without any room. The complainant's father's house was next to his. Between 15th April, 2016 to 2nd May 2016 the accused was at home watching English movies after sometime the complainant came into his house. At this time the accused was lying down the complainant came and sat behind him. The accused kept watching the movie and as the movie progressed there were sexual scenes, when he looked around he saw the complainant. The accused knew the complainant was 10 years old and he told her to look away from the screen and told her "*do you want to follow it*". According to the accused the complainant just smiled and walked away.
49. The accused denied calling the complainant into his house he stated she came running and sat in his house and started watching the movie. The accused also denied telling the complainant to go into the room since his house does not have any room. He also stated that he did not lay her on the bed and penetrate his penis into the complainant vagina for 5 to 10 minutes or threaten her.
50. When asked why the complainant made such an allegation against him the accused stated "*from what I can think of, from what I know because we were having family problems her mother may have told her to say these things.*"
51. Furthermore, on 17th April, 2017 the accused was at home his wife and children had gone to attend a birthday party which was to start at 3pm. After sometime the complainant came running into his house to request for his daughter's dress to wear since they were of the same size. The accused went to look for a dress but could not find one when he turned

around he saw the complainant's towel had fallen and she was scratching her vagina.

52. The accused denied calling the complainant to his house and telling her to sit down on the mat and he had not touched her body and kissed her breast. The accused further denied that he had laid down the complainant and had removed her clothes or had penetrated the complainant's vagina with his penis for about 10 minutes. The accused also denied telling the complainant to wear her clothes and go outside to play with other children and he had not threatened her.
53. When asked why the complainant had come up with the allegation against him, the accused said *"because of the family problem we were having that time I know her mother's relatives would have told her to say these things."*
54. Finally, on 5th November, 2017 the accused was at home alone since his family members had gone to town. After sometime the accused was walking to the washroom he signaled to the complainant with his eyes to follow him to the toilet. However, the accused denied removing the complainant's shorts and panty when she got inside the toilet. The accused also denied telling the complainant to sit on his penis for 10 minutes or threatening the complainant not to tell anyone about what he had done.
55. When asked why the complainant had raised such an allegation the accused responded by saying *"because of the family problems we have been having her mother may have told her to say things."*
56. In cross examination the accused agreed the complainant used to visit her father at Tomuka after the separation of her parents and that she was approximately 10 years in 2016 and 11 years in 2017.

57. The accused also agreed that the complainant had a good relationship with him prior to the allegations and she had no grudges against him and therefore she had no reason to lie about anything against him.
58. The accused denied all the allegations raised against him by the complainant but agreed that on 5th November, 2017 he had signaled to the complainant to follow him to the toilet. When it was suggested that he had signaled to the complainant because he wanted to have sex with her the accused denied this.
59. Upon further questioning the accused agreed when the complainant came to the toilet he was sitting there with his underwear down to his knees and his penis was already out.
60. Furthermore, the accused did not tell the police during his questioning at the police station that the mother of the complainant was behind all the allegations raised against him. When it was put to the accused that the only reason why he was putting this up was to escape from the reality of what he had done the accused said "*I did not realise at that time but over time I came to know.*" The accused denied committing any of the offences raised against him.
61. This was the defence case.

ANALYSIS

62. The prosecution alleges that on the first two occasions mentioned in the information the accused had called the complainant into his house and on the third occasion the accused had signaled to the complainant to follow him into the outside toilet.

63. On the first two occasions the accused had penetrated the vagina of the complainant with his penis after making her lie on her back on the bed and mat in his house. On the third occasion in the toilet the accused had penetrated his erected penis into the vagina of the complainant whilst in a sitting position. In 2016 and 2017 the complainant was 10 and 11 years of age respectively.
64. The prosecution also states that the accused took advantage of the good relationship he had with the complainant and he was bold in what he did to the complainant. The complainant was raped by the accused on two occasions in his house and on the final occasion in his toilet.
65. To ensure that the complainant does not tell anyone about what he has been doing to her the accused threatened the complainant that he will beat her if she did so. The complainant was scared of the accused so she did not tell anyone until she was able to muster enough courage in the year 2019 at the age of 13 years to finally tell her sister about what the accused had been doing to her.
66. The delay by the complainant in reporting the unlawful sexual conduct to her sister was not her making since circumstances were beyond her control and most importantly the threat of the accused after each incidents of rape.
67. On the other hand, the defence says the allegations are baseless and a made up story by the complainant. The accused did not do anything to the complainant as alleged. The allegations against the accused was influenced by the mother of the complainant who had a dislike for the accused after the complainant's parents got separated.

68. The defence states that the delay in reporting is substantial the complainant was a “free agent” if what she told the court was the truth then she could have told her mother or elder sister Kasanita immediately after the alleged incidents but she did not because nothing had happened.
69. The accused was never in control of the complainant she had her own life away from the accused with her mother and siblings and yet she did not tell anyone is suspicious.
70. It was the motivation of the complainant’s mother that made the complainant to support her mother’s ulterior motives by raising the false allegations. The complainant’s sister had told the court that it was her mother who had influenced the complainant to implicate the accused due to her separation from the complainant’s father.
71. Finally, the defence submits that the complainant has not told the truth she has made up a story which does not make sense and is riddled with doubt. The defence is asking this court to believe the accused who gave a frank and honest account that he did not do anything to the complainant as alleged.

DETERMINATION

72. 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.

73. 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 consistent and coherent account of what the accused had done to her, she was also able to withstand cross examination and was not discredited. The complainant was steadfast in what the accused had done to her and she had expressed herself clearly in this regard.
74. I did notice that the complainant was not able to remember specific dates of the allegations but this cannot be taken against her considering her age at the time and passage of time. The complainant was 10 years in 2016 when the first incident took place and the following year 2017 she was 11 years when she was again confronted with two unexpected experiences by the accused her uncle.
75. I have no doubt in my mind that the complainant told the truth in court her demeanour was consistent with her honesty. I accept that the complainant did not tell anyone about what the accused was doing to her because of his threats to her. Furthermore, 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. It cannot be ignored that the complainant was a child at the time who was oblivious to the unexpected abuse by her uncle.

LATE REPORTING

76. It is obvious that there is an issue of late reporting by the complainant to her sister. The delay is a little over three years from the date of the first incident in 2016 and two years from the second and third incidents in 2017. In law the test to be applied in such a situation is known as the totality of circumstances test. The Court of Appeal in *State v Serelevu*

163; AAU 141 of 2014 (4th October, 2018) had explained this issue as follows:

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

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

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

“A prompt first information statement serves a purpose. Delay can lead to embellishment or after thought as a result of deliberation and consultation. Prosecution (not the prosecutor) must explain the delay satisfactorily. The court is bound to apply its mind to the explanation offered by the prosecution through its witnesses, circumstances, probabilities and common course of natural events, human conduct. Unexplained delay does not necessarily or automatically render the prosecution case doubtful. Whether the case becomes doubtful or not, depends on the facts and circumstances of the particular case. The remoteness of the scene of occurrence or the residence of the victim of the offence, physical and

mental condition of persons expected to go to the Police Station, immediate availability or non-availability of a relative or friend or well wisher who is prepared to go to the Police Station, seriousness of injuries sustained, number of victims, efforts made or required to be made to provide medical aid to the injured, availability of transport facilities, time and hour of the day or night, distance to the hospital, or to the Police Station, reluctance of people generally to visit a Police Station and other relevant circumstances are to be considered.”

77. At the time the complainant told her sister about what she was going through she was 13 years of age. I accept what the complainant told the court that she could not take it anymore and therefore she had to speak out. It was because of the accused the complainant had stopped going to her father’s house as well. I accept that the complainant was threatened by the accused that he will beat her if she told anymore about what he was doing to her.
78. Kasanita also told the court about what the complainant had told her and then she relayed the same to her mother. The complainant was a victim of circumstances I do not expect the complainant to express what she was going through to anyone due to the good relationship the accused had with the complainant’s father and his threat to harm her if she told anyone about what he was doing to her.
79. I accept that the complainant was restrained by circumstances beyond her control in failing to immediately inform anyone and report the matter to the police. Although the delay is substantial the complainant was of such an age that she cannot be blamed for the late reporting, when she was able

to get the courage she did not hesitate to inform her sister about what the accused had done.

80. I also accept that there is no motivation by the mother of the complainant against the accused. The accused himself told the court that he had a good relationship with the complainant and I do not accept that the separation between the mother and father of the complainant had made the complainant's mother to influence the complainant to make a false complaint against the accused. The evidence given by the complainant does not have any iota of suggestion that she made a story to falsely implicate the accused
81. Although Kasanita in cross examination agreed that her mother had influenced the complainant to lodge a complaint against the accused does not mean that this led to a false complaint. The accused was caution interviewed by the police in respect of the allegations raised by the complainant, however, he did not tell the police that the mother of the complainant was behind all the allegations raised. I reject the assertion of the accused that he came to know about the motivation of the complainant's mother later is an afterthought to escape from what he had done.
82. I accept that the complainant was scared of the accused and it was the accused who was calling the complainant on all occasions. In my judgment the power of authority the accused had over the complainant as her uncle, neighbour of her father and the threat to harm the complainant made her oblige to what the accused wanted to do to her.
83. 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

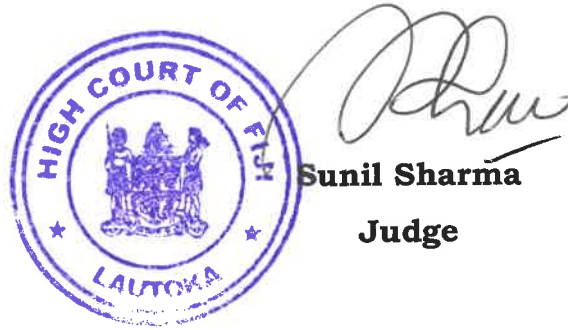
reject the defence assertion that the accused had not done anything to the complainant as unworthy of belief. The demeanour of the accused was not consistent with his honesty he did not tell the truth when he said he did not do anything to the complainant and that the allegations are a concocted story made up by the complainant's mother because of the enmity the complainant's mother had against the accused due to her spousal separation is far-fetched and not believable.

84. The defence has not been able to create a reasonable doubt in the prosecution case.

CONCLUSION

85. This court is satisfied beyond reasonable doubt that the accused between 15th day of April, 2016 and the 2nd day of May, 2016 and also on 17th day of April, 2017 had penetrated the vagina of the complainant with his penis, a 10 year old child.
86. This court is also satisfied beyond reasonable doubt that the accused on 5th day of November, 2017 had penetrated the vagina of the complainant with his penis, an 11 year old child.
87. In view of the above, I find the accused guilty of three counts of rape as charged and I convict him accordingly.

88. This is the judgment of the court.



Sunil Sharma
Judge

At Lautoka
26 May, 2023

Solicitors

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