

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 92 of 2022

STATE

vs.

- 1. MOHAMMED RIYAZ**
- 2. VIKASHNI KAJAL KUMAR**

Counsel: Ms. A. Vavadakua for the State
Mr. A. K. Singh for both the Accused

Date of Hearing: 18th to 24th April 2023

Date of Closing Submission: 12th May 2023

Date of Judgment: 19th May 2023

JUDGMENT

(The name of the victim is suppressed she will be referred to as "NB")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Amended Information dated 17th April 2023

COUNT ONE

Statement of Offence

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

Particulars of Offence

MOHAMMED RIYAZ, between the 1st day of January 2016 and the 31st day December 2016, at Koronivia, in Nausori, in the Eastern Division, had carnal knowledge of **NB**, without her consent.

COUNT TWO

Statement of Offence

RAPE: contrary to Section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, had carnal knowledge of **NB SHAHEEN BIBI**, without her consent.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: contrary to Section 210 (1) (b) (ii) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, procured **NB**, to witness **MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR**, having sex.

COUNT FOUR

Statement of Offence

DOMESTIC TRAFFICKING IN CHILDREN: contrary to Section 117 (1) (a) and (b) and (c) (i) of the Crimes Act, 2009.

Particulars of Offence

MOHAMMED RIYAZ and VIKASHNI KAJAL KUMAR, between the 1st day of January 2018 and the 31st day December 2018, at Koronivia, in Nausori, in the Eastern Division, facilitated the transportation of **NB**, a person under the age of 18 years, from Koronivia in Nausori to Siri's Apartment in Nausori, with intent that **NB** be used to provide sexual services to another at Siri's Apartment in Nausori.

2. Upon the Accused pleading not guilty, the trial commenced and the Prosecution led in evidence six witnesses. PW1 Janifa Bibi (mother of victim), PW2 NB, PW3 Doctor Guna Goundar, PW4 Doctor Nikotimo Bakani, PW5 Doctor Shelvin Kapoor and PW6 Mohammed Haniff and closed the prosecution case. As there was prima facie material the defence was called for and the rights were explained to each Accused. Both the Accused gave evidence on their behalf and the following witnesses were called on behalf of both the Accused as witnesses for the defence. They are DW3 Nivita Narayan, DW4 Anjela Devi and DW5 Zohra Begum.
3. Upon the close of the Defence both parties were granted time to obtain the transcript and to file their closing submissions in the written form. Written submissions were filed on 12th May 2023 and the judgment is thus pronounced.

Elements of the Charges

4. For the Accused to be found guilty of the counts of Rape in the present case based on sub sections 1 and 2(b) of Section 207 of the Crimes Act, in addition to the date and place stated in the respective counts the prosecution must prove beyond reasonable doubt, the following elements, that;
 - i) The Accused,
 - ii) Penetrated the vagina with his penis,
 - iii) The Complainant did not consent to the Accused to the said penetration,
 - iv) The Accused knew or believed or reckless that the Complainant was not consenting for him to insert his penis in that manner.The slightest penetration of the complainant's vagina by the Accused's penis is sufficient to satisfy penetration.
5. If I may elaborate counts No.1 and 2 that of rape are based on sub sections 2(a) of Section 207 of the Crimes Act. Under these sections, the offence of Rape is constituted when a person penetrates the vagina without that other person's consent. The slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to so give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.

6. For the accused to be found guilty of count No. 3 that of “sexual assault” under section 210 (1) (b) (ii) of the Crimes Act, the prosecution must prove beyond reasonable doubt, that the accused themselves did on the date and place specified in the charge, procured NB without her consent to witness an act of gross indecency namely the two Accused persons having sex.

7. For the Accused to be found guilty of the charge of **Domestic Trafficking in Children** contrary to section 117 (1) (a) and (b) and (c) (i) of the Crimes Act the prosecution must prove three elements beyond reasonable doubt. Firstly, that on the alleged dates, the Accused persons facilitated the transportation of the complainant from one place to another in Fiji namely from Koronivia to Siri’s Apartment in Nausori. *Facilitate* is to make a process or action easy or easier. Secondly, the prosecution must prove that the complainant was under the age of 18 years at the relevant times. Thirdly, the prosecution must prove that in facilitating that transportation the Accused intended the complainant will be used to provide sexual services during or following the transportation to that other place.

8. As alleged the physical elements of the offence is facilitation of transportation and the age of the person so transported should be under the age of 18. The fault element is the intention that NB will be used to provide sexual services to another at Siri’s Apartment.

9. **In State v Laojindamane** [2013] FJHC 20; HAC323.2012 (25 January 2013) the term facilitate’ was defined as follows

“[42] Facilitate is the physical element. The legislature has not defined the word 'facilitate'. Ordinarily, the word 'facilitate' means 'make easy or easier; promote; forward (an action result etc)': New Oxford Dictionary (Oxford Unid University Press, 1993) 903. In P J v Queen [2012] VSCA 146, the Victorian Court of Appeal said at [48] that the word facilitates is an active verb, describing conduct directed at producing a result or outcome.”

Presumption of Innocence

10. The accused are presumed to be innocent until they are proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove

their innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court is not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence led by of the prosecution the Accused must be found not guilty of the charges and accordingly acquitted.

The Following Facts are Admitted;

11. As per section 135 of the Criminal Procedure Act 209, the following facts have been agreed to between Prosecution and the Defence;
 1. *THAT the complainant is NB, also known as "Rahila" – hereinafter referred to as "the complainant"*.
 2. *THAT the complainant is the biological daughter of the 1st Accused, Mohammed Riyaz.*
 3. *THAT the complainant was born on the 27th of June 2002.*
 4. *THAT the complainant's biological mother is Janifa Bibi.*
 5. *THAT 1st Accused and Janifa Bibi are not married but were in a relationship before the complainant was born.*
 6. *THAT the 1st Accused and the 2nd Accused entered into a relationship and started looking after the complainant from when she was 9 years old until towards the end of 2018.*
 7. *THAT when the complainant was living with 1st and the 2nd Accused, they enrolled her at an Islamic School, namely Aesha Learning Centre.*
 8. *THAT at the time the complainant was staying with 1st and the 2nd Accused, the 1st Accused was working for a company, Tasman Tank Pacific Pty Ltd, and his employer at the company was a Caucasian male by the name Shane Nolan.*
 9. *THAT Shane Nolan would occasionally visit the 1st Accused person's residence in Koronivia in 2018, when he was came into Fiji.*
 10. *THAT the above mentioned Shane Nolan has now left the country.*
 11. *THAT the 1st Accused in 2018 would hire vehicle from a Rental Company, namely, Aladeen Rentals, under the Tasman Company business name, to be driven by the 1st Accused.*
 12. *THAT one of those vehicles rented by the 1st Accused from Aladeen Rentals and used by the 1st Accused was a black car, registration number IT 626.*
 13. *THAT on certain occasions in 2018, when the complainant was residing with the 1st and the 2nd Accused, they would visit Siri's Apartment in Nausori a Motel, in one of the rental cars from Aladeen Rentals, rented out by the 1st Accused, under the name of the company Tasman's company.*
 14. *THAT the complainant lodged her 1st police complaint on the 25th of November 2018.*
 15. *THAT the complainant thereafter made another statement on the 28th of*

November 2018 saying that her allegation on the 25th of November 2018 was not true.

16. *THAT on the 18th of February 2019, the complainant was by then residing with her biological mother.*
17. *THAT on the 18th of February 2019, the complainant made another police statement where she informed the police about being sexually abused by her father's employer, namely Shane Nolan sometime in 2018.*
18. *THAT the complainant then gave a 4th statement on the 17th of March 2020, where she gave more details of alleged sexual abuse at the time she was residing with Accused 1 and 2.*
19. *THAT the complainant was medically examined by Dr. Shelvin Kapoor on the 27th of November 2018.*

Prosecution's Case

12. The incident as it transpired from the totality of the evidence is that NB is the biological daughter of the 1st Accused Riyaz. PW1 Janifa is her biological mother. Riyaz and Janifa were never married but were in some relationship due to which Janifa was pregnant with NB. Riyaz appears to have left her and then married the 2nd Accused Vikashni. Janifa upon giving birth to NB had looked after her until she was about 9 years and then she appears to have abandoned or handed over NB to her sister and then the Social Welfare and the police had intervened and handed over the custody of NB to the 1st Accused Riyaz. NB had then gone to live with Riyaz and Vikashni.
13. The evidence reveals that NB was attending Nasinu Muslim School however, she had been removed and then admitted to the Islamic Institute by the Accused. The alleged incidents of Rape by the 1st Accused and the Sexual Assault have taken place whilst she was with the Accused persons. NB also said that the two Accused persons took her to Siri's Apartment at Nausori and was forced to have sexual intercourse with the 1st Accused's employer (boss) an European man named Shane Nolan. NB also said that Shane on that day came to her house and she was forced by the Accused to have sexual intercourse with him.
14. Somewhere around November, 2018 NB after making a report at the police had returned to her mother Janifa. She had since then been living with Janifa. During this period NB had on 18th February, 2019 complained of the alleged act of being forced to have sex with Shane. Thereafter, on 17th March, 2020 she had made a further report alleging that her father Riyaz himself had forced her to have sexual intercourse on two

occasions. NB also said that the 2nd Accused Vikashni was present when these acts took place and both the Accused themselves engaged in sexual intercourse in her presence on one occasion.

15. The charges are based on the above events and the only witness who testifies as to the acts of sexual intercourse and trafficking is the victim NB.

Summary of Prosecution Evidence

16. **PW 1 Janifa Bibi** stated that NB her biological daughter was handed over to Janifa's sister when NB was around 9 years old. However, with the intervention of Janifa's mother and the Social Welfare NB was handed over to her biological father the 1st Accused Riyaz. This was in around 2011 and from there onwards until NB returned to her, was in the custody and care of Riyaz and his wife Vikashni the 2nd Accused. During this time Janifa did not have any contact with NB. After 7 years NB was handed over to her by the police in 2018.
17. From there onwards NB was with Janifa however she had not appeared normal and happy. As she felt that NB was concealing something she had asked her if there was any issue. NB then for the first time disclosed that Riyaz and Vikashni took her to Siri's Apartment and forced her to have sexual intercourse with Riyaz's boss Shane Nolan. A complaint had been made on 12th February, 2019.
18. She also at some point has told her that Riyaz himself had sexual intercourse with her on two occasions. Upon this revelation Janifa had taken her to the Medical Services Pacific (MSP) and then to the Lami Police Station. The Lami Police Station initially had refused to get involved as this was a matter for the Social Welfare. Then she had met the Social Welfare Officer Ms. Lal after which they had met the police officer Ana and made a report against Riyaz and Vikashni. Ana had refused to take her report alleging that Janifa and NB are lying. However, Ana had finally recorded the statement after the Women Crisis Centre intervened.
19. NB was then referred for a medical examination which had revealed that she was sexually active. As the Lami police was not taking any action she had complained to the CID who accepted her complaint last year (2022).

20. She was cross examined at length and she admitted making a statement in December 2019 and also said that she was not in defacto relationship but was having only an affair and was girlfriend and boyfriend when she got pregnant with NB. It was suggested that NB was abandoned by her when she was 9 years and that was how Riyaz obtained custody. She denied abandoning but admitted NB was handed over to him. She admitted that in 2015 she went and lived with the Accused for about 4 days in Taveuni Island. According to her the Accused had said that her daughter's life was in danger and was tricked to meet him there. It was suggested that she made up the story and got NB to make a false complaint against the Accused as she was unhappy that Vikashni got married to Riyaz which she denied.
21. She admitted that the daughter initially mentioned only of the incident at Siri's Apartment and it was 11 months after that the allegation of rape against Riyaz was made. Then she explained that it was after she threatened her daughter to take her to a "Lie Detector Test" that she came out with the incident of rape committed by Riyaz.
22. **PW2 NB** was 20 years old when she gave evidence. Until 2009 she had been living with her mother Janiffa and then had gone to live with her father Riyaz and was there until 2018. She had left Riyaz's house as she could not tolerate the ill-treatment she had to suffer. She said that on the 25th November 2018 she was taken to the police and Vikashni wanted her to make a false statement alleging that NB had consensual sex with Riyaz. NB had made such a statement and she says it was due to fear that she did so. However, on 28/11/2018 she had made a further statement informing that 25th statement was not true. She admitted that she withdrew the first statement and said that it was her step-mother who wanted her to make this report of consensual sex with her father. When asked what the false part of it was she did say the scenario, at particular times she said that consensual sex and also at times and in cross-examination she said her statement was false.
23. When asked why she did not at that time complain about the various acts of sexual abuse and rape her answer was that she wanted to get away from her step-mother's house and go to her biological mother.

24. She had been examined by Doctor Kapoor on the 27th and also, she admits having being taken to Doctor Goundar before that by her step-mother.
25. She had on the 18th February, 2019 made a third statement by which she had disclosed the alleged acts of sexual abuse committed by Shane Nolan. Thereafter, by her fourth statement made 17th March, 2020 she made a statement revealing the acts of sexual abuse alleged to have been committed by her father the 1st Accused as well as all other acts she alleged was committed against her, during her stay at Koronivia with the Accused.
26. According to her evidence she explains and narrates the incidents as follows. She says that in the year 2016 when she was sleeping with the step-brothers, the Accused had come in the night, called her out to the sitting area and had started touching her and kissing her and then had kissed her on her lips when she had realised it was improper but her father the 1st Accused had removed her clothes and inserted his penis into her vagina. Whilst doing this having heard some noise her father had immediately got off and that act ended there. She says it was night but there was a dim light by which she recognized the 1st Accused and that he also smelt of liquor (Count No. 1).
27. Thereafter, when she was around 16 years old in 2018 she said that Riyaz had come to school with Vikashni, picked her up and gone to the beach at Cuba. She says that she was in the front passenger seat and Vikashni and Riyaz had sex in the boot or the rear part of the car (Count No. 3). Thereafter Vikashni had wanted her to have sex with the 1st Accused in the same way. She says that he sucked her neck and put his erected penis and had sex with her (Count No. 2). Vikashni was in the car. NB was embarrassed and says that she did not consent and indicated her refusal. She had been threatened that she will be killed.
28. She also says that on one occasion during mid-day when her grandmother had left the house Shane Nolan had come to their house at Koronivia. Shane was her father's boss. He had gone into the room and Riyaz and Vikashni had called and introduced her to Shane and told her that she should have sex with Shane. She had not been willing as Vikashni was seated in the room whilst she had sex with him on the bed. However, as her grandmother was heard coming in they asked them to stop and they had dressed up

and Shane Nolan had then left. On the same day after dinner; Riyaz had told that they were going for a car cruise and taken the three children including NB and gone to the grandmother's house and dropped the two brothers and driven to Siri's Apartment in Nausori. She had been taken up into the apartment through the rear entrance by both the Accused. When they went in Shane Nolan was there. After speaking to Shane, Riyaz had left and Vikashni remained. She had asked her to sleep with Shane meaning to have sex with him. NB had told Vikashni that she did not want to have sex but Vikashni has told her to take her clothes off and sleep with him. As she was helpless and she had been threatened earlier and even beaten her up she had obeyed (Count No. 4). She had removed her clothes and Shane Nolan had come naked and asked her to lick his penis and then come over her, kissed her and put his penis into her vagina and had sexual intercourse. Vikashni had been seated with her mobile phone in the same room. Shane Nolan has after sometime had got off and she had seen some white stuff on his penis. She had a shower thereafter.

29. She had felt disgusted and then Riyaz had come up and spoken to Shane, shook hands. Shane had thanked and then three of them had left. They had then picked up the boys and gone home. She said that she was afraid to complain to anybody and she had remained silent.
30. As time went by she was getting weak and vomiting and they had taken her to Doctor Goundar to do a pregnancy test. However, the Doctor had told her that she was not pregnant but was suffering from gastritis. Riyaz had then got her to speak to Shane and collected money alleging that she was pregnant by him. With these events she had started to react and wanted to get back to her biological mother.
31. NB under cross-examination admitted making a statement on the 25th November, 2019 and that she made a further statement on the 28th withdrawing the said complaint on the basis that it was false. On the 27th she admits being examined by Doctor Kapoor but denied telling the doctor that intercourse was consensual. The history recorded by the doctor was put to her where she had said that this intercourse was consensual.
32. She denied that the Welfare Officer visited her regularly. According to her, there were two visits in 2013 but there were no visits between 2016 and 2017. She admitted

writing the two letters to Gaurav and said it was on the request of Vikashni that this was written and also that Gaurav was related to Vikashni. These letters were produced by Defence DE2 and DE3.

33. She was questioned on the statement made on the 25th. She admitted that this was false and made on the instigation of Vikashni. She said that her step-mother forced her to make this first statement about she having consensual sex with her father and that was not true (Page 63 of the Transcript). Then she in cross-examination admitted that the allegation against the father is false and in response to court she said that the *scenario* is false. She was asked why she did not make a full disclosure on the 28th November of all these incidents; she said that “I was like full of these threatening and this sexual intercourse that was happening with me by Riyaz and Shane Nolan so that time when I was telling Anna that the first statement was false because I just didn’t want anything else I just wanted to go to my mother”. She also said that in the first statement the consensual sex with the father was false. When asked why it took 11 months for her to disclose the acts of rape by her father; she said that her mother realizing that she was concealing something threatened to take her to a “*life detector test*”. This prompted her to reveal in detail the acts of rape alleged to have being committed by the father. This not being mentioned in a statement was raised as an omission. She mentioned that Nolan had sex at the house at Koronivia however this not being mentioned in the statement was the other omission.
34. In cross-examination she said that when her father had sex with her first the two Accused injected something to each other and also the same substance was injected to her. She referred to this as ‘ice’. When this was injected she had not been able to sleep for two whole days and felt that everything was turning around like swinging, dizziness and had a profound effect on her. She also said that she felt dizzy and did not have the energy to run.
35. On one occasion when she went to meet the school principal at the Islamic Centre her step-grandmother had informed the principal that she was having an affair with the father which the principal had asked NB she had not said anything but just nodded.

36. The Defence suggested that this was a cooked up story instigated by her mother to take revenge from Riyaz and Vikashni. She said that she was only seeking justice for what was done to her by the two Accused and Shane and said that “this is not revenge, I just want justice that is why I am here”.

Medical Evidence

37. The Prosecution called PW3 **Doctor Guna Goundar** he had examined NB on the 13 November, 2018 she was brought by her parents he said and they wanted to know if she was pregnant as she was vomiting. He had tested and found that she was not pregnant but it was gastritis.
38. PW4 **Doctor Nikotimo Bakani** said that he was a general practitioner and was attached to MSP. He had examined NB in 2019 and it was to do a drug test and he had not made any genital examination. This was on 11th December, 2019.
39. PW5 **Doctor Kapoor** has examined NB on the 27th November, 2018; consent for this examination had been given by Vikashni. The said report was marked as PE1. He had observed that the girl was sexually active and there was evidence of vaginal penetration. Sexual active he said that the child was having sexual intercourse. As for the medical history she had said she had penile penetration and it was consensual. Doctor has observed that she was openly speaking to him and was not scared. She had not mentioned as to with whom she had sexual intercourse.
40. Finally the Prosecution called a neighbor Mohammed Haniff; he said that Riyaz is his sister's adopted son and Vikashni is his wife. They lived about 15 meters away. He had seen a European man who used to come to Riyaz's house. NB he said was a good girl whom he had seen go to school as well as doing the sweeping and cleaning in the house and said that Vikashni did not do anything.

Defence Case

41. Both the Accused gave evidence and two other witnesses were called on behalf of both the Accused. They are DW3 Ms. Nivita Narayan (the Welfare Officer). DW4 Ms. Anjela Devi and PW5 Zohara Begum.

42. **1st Accused Riyaz** admits that he the biological father of the victim and that he was not married to the victim's mother Janifa. It was only when the victim was 9 years old that she came to live with him and his wife Vikashni. His position is that he and Vikashni looked after the victim NB, lovingly and very well and she was given whatever required and there was no problem between them. She lived with them for 7 years until 2018.
43. NB was in the Muslim School in 2018 when they heard from school of an allegation that he had raped NB.
44. On 25th November 2018 he and his wife Vikashni and NB were taken to the police and a statement of NB was recorded. Thereafter, NB was dropped off at his mother's place by the police. He had not been aware as to the nature of the allegation made by her.
45. He denies raping or have sexual intercourse with NB either at Koronivia house or at the Cuba beach in the car.
46. He denies giving NB to Shane Nolan or allowing him to have sexual intercourse with her. He denies taking her to Siri's Apartment. He admits taking the three children and going out for a joy ride in the car with Vikashni. He also admits Shane coming to his house in Koronivia during day time the day he visited Siri's Apartment in the evening between 6 – 7.30 pm.
47. According to him NB is lying and making false allegations on her mother's instigation to take revenge as he never get married to her. He admits living with Janifa for two weeks in Taveuni Island where he worked and then he ended his connections with her as he was then married to Vikashni. He says this angered Janifa.
48. He denies all the allegations as been fabrications and false.
49. **2nd Accused** Vikashni while giving evidence said that she is married to Riyaz and have two children. She said that NB came to live in Koronivia with them when she was 9 years old. She was handed over by the Social Welfare in 2011. According to Vikashni, ever since NB came to live with them she was sleeping in her grandmother's mum, (Vikashni's mother-in-law).

50. According to her, she with Riyaz had looked after NB and she had treated her like her own daughter, and they had no problems. On one occasion she had found two love letters in NB's bag which she had taken and kept and said there was another incident when she was found with a boy on the ground floor of the house. However, she repeatedly said that her relationship with NB was very good and NB was happy.
51. However, in November 2018 she had been informed by the Muslim School principal that NB had said that her father had raped her. Then the police had come to their house. She believes it was the teacher who had informed the police.
52. NB, Riyaz and Vikashni were all taken by the police. NB had made a statement and Vikashni was also given a paper to sign. She admitted that her signature is there on the statement given by NB on 25th November, 2018. After that the police accompanied them and dropped NB at Riyaz's biological grandmother's house and the others were dropped at Koronivia.
53. She then said that NB was examined by a doctor and the police wanted her to sign a statement the contents of which she did not know. She denied the allegation made by NB of forcing her to make a false complaint on the 25th of November. She also said that the contents of NB's statement is false. She repeatedly said that she had no problem with NB and she was good and supportive.
54. She also denied the allegation of forcing her to sleep with Shane Nolan, and taking NB to Siri's Apartment. She also said Shane has come to her home but on all such occasions the children were at school. She also denied taking NB into Siri's Apartment. She said that sometimes when her husband has to hand over documents to Shane all of them go to the Siri's Apartment but she with the children stay in the car. She denied taking NB to the Cuba beach in the car and having sex with Riyaz in front of NB. She also denied that her husband never had sex with NB and she had no reason to believe that they had any sexual relationship. She had taken NB to Doctor Goundar as NB started vomiting and as NB was found to be with a boy. However, she was found to be suffering from gastritis.

55. She also said that the Social Welfare officer used to visit her house now and then and she used to talk to NB alone. She admitted that Janifa and Riyaz are first cousins.
56. Under cross-examination she admitted that Janifa and Riyaz spent time together in Taveuni Island where Riyaz was working. She said that after finding out she did not ill-treat NB in the contrary that NB was very supportive. It was after this incident that Janifa complained to the police and sent the police to their house.
57. She admitted that on the 25th November, 2018 she went to the police with NB. Before going to the police she had got to know from the head teacher of the school of an allegation of rape of NB by her father. On the 25th she admits signing on NB's statement however denied making a statement herself. She was shown a copy of a statement made by her on the 27th November, 2018. She admitted the signature and said that the police got her signature but she did not make a statement. It was put to her that she had said "I open the door and saw NB and Riyaz on the bed" in her statement; she denied this.
58. She denied coaching NB to make a statement on the 25th. It was suggested that she forced NB to make a statement of having consensual sex with her father; she denied the same. She denied the prosecution suggestions of allowing Shane to have sex with NB or taking her to Siri's Apartment. She said she has never taken NB or gone into Siri's Apartment. She admitted handing over the love letters she found to her lawyer for the maintenance case. She denied having sex in the car in the presence of NB. She admitted not telling the police about some boy being caught with NB to protect NB's future.
59. She said that for 7 years she was like a mother to NB, flooded her with love and affection and she had no problem with her.
60. DW3 Nivita Narayan was called next and she had been the Welfare Officer who was assigned to handle NB and her case. She said since 17th May 2016 she knew NB and she was a happy child between 2016 and 2017. In 2016, she had inquired into a complaint made by the mother about her schooling. She testified that NB was very happy with her step-mother and her father and she never complained against them. On the 28th November 2018, she had witnessed NB's 2nd statement to the police by which

the complaint made on the 25th was withdrawn. NB had told that she had made a false statement against the father and wanted to withdraw. She had also said that she wanted to live with her mother.

61. Nivita said that during 2016 and 2017 NB hated her biological mother and did not want to speak to her. In cross-examination she admitted that she did not know of an allegation of rape by the father and she had not known that the girl was sexually active. Then Nivita also admitted that she had visited NB only on four occasions and the two home visits NB was not at home. At school she spoke to her in the presence of the teacher and has spoken to her twice at her office. She admitted she is not a psychologist and has a Degree in Pathology and Sociology.
62. DW3 Anjela Devi; she is Vikashni's mother and she said sometimes the children are brought to her house and that all times all the three children are brought. She said that there had never been an occasion on which the two boys were left and the girl taken by the Accused. When confronted with the statement in which she has said that the two boys were left at home; she denied and said she didn't read before signing it.
63. DW4 Zohara Begum; she is the step-mother of Riyaz. She lives in the same house with Riyaz and said that NB came to live with them in 2011 and she always slept in her room. She said that the room door is always locked at night and in 2016 she had an eye problem and a leg problem. She said that she is always at home and does not go on her own. She said the relationship between Rahila (NB) and the Accused was good and she had never heard of any abuse.
64. In cross-examination she admitted that when Rahila came there was no double bed in the boy's room. However, she said that Rahila always was in her room. She also said that she wakes up at 3am; moves around and also prays at night. She said that nothing would happen in her room without she knowing. Initially she said that she does not go on her own or leave the house. However, later on she admitted that she does go to the hospital with her neighbor and when she goes to the hospital in the mornings if there was no crowd she would return around 2 o'clock in the afternoon and if it is crowded she sits alone.

Evaluation of the Defence Case

65. The 1st and the 2nd Accused did repeatedly say that NB was treated extremely well, she was happy and they had no problem with her. However, on the 25th November, 2018 they admit that NB made a complaint alleging sexual abuse against Riyaz. And also they were informed by NB's head teacher of such allegation. In the normal course of event if NB has been treated so very well and she was happy and content during the period of almost 7 years one would not expect her to suddenly complain in this manner. NB has not been in contact with her biological mother. Accordingly, the accession of extreme cordiality and good relations becomes highly improbable. Considering the demeanour of these two Accused I observe that they were overzealous to impress upon this court that NB was an extremely happy child and there was no issue.
66. Further, both the Accused took up the position that even after they went to the police on the 25th August, 2018 they were unaware and ignorant of any allegation of sexual abuse made against Riyaz. When Riyaz as well as Vikashni were asked as to what they did when they heard of such an allegation from the head teacher, their response was that they wanted to go to the police and get the girl to complain and have it sorted out and investigated by the police. If the relationship was so cordial and extremely good between them in the first place one would not expect an allegation of rape to be made to the head teacher. In such circumstances if one was to hear from the head teacher of such a thing isn't it natural and normal to have asked NB what this is all about. Riyaz says he did not ask so does Vikashni say. To my mind when a girl who is your daughter living with you is alleged to have made an allegation of this nature you will certainly ask her what it is all about. The Accused without asking her and were making arrangements to rush her to the police sounds incredible and highly improbable. This certainly cannot be in the normal cause of event. It is so improbable to my mind, in all probabilities it should be false.
67. Vikashni admits her signature on her statement made on the 27th November, 2018. She denies informing the police of seeing NB and her husband on the bed which is a contradiction that was elicited. She claims that she cannot understand English however, she herself opted to have the charges read in English. The police had no reason to act against Vikashni in this manner. Nothing was suggested or told by her. The police did

not record any statement from her husband the 1st Accused. This clearly shows that she had volunteered and made her statement on her own and now uttering a falsehood.

68. Both the Accused try to impress that the two boys were never left alone with their mother-in-law. Further, they also try to impress this court his step-mother Begum never left home without the Accused. In the normal course of event it is improbable to believe that all three children are always taken together. Defence witness Begum giving evidence in cross examination and re-examination admitted that there are occasions she goes out to the hospital with an outsider. The Accused has clearly being untruthful in this regard.
69. The Defence called three other witnesses DW3 Nivita was called specifically to say that she had been the Welfare Officer and that NB was extremely happy and cheerful and got on well with the two Accused. However, Nivita admitted that she had never met NB at her house. She had made only two visits to the house. She met her at school once and spoken to her twice at her office. This admissions clearly shows that Nivita could not have observed and ascertain the true position of NB. For some reason I observe that Nivita initially attempted to impress this court that for 2 years she visited NB and was aware as to the home environment and the dynamics of her relationship with the Accused which in cross-examination was proved otherwise. Nivita is not a psychologist.
70. As for Anjela Devi her entire purpose was to say that the children were always brought together and there had never been an instance when the boys were left at her house and the girl was taken by the Accused. There was a contradiction elicited in this regard. In addition to that it is highly improbable that all children were taken to the grandmother's house together and never separately. When she was giving evidence I observe that she was extremely eager to emphasise that *all the three* were brought and to many questions she repetitively answered so. She was certainly not a truthful witness and her evidence is highly unrealistic and improbable.
71. As for Zohara Begum she started off by telling that she does not leave home alone and that she had an eye problem as well as a leg problem. However, she admitted that there are occasions when she goes out for long period of the day. Further, whilst saying that

she cannot see she also said that she wakes up during the nights and walks about. On one occasion she had gone down and claims to have seen NB with a boy in the night. If she was so blind as she says it is not improbable for her to be walking about in the night as she claims. I observe that she was making a great effort to stick to her version which she was told but under cross-examination and in re-examination she could not maintain. She is certainly not a truthful witness.

72. In the above circumstances the evidence of the two Accused as well as the defence witnesses considered separately are highly improbable, contradictory and is false. Accordingly I reject the defence version in its entirety, separately and collectively.
73. In the above circumstances the accused evidence is contradictory and extremely improbable and false on the face of it. Accordingly I reject the defence evidence in its totality. I do not believe the defence evidence, but this by itself does not lead to a finding of guilt, because to do so would be to forget who has to prove the case. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused's guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused as innocent until the State has proved his guilt. The presumption of innocence means that Accused does not have to establish his innocence. The State must prove that Accused is guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused is probably guilty or even that he is very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused is guilty when I can find him guilty. On the other hand, if I am not sure that he is guilty, I cannot find him guilty. Now let's evaluate the prosecution evidence.

Evaluation of the Prosecution Evidence

74. The main Prosecution witness is NB. I will first consider and evaluate her evidence. In cross examination it was suggested that she is narrating a story which was fabricated by

her mother and this was a false allegation to take revenge. That being so I will first of all consider the delay.

Delay

75. The starting point is that these are belated complaints made 2-4 years after the alleged acts. Prompt complaint certainly supports consistency and belated complaint, if there be a reasonable and acceptable explanation may be considered as evidence. Prosecution intends to prove the main elements of these offences with the evidence of NB alone. In a case of this nature since no corroboration is necessary, it is possible to prove all the ingredients and elements with only that of the victim's evidence. There is a delay of about 2-4 years in disclosing this incident. The delay by itself in the circumstances of this case will not affect her credibility if such delay is explained.

76. The complainant in this was between 14-16 years in age when these offending acts were committed in 2016 and 2018. She gave several reasons for not disclosing. The primary reason is that she was living with the Accused and had no contact with her biological mother and also that she was at times threatened. It is settled and well accepted that girls especially of immature age are prone to conceal due to shyness and threats even sometimes due to self-blame. Justice Anthony Fernando (President of the Court of Appeal of Seychelles) in **Jean-Luc Louise v State** [2021] SCCA 72 in considering a similar case of delay of a child victim opined thus;

“The matter of recent complaint only goes to the issue of credibility and consistency of the complaint...” and that, *“...Delay is a typical response of sexually abused children, as a result of confusion, denial, self-blame, embarrassment, powerlessness and overt and covert threats by offenders”*.

77. As to the manner of assessing a belated complaint was considered in ***State v Serelevu*** [2018] FJCA 163; AAU141.2014 (4 October 2018) at paragraph 24 – 27; and it was held that;

[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 at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.”

78. In the above circumstances let me now consider if the delay is so explained. NB at the age of 9 was suddenly handed over to the two Accused persons. According to the evidence she was under the command and control of the two Accused and she had been transferred to another school closed to home which was an Islamic Institute. When these acts of abuse started she was around 14 years. It is her own biological father who committed this. Then gradually she was also provided to Shane Nolan for sexual purposes. It appears that towards November 2018 the fact of her abuse had reached the head teacher and this information had gone to the police. It is at that point the victim was taken out of the Accused’s house and was returned to the mother Janifa in November, 2018. It was thereafter in February 2019 that she reveals the abuse.
79. A girl of tender age being abused by her own father and living in that house with the stepmother will certainly make her helpless. She was born to a single mother and appears to have been abandoned when she was 9 years. When a girl is in these circumstances she will not have the moral courage to complain against her own father. In these circumstances she not immediately telling, concealing and suffering in silence is probable.
80. That being so, 4 months after she came out of the control of the Accused she had told her mother of the abuse by Nolan. That also was only when her mother made inquiries. That too she did not disclosed the abuse by her father. It took another 11 months to disclose the abuse by her father. Is this rational and probable? Why did she not make a full disclosure in February, 2019? NB said that she was ashamed and that in the Muslim Society abuse by the father is always blamed on the girl and she was afraid that no one will believe her. Most of all she was ashamed of what was done by her father. Thus, it is possible that she would with some assistance, encouragement and support would disclose the abuse by a third party, readily.

81. As observed above, the circumstances had initially compelled NB to conceal and then the concealment has continued for a long period and it is possible that she would have a mental block to disclose voluntarily even when asked due to the prolonged self-denial and fear. In these circumstances a girl in that state of mind would require great persuasion and assurance to confidently disclose what she had been concealing for a long period of time.
82. According to PW2 it is only upon the mother re-assuring and that NB has disclosed that, the abuse and rape by the father. Was the victim prompted and induced or coached to make an allegation of rape? It is true that a child, owing to immature age and understanding, is prone to manipulation and tutoring. But there is a vast difference between tutoring and counselling. Tutoring, in common parlance, means inducing a person to say something which is untrue or about which the person tutored has got no personal knowledge, whereas, counselling means encouraging a person to come out with the truth. Even in an adult, sexual abuse will cause intense feeling of embarrassment, fear and humiliation. A survivor of sexual abuse may even be afraid that she would not be believed by her family members. Especially when this happens within the family. This fear can keep the victim under silence without disclosing the abuse to anybody. At times, the survivor may allow her to be exploited repeatedly under threat by the abuser especially if the abuser is her own father. Thus, there are so many reasons for even adult survivors of sexual abuse to keep silent without disclosing about the harm caused to her. This is in effect, a psychological and emotional phenomenon. In order to relieve such survivors from the said trauma, the survivor may need intense encouragement and counselling by experts or the family members or the persons in whom the survivor reposes confidence.
83. Similarly, in the case of a child victim, it is quite common for the child survivor of sexual abuse to keep silent either due to fear of the abuser in this case a her own biological father and the step mother. In such cases, the child victim may not disclose the occurrence to anyone or may even go to the extent of saying that nothing had happened to her. If such earliest statements of the victims are given weightage, then, one more real victim shall be the truth. Therefore, in order to bring out the truth, the child needs to be counselled intensively either by the parents or by their family

members, teachers or the others with whom the child is very affectionate and also with a skilled professional counsellor. If the child as a result of such counselling, comes out with the truth by making a disclosure statement after being relieved from the above inhibition, the evidence of the said child cannot be discarded. [**Ganesan vs. The state** (The High Court of Judicature at Madras (Criminal Appeal No.401 of 2015 (27.04.2017))].

84. Time and again studies have shown, and common-sense dictates, that victims, especially young children differ in their responses to traumatic events, and are inclined to display individualised emotional responses to such situations. This is particularly so when the experience is an embarrassing and shameful one which involves the bodily invasion and assault on the integrity of the victim. In such circumstances when she is faced with abusers from within her home it may not be unusual for a victim to put up a front of normality.
85. In these circumstances I am satisfied that the delay is satisfactorily explained and it is not unsafe to act on this belated evidence of NB.

Demeanour and Deportment

86. As to the demeanour and deportment of NB: she had no doubt matured to some extent when she gave evidence several years after and she was around 20 years. Yet, I observed that when she was narrating various incidents, she was visibly emotional and exhibited a degree of tension and fear and even anger. This emanated quite naturally and effortlessly. In my experience, it is not possible to artificially and falsely to play act in this manner. She however, appeared to have some kind of strong ability to respond to cross examination and withstand even when harsh suggestions were made. She did not at any stage get into a condition of uncontrollable emotional outburst. She was quite in control to that extent. Her responses were prompt and deliberate. Thus, her demeanour was extremely consistent with that of a truthful witness.

Probability

87. During a period of about 3 years starting from January 2016 upto November 2018 the alleged acts of abuse have taken place. They include abuse by her biological father the first Accused and also her own father giving her to his employer for sexual purposes.

The second Accused her step-mother is said to have been present and witnessing she engage in sex with her husband and the foreigner. The Defence suggested and the Accused in evidence said that this is not probable and realistic especially in the Muslim cultural background. Therefore, the issue of probability looms paramount in determining the credibility.

88. In the normal course of events this may sound incredible and improbable. However, in the present case though the first Accused is her biological father NB was an unwanted pregnancy which the first Accused wanted Janifa to abort. Then with the pregnancy Janifa is abandoned and the first Accused leaves Janifa and has no contact with NB ever since her birth up until she was 9 years old. Therefore, the first Accused though is the biological father did not have the natural and normal bond or relationship of father and daughter. That being so NB is almost forced on the two Accused persons. In this backdrop it is possible that the first Accused would behave in this manner.
89. It is also relevant that NB very clearly said that the two Accused used to inject some substance before engaging in sexual activities and abusing her. NB's vivid description of the effect of the said substance is very relevant now. She feels dizzy, suffering sleeplessness and everything starts turning and she appears to get into a complete different frame of mind which is not reality. That being so persons in that state of mind will be able to act in the most unusual manner. Thus, the Accused engaging in the sexual acts with his own daughter in the presence of his wife is extremely possible and probable in the circumstances.
90. Will a father give his daughter to another for sexual abuse? In the above circumstances once you have embarked upon abusing your own daughter providing her to another and using her to gain an advantage from your employer or boss is not out of the question and is possible. Therefore, the use of some substance becomes relevant and admissible in this matter. In the above circumstances I see no improbability in NB's narration.

Consistency

91. Now I will consider the consistency of her evidence. No doubt her statements were belated and has been made in February 2018 and March 2020. When she testified in 2023 several omissions and contradiction were elicited. Let me consider the effect of

these contradictions and omissions. She said of a “lie detector test” threat made by the mother as being the reason to disclose the allegations against the father. This was not in her statement. When she is taken to the police she will narrate the incidents and unless specifically asked it is very unlikely that the reason that prompted her to disclose will be stated. This was something that transpired during cross-examination. Therefore, certainly not a fabrication. Thus, I do not consider this as a significant omission.

92. In evidence she narrated that Shane Nolan came to the house and had sex with her for the first time at home during mid-day. This incident is not in her statement and is an omission. No doubt this is a relevant omission. However, when a victim had suffered sexual abuse for a long period and is reluctantly disclosing the same it is natural for her to have some mental block in making a full disclosure to the police. However, when giving evidence in court in a much more relaxed environment with probing it is probable that she would disclose more incidents and details. That by itself will not make her evidence false and unreliable.
93. The most significant contradiction that was elicited is her first statement made on the 25th of November, 2018. She had alleged sexual intercourse with the father and appears to have narrated a certain subsequent events. However, within a few days she changes and retracts and admits the first statement was false. It is in evidence that the allegation made was one of sexual intercourse with the first Accused. It is admitted that NB has in that statement said it was with consent. Therefore, this statement as revealed in evidence contains three things. Firstly, the fact of intercourse with the father, certain events of that day and then consent. However, as to exactly what the false accession in that was not elicited either by the prosecution or the defence. The bottom line is as far as “consent” is concerned there is certainly an inconsistency which remains unclarified. Subject to this except for some inconsistencies by large her evidence remains consistent. When a victim of this nature narrates an incident several years after it is natural for there to be some inconsistencies.

The Defence Suggestions

94. The defence suggested that this was a false fabrication instigated by her mother. The defence is that of a fabrication and a total denial. It was also suggested that she is fabricating and making a false allegation due the influence of the mother. The position

suggested by the defence is that these are false allegations and things that did not happen. It was suggested that the fabrication was by Janifa to take revenge. Let me consider this suggestion. In the normal course of events if Janifa wanted to maliciously fabricate it is unusual for her to wait for over one year after NB return to her. Then in the first instance in February 2019 there is no allegation made against Riyaz of rape. If she wanted to falsely fabricate it is highly improbable that she would create a fictitious story involving Nolan who is a complete outsider. Further, it is not normal and natural to fabricate and extremely complicated story running into several years in this form. Therefore, the allegation of fabrication is not probable and cannot be in this instance.

95. In these circumstances it is extremely unrealistic and highly improbable that an allegation of this nature will be randomly fabricated against the accused and a third party Nolan in this form and in this manner. Thus, this suggestion is baseless.
96. In the above circumstances I am satisfied that NB is a truthful and credible witness. Her evidence is reliable. As for PW1 Janifa she appeared to be somewhat agitated at certain times but she did not add or exaggerate her evidence. She just said what she knows. I did not find any significant omission or contradiction that affect her credibility. Overall I accept that her to be truthful witness. As for the other prosecution witness they merely narrated what they knew and had no reason to utter anything false. Accordingly, I accept the prosecution evidence as being reliable and truthful.

Consent

97. In evidence NB clearly says that on both occasions she did not consent but her first statement for whatever reason says otherwise. She admits saying so but gives an explanation. The initial inquiry may have most certainly been as to who was responsible for the acts of abuse and rape. It is that she had disclosed as being the 1st Accused and Nolan with the connivance and assistance of Vikashini. That being so now it is incumbent and necessary to consider if the sexual intercourse may have been consensual. The defence no doubt takes up a total denial. I have not accepted and have rejected the denial as being improbable. Even though the defence denies it is the duty of this court to consider the issue of consent independently. As said above, though the defence denies NB says otherwise. This issue is solely dependent on the credibility and the reliability of NB's evidence.

98. As evaluated above, the evidence of NB is credible and reliable. That being so, she says that she did not consent and the sexual intercourse was committed on both occasions and without her consent and against her will. However, as discussed above NB has at the outset taken up the position of consensual intercourse. This issue had not been completely clarified. NB no doubt is the biological daughter of the first Accused but in reality this bond was not there. There is evidence of some substance being injected to her. In her predicament and circumstances there is a possibility that she may have tacitly consenting. Atleast there is a doubt in this regard. This primarily arises due to the failure of the prosecution to clarify the inconsistency in the first statement and to identify what exactly was the untruthful part. Thus, there is an uncertainty as regards the issue of consent.

Consideration of the Charges

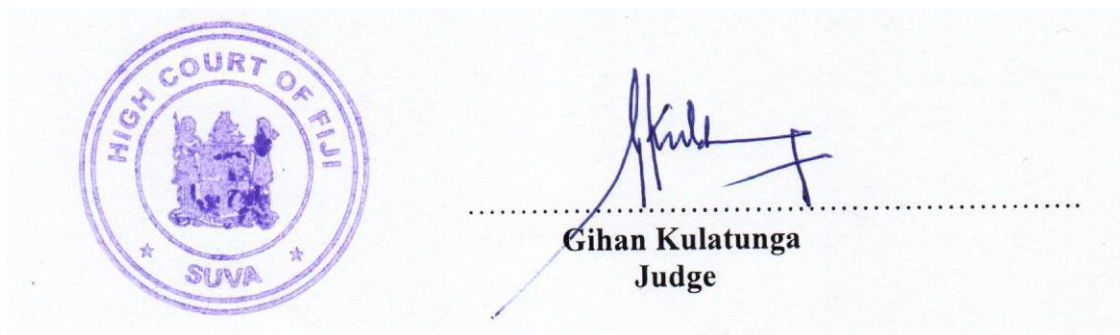
99. On a consideration of the totality of the evidence and that of NB's version the fact of sexual intercourse between the first Accused and NB on two occasions is proved. Once at Koronivia in the house and another in the car at the beach. The second Accused being present in the car and having sex with Riyaz in the presence of NB is also proved. However, as to the issue of consent there is a doubt and uncertainty as aforesaid. It is not that I disbelieve NB's evidence but it is just that there is a doubt. As for NB when she says that she did not consent it is what she now sincerely believes but at that moment it may not have been so due to circumstances. Accordingly, Counts 1, 2 of Rape and 3 of Sexual Assault require the lack of consent to be proved. I hold that there is a doubt on this ingredient and the prosecution has thus failed to prove Counts 1, 2 and 3 beyond reasonable doubt.

100. As for Count No. 4 of Domestic Trafficking of Children the consent of the person who is subject to such trafficking is not relevant issue. Therefore, the doubt on consent would not affect Count No. 4. NB clearly says that during 2018 she was taken to Siri's Apartment and was compelled to engage in sexual intercourse with Nolan in the presence of Vikashni. She had been taken from Koronivia to this place by Riyaz and Vikashni together. There is sufficient evidence to prove that Riyaz and Vikashni did facilitate the transport of NB who was less than 18 years with the intent that she be used to provide sexual services. The conduct of the two Accused clearly proves that

they were acting together. As for the consent of the person so transported is immaterial need not be against the will or by the use of force or threat. The purpose and object of this section is to protect persons under the age of 18 years from sexual exploitation. Their consent does not matter. It is in the interest of the society that children are not used for provide sexual services or subjected to sexual exploitation. Accordingly, the prosecution has proved beyond reasonable doubt all ingredients of Count No. 4 of Domestic Trafficking in Children as alleged.

Conclusion

101. In the above circumstances I hold that the prosecution has failed to prove Counts 1, 2 and 3 beyond reasonable doubt and accordingly the first Accused is acquitted of Counts 1 and 2 that of Rape; and both the Accused are acquitted of Count No. 3 that of sexual assault.
102. However, as the Prosecution has proved Count No. 4 beyond reasonable doubt I find both the first and the second Accused guilty of Count No. 4 of Domestic Trafficking in Children and convict both the Accused separately for the said offence of Domestic Trafficking in Children contrary to section 117(1)(a) and (b) (c) (i) of the Crimes Act.



At Suva

19th June 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

AK Singh Lawyers for both the Accused