

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

**Criminal Case No.: HAC 94 of 2021**

**STATE**

**V**

**BRIAN RAVATUDEI**

**Counsel** : Mr. M. Rafiq for the State.  
: Mr. S. Heritage for the Accused.

**Dates of Hearing** : 25, 26 and 27 July, 2023  
**Closing Speeches** : 28 July, 2023  
**Date of Judgment** : 31 July, 2023

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**JUDGMENT**

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

1. The Director of Public Prosecutions charged the accused by filing the following information dated 22<sup>nd</sup> October, 2021:

***Statement of Offence***

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

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

**BRIAN RAVATUDEI** on the 19<sup>th</sup> day of September, 2021, at Lautoka in the Western Division, had carnal knowledge of “A.V”, without her consent.

2. In this trial, the prosecution called two witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer for one count 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 is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

### **ELEMENTS OF THE OFFENCE**

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

without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

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

12. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offence of rape, then this court must find the accused not guilty.
13. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
14. As a matter of law, I have to direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant.

#### **ADMITTED FACTS**

15. In this trial, the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
16. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

#### **PROSECUTION CASE**

17. The complainant informed the court that she is a Police Officer who was recruited by the Fiji Police Force in January, 2021 and she was based at the Lautoka Police Station. The complainant was accommodated at the

police barracks. On Sunday 19<sup>th</sup> September, 2021 at around 10.30 am her boyfriend came to the barracks and picked her in his rental car to visit his sister who was living in Kashmir.

18. After spending time at the house of her boyfriend's sister at about 2pm the complainant was dropped at the police barrack. She quickly went out of the car and left her lunch in the room, from her room she saw the accused and two others standing and talking with her boyfriend. The accused was known to the complainant and he was also a Police Officer staying in the same barracks.
19. At about 7pm the complainant went to have her shower she was wearing a panty and her towel was wrapped around her. The bathroom was about 5 rooms away, while the complainant was having her shower the accused started to call her and asked her to open the bathroom door. When asked how she was able to know that it was the accused, the complainant said *I could clearly identify it was Brian because he was saying he wants to ask for forgiveness ...*
20. Upon hearing this the complainant told the accused to wait outside and after her shower she will talk. Shortly after the accused broke the bathroom door, upon seeing this the complainant called out Emi's name (another police officer staying at the same barrack) two times but there was no response. The complainant at this time was naked she once again told the accused to wait outside and then she closed the door. After having her shower when the complainant was going to her room she saw the accused standing in the passage and she ignored him.
21. When inside her room the accused from outside her room door asked the complainant to open the door. The complainant told the accused to wait

and after she has worn her clothes he can come in. According to the complainant the accused continued pushing the door and kept saying that after seeking forgiveness he will go back. Upon hearing this, the complainant opened the door and told the accused to sit on the other bed since there were two beds in the room. The complainant started looking for a t-shirt to cover her shoulder, however, when she was facing the wardrobe the accused from behind grabbed her and threw her on the bed whereby her head hit the wall.

22. At this time the room door was closed but not locked, the windows were open but the lights were off. When questioned how she was able to say it was the accused in her room the complainant said she was able to see the accused from the outside light as a result she was able to see the accused face clearly. The complainant also stated that when she was grabbed and thrown on the bed (her towel opened) she was scared and at this time she told the accused not to do anything to her.
23. Furthermore, after the complainant was thrown on the bed the accused laid on her chest, removed his trousers and shirt. The accused threatened the complainant not to do anything or say anything otherwise he will do something to her.
24. After this the accused spread the complainant's legs and inserted his erected penis inside her vagina. The complainant did not want the accused to do this to her and she told the accused not to. When the accused did not stop the complainant started crying she again told the accused to stop but the accused kept forcing his penis inside her vagina and also kept kissing her neck. After the accused finished having sexual intercourse he wore his clothes and told the complainant that this was not going to be the last time he will come again and then he left. The

complainant clarified when she went into her room she had wrapped herself in her towel and she was not wearing her panty.

25. After this the complainant sat on her bed since she felt weak after a while the complainant had her shower. The complainant went to do night shift, she did not tell anyone about what the accused had done to her because she was working with male colleagues and she was embarrassed to tell them about what had happened to her. However, the next day Monday, 20<sup>th</sup> September, 2021 the complainant told Penina a police officer and her close friend about what the accused had done to her. Thereafter the matter was reported to the police. The complainant recognized the accused in court.
26. In cross examination the complainant agreed that when the accused was trying to open the bathroom door she called out Emi's name on top of her voice since Emi's room was about two rooms away from the bathroom. The complainant also agreed that when she went to the bathroom she had seen Emi in Emi's room and that was the reason why she had called Emi. Upon further questioning the complainant stated that it was the accused who had pushed open the bathroom door which was locked by a small nail.
27. The complainant agreed that when she was thrown on the bed her leg was towards the wardrobe and she did not scratch the accused face or beat him in defence. The complainant also agreed that when the accused was on top of her she had pushed him but she did not scream.
28. The complainant was referred to her police statement dated 20<sup>th</sup> September, 2021 page 2, 3<sup>rd</sup> paragraph, line 7 which was read as:

*Brian then replied saying cava iko nanuma au na sega ni rawa ni dolava yani na katuba translated meaning what you think I can't open the bathroom door.*

29. The complainant agreed that she did not say the above in her evidence but when she went into her room after her shower the accused came outside her room door and asked her to open the door so that he could ask for forgiveness. Upon hearing this she had opened the door. The complainant was referred to page 2, 3<sup>rd</sup> paragraph, line 20 of her police statement which was read as:

*I then went inside my room switched off the lights in my room but my bedroom curtain was tied up. I was about to close the door when Brian suddenly tried to push the door open from outside. I then blocked the door from inside and tried to push it back.*

30. The complainant agreed that in her evidence she did not tell the court the above but what she told the court was that she had opened the door. The complainant also agreed that what is mentioned in her police statement was different to what she told the court.

31. The complainant agreed that she told the court the accused was on top of her and he had spread her legs and inserted his penis into her vagina. The complainant was referred to her police statement page 3, line 9 which was read as:

*I kept moving and trying to push him away but I could not. Whilst I was struggling to push him away I was also kicking my bedroom wardrobe but no one heard as no one was at the room beside my bedroom.*

32. The complainant agreed in her evidence she did not mention about kicking the wardrobe. Moving on the complainant agreed that in her evidence she



had told the court that she knew what the accused was going to do to her so she told him not to do it. When referred to her police statement the complainant agreed that this was not in her police statement page 3, line 16 was read as:

*I managed to push him away from me and he fell on the bedroom floor. I then quickly tried to get up but Brian got up again and pushed me on the bed again.*

33. The complainant agreed that she did not mention the above in her evidence, however, she maintained that the accused had threatened her not to say anything otherwise he will do something to her which she had told the court in her evidence. The complainant was referred to page 3, line 20 of her police statement which was read as:

*He then forcefully inserted his erected penis forward and backwards for several time into my vagina and at the same time kissing my neck.*

34. The complainant did not agree that whatever is mentioned in her police statement before the actual penetration is different from what she told the court. She explained that she was scared at the time so some things she had said and some things she did not say.

35. The complainant agreed that since the lights in her room were switched off her room was dark the bed in her room was a single bed and since she was in the middle of the bed her leg was able to reach the wardrobe.

36. The complainant maintained that the accused had entered her room that night she denied the suggestion that the accused had only stood outside the room door and after apologizing had left. The complainant maintained that the accused had forcefully penetrated her vagina with his penis.

37. The complainant denied that she told Penina the incident had happened on 18<sup>th</sup> September, 2021, but she agreed that she did not tell Penina that the accused had threatened her that he will hit her with the electric iron and the cup placed on top of the table next to the complainant's bed.
38. The complainant agreed it was not in her police statement that she had smelt alcohol on the accused. She also agreed that after the alleged incident she was afraid of the accused.
39. The complainant stated that in 2021 she had a Viber account and after the incident the next day on 20<sup>th</sup> September she had texted the accused from her phone at 5.30 am and thereafter there were many Viber messages exchanged between her and the accused.
40. Upon further questioning the complainant agreed that throughout her Viber messages she did not specifically mention about what the accused had done to her. She also agreed that she did not mention in her Viber messages that the accused had raped her.
41. The complainant agreed she was the first one to send the Viber messages to the accused. She also agreed that had the accused raped her she would have confronted him through the Viber messages and in the messages she never confronted the accused about raping her.
42. The complainant was again referred to her police statement page 3, 9<sup>th</sup> last paragraph which was read as:

*I do not personally know Brian because I hardly talk to him and we have never called or texted each other through phone or any social media account.*

43. The complainant denied that what is stated in her police statement above was false. She agreed that despite doing night shift after the alleged incident she did not bother to go to the Sexual Offences Unit which has female police officers who are trained to deal with sexual offence cases.
44. In re-examination the complainant stated that she had sent those Viber messages to the accused because she was furious about what the accused had done to her that is raping her that night. Furthermore, the complainant explained that she had told the officer writing her police statement that she had messaged the accused in the morning and she thought this was in the last line of her police statement.
45. The complainant also stated that she had confronted the accused in her Viber message to the effect *do you know what you did yesterday*. The reason why the complainant did not complain to the Sexual Offences Unit was because she was waiting for Penina who she trusted and knew and therefore she could share with Penina whatever had happened to her. During the night shift she was the orderly in the charge room and after the incident it did not occur to her to go and report the incident to the Sexual Offences Unit.
46. The complainant also stated that she did not mention about kicking the accused and the accused falling on the floor and coming back on top of her in her evidence because whatever she remembered she told the court and whatever she could not remember it is in her police statement which were true as well. The complainant maintained that despite the lights in her room being switched off she was able to see the accused in her room from the outside light, stairs light, light from the hospital and the basement.

47. The final prosecution witness Penina Manumanunivalu informed the court that she is a Police Officer having joined the Fiji Police Force in January, 2021 she was also based at the Lautoka Police Station. On 20<sup>th</sup> September, 2021 she returned to Lautoka from her village at around 6pm. She went to her room at the police barracks after leaving her bags in the room she went into the room of the complainant.
48. The witness saw the complainant lying in bed not saying anything so she asked what happened since the complainant was not interested in what the witness was saying about her trip home. The complainant told her that while she was in the bathroom the accused forcefully opened the bathroom door. Although the accused left after the complainant told him to leave, after shower when she was about to close the room door the accused forcefully opened the door and entered her room.
49. The accused removed the complainant's towel pushed her on the bed and in the process she hit her head on the wall and then he had sexual intercourse with her. The witness noticed the complainant was sad and crying at the same time, the witness questioned the complainant why she did not ask for help, the complainant replied saying that the accused had threatened her.

#### **RECENT COMPLAINT DIRECTION**

50. Complainant's 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.

51. 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 Penina the accused had removed the complainant's towel pushed her on the bed and had forceful sexual intercourse with her.
52. This is commonly known as recent complaint evidence. The evidence given by Penina is not evidence of what actually happened between the complainant and the accused since she was not present and she did not see what had happened between the complainant and the accused.
53. 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 a close and trusted friend and colleague Penina about what the accused had done to her on the next day of the incident.
54. The prosecution is also asking this court to consider the observations of the complainant by Penina at the time she was relaying the conduct of the accused from the bathroom to her room and then eventually having forceful sexual intercourse therefore she is more likely to be truthful.
55. On the other hand, the defence says the complainant had made up a story against the accused, she did not go into the room of Penina to complain but it was Penina who came into the room of the complainant for a casual chat. In the room of the complainant it was Penina who asked the

complainant if anything had happened to her. This is when the complainant made up the rape story against the accused.

56. The defence is also saying that the complainant gave one version to the police and a completely different version in her evidence and therefore she should not be believed.

57. It is for this court to decide whether the evidence of recent complaint helps this court to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. It is for this court to decide whether the complainant is reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.

58. In cross examination the witness was referred to her police statement dated 21<sup>st</sup> September, 2021 to paragraph 3 which was read as follows:

*She then told me that on Saturday 18/9/21 night PC Brian who is also staying at the single quarters forcefully had sexual intercourse with her in her room.*

59. The witness agreed that in her evidence she told the court the complainant had told her the incident happened on Sunday 19<sup>th</sup> September, 2021 but in her police statement it was mentioned as Saturday 18<sup>th</sup> September, 2021.

60. The witness agreed she had signed her police statement after it was read to her she also agreed the complainant had told her the accused had threatened her, again she was referred to her police statement line 9 which was read as:

*She said that she was also threatened by PC Brian not to do anything and if she does he will hit her with the iron and cup that was placed on top of the table next to the bed.*

61. The witness maintained the complainant had told her the above. When it was put to the witness that according to her police statement the alleged incident had happened on Saturday 18<sup>th</sup> September, the witness said it was a mistake and it should be Sunday. Upon further questioning the witness agreed that in her police statement the day was Saturday and next to it was the date which was not a mistake.
62. In re-examination the witness explained that there was a mistake in the day and date of the alleged incident in her police statement since this was written by someone else for her. The witness stated the incident happened on Sunday 19<sup>th</sup>.

#### **PREVIOUS INCONSISTENT STATEMENT**

63. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and Penina Manumanunivalu had questioned these witnesses about some inconsistencies in their police statements which they had given to the police when facts were fresh in their minds with their evidence in court.
64. This court is allowed to take into consideration the inconsistencies or omissions between what these witnesses told the court and their police statements when considering whether these witnesses were believable and credible. However, the police statements are not evidence of the truth of its contents.

65. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
66. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
67. This was the prosecution case.

### **DEFENCE CASE**

68. At the end of the prosecution case the accused was given his options. The accused chose to remain silent and he did not call any witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent and did not call any witness.
69. From the line of cross examination the defence took the position that the complainant did not tell the truth in court of what had happened that evening. The accused did not at any time enter the complainant's room so the question of any forceful sexual intercourse does not arise.
70. The accused had in fact stood outside the door of the complainant's room and after the complainant opened the door he apologized and left.



71. Had the accused done anything as mentioned by the complainant then firstly as a trained police officer she would have defended herself by shouting, screaming, scratching and acting in self defence. Secondly, she would have immediately complained about the accused at the police station where she was doing her night shift. She did not do the above because nothing had happened. Furthermore, it was the complainant who had sent Viber messages to the accused from about 5:30am the next day yet she did not mention anything about being raped by the accused.
72. The defence is asking this court to consider the fact that the complainant had the audacity to swear at the accused on many occasions in her Viber messages yet she did not mention about being raped by the accused is highly unusual.
73. Moreover, the complainant's evidence does not make sense needless to say that what she told the court is not possible thus making it obvious that the complainant did not tell the truth.
74. Finally, the defence is asking this court to consider the fact that the complainant did not tell anyone about what the accused had done to her immediately after the incident when she went for night shift at the police station is unbecoming of a genuine complainant. The complainant was not restrained by the accused and there was nothing for the complainant to be afraid of yet she did not tell anyone at the police station about what had happened to her points to the fact that there was nothing for the complainant to complain about.
75. The defence is asking this court to disregard the explanation of the complainant that during the night shift she was embarrassed to complain to her male colleagues when as a police officer the complainant knew about

the Sexual Offences Unit and no doubt there were other female police officers who would have been happy to take the complainant's complaint.

76. This was the defence case.

## **ANALYSIS**

77. The complainant and the accused are known to each other and they were police officers occupying the police barracks. The prosecution alleges that during the evening of 19<sup>th</sup> September, 2021 the accused followed the complainant to her room after she finished having her shower. When outside the complainant's door the accused told the complainant that he wanted to apologize and leave.

78. The complainant opened the door allowing the accused to enter her room at this time the complainant was still wrapped in her towel. Although there were no lights switched on in the complainant's room at the time, she was able to recognize the accused due to the lights outside since the curtains in the window was not drawn.

79. As soon as the accused entered the room he grabbed the complainant from behind removed her towel and threw her on the bed whereby her head hit the wall. The complainant was scared and was alert to the impending danger so she told the accused not to do anything to her. The accused did not listen and he forcefully laid on the complainant's chest removed his clothes (trousers and shirt). He then threatened the complainant not to do anything or say anything otherwise he will do something to her.

80. After this the accused forcefully spread the complainant's legs and inserted his erected penis inside her vagina and had forceful sexual

intercourse with the complainant for a long time. The complainant did not consent for the accused to have sexual intercourse with her. When the accused did not stop the complainant started crying she again told the accused to stop but the accused kept forcing his penis inside her vagina and also kept kissing her neck. According to the prosecution the accused knew or believed the complainant was not consenting and he didn't care if she was not consenting at the time.

81. Next day the complainant told her friend and colleague Penina about what the accused had done to her. The matter was reported to the police.
82. 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 how could he have done so when he did not at any time enter the complainant's room. The complainant narrated a story that was not possible and/or probable. The complainant a trained police officer would have most certainly acted in defence and shown resistance by screaming, shouting and scratching the accused.
83. If what the complainant told the court is the truth then the complainant had the opportunity to lodge a police complaint the same night when she went for her night shift at the police station. The defence is asking this court to scrutinize the many inconsistencies and omissions between what the complainant told the court in her evidence and her police statement which are noteworthy. The difference between the two versions shows that the complainant did not tell the truth.
84. In addition to the above before lodging her police complaint the complainant as early as 5:30am (following day) sent many Viber messages to the accused and in none of the messages she expressed in any form or

manner that the accused had raped her. The defence says when one considers the tone of the Viber messages had anything untoward happened between the accused and the complainant, the complainant would have no doubt confronted the accused on this. She did not because nothing happened.

85. Finally, the defence submits that what the complainant told the court does not make sense and is riddled with doubt. The accused has been wrongly blamed. The defence is asking this court not to believe the complainant.

### **DETERMINATION**

86. 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.

87. At the outset I would like to state that the complainant and the accused were known to each other and both were occupying the Lautoka police barracks.

### **TURNBULL DIRECTIONS**

88. Although this is a case of recognition as opposed to identification the defence has taken the position that the complainant made a mistake in thinking that it was the accused who had sexually assaulted her for someone else so she had identified the wrong person in court.

89. The defence contention is that the case against the accused in some respect depends on the correctness of the identification of the accused which the defence alleges to be mistaken. I have therefore taken special care on the evidence of identification because it is possible that an honest witness can make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of such witnesses. I wish to also remind myself that mistakes in recognition, even of close friends and relatives, are sometimes made.
90. I have carefully looked at the following circumstances in which the complainant had identified the accused in her room:

*How long did she have the person the complainant says was the accused under observation?*

According to the complainant she had seen this person when he broke the bathroom door while she was having her shower, while walking towards her room she saw this person standing in the passage and inside her room. There is no time duration given by the complainant of her observations but she did say this person was having sexual intercourse with her for a long time.

*At what distance?*

This person was very close to the complainant at the bathroom, in the passage when she was walking to her room and into her room and during the act of forceful sexual intercourse.

*In what light?*

According to the complainant the alleged incident happened in her room where all the lights were switched off, however, the windows were open

and the curtains were tied. The complainant also said the outside lights were sufficient for her to see the face of this person clearly.

*Did anything interfere with that observation?*

The complainant did not say there was any obstruction or interference she was able to see the face of this person clearly which prompted her to recognize this person to be the accused.

*Had the witness ever seen the accused before?*

The complainant said that this person was also a police officer and both were staying in the police barracks.

91. I must remind myself of the following specific weaknesses which appeared in the identification/recognition evidence of the complainant. The complainant did not say why she had switched off the lights in the bedroom after she had returned from the bathroom and what she meant when she said it was dark inside the room.
92. I have given the above directions as a matter of caution after the defence counsel raised the issue of identification of the accused in the darkness of the complainant's room as narrated by the complainant.
93. Finally, I would like to state that the complainant did not make any mistake in recognizing the accused since she has seen the accused on previous occasions and both were living in the same barrack and from the bathroom to the complainant's room, in the passage and on her bed the complainant had seen the accused from very close by.

94. In view of the above, this court accepts that it was the accused and no one else and there was no mistake made by the complainant in the recognition of the accused.
95. After carefully considering the evidence adduced by the prosecution and the line of defence put forward by the accused, I accept the evidence of the complainant as truthful and reliable. She gave a reliable account of what the accused had done to her that evening inside her room.
96. She was also able to withstand vigorous cross examination and was not discredited as to the main version of her evidence that it was the accused and no one else who had forceful sexual intercourse with her on her bed without her consent. The complainant was steadfast in what the accused had done to her and she maintained this complaint in her evidence.
97. I accept that the complainant did not feel comfortable in telling her male colleagues about what the accused had done to her that evening. The complainant trusted Penina since they were close friends so the complainant told Penina about what the accused had done to her and a police complaint was promptly lodged. I agree the complainant was a police officer and she could have been more reactive to the situation, however, every individual reacts differently to what he or she may be going through.
98. In any event the police complaint was made by the complainant on the following day of the incident. I also accept that the complainant was scared of the accused both during and after the incident. The totality of circumstances test favours the complainant (*see State vs. Serelevu [2018] FJCA 163; AAU 141 of 2014 (4 October, 2018)*) and in any event the delay of a few hours is not substantial.

99. Furthermore, the failure by the complainant to scratch, shout or scream or tell anyone about what the accused had done immediately after the incident does not affect her credibility. Experience has shown that individuals differ in terms of how they react to an unexpected happening. Some display obvious signs of distress and some not. The fact that the complainant did not shout or scream or complain to a colleague during her night shift does not mean that she cannot be believed or nothing had happened to her. The situation of the complainant ought to be considered holistically.
100. In my considered judgment the lack of resistance by the complainant in shouting, screaming and scratching the accused cannot be taken in isolation but in the totality of the circumstances of the complainant. It is to be noted that the legal meaning of consent is wide which includes submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
101. I accept that the accused had forcefully penetrated his penis into the vagina of the complainant without her consent. Furthermore, the accused knew or believed the complainant was not consenting and he did not care if she was not consenting at the time.
102. Moreover, there were some inconsistencies or omissions between what the complainant told the court and her police statement, however, those discrepancies or omission must be considered in light of the passage of time which is nearly 2 years now. It is not expected that a person will give evidence dot to dot in line with what is mentioned in the police statement. I would have been surprised if the complainant had given evidence which would have been a carbon copy of her police statement. The discrepancies and omissions were based on human memory recollection and in any event



were not significant to adversely affect the credibility or the thrust of the complainant's evidence.

103. The complainant was not shaken as to the basic version of her allegation. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

*[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirjibhai v State of Gujarat (supra):*

*“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important “probabilities-factor” echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. .... It is unrealistic to expect a witness to be a human tape recorder;”*

104. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony* (1985) 1 SCC 505:

*‘While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole*

*appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'*

105. In respect of the Viber messages I would like to state at the outset that I have disregarded any reference made in the messages to the boyfriend of the complainant on grounds of prejudice to the accused. A perusal of the messages makes it obvious that the complainant was off loading her anger and frustration on the accused about what he had done to her the previous night. This leads me to an important point which was not canvassed by any counsel that is the accused and the complainant had exchanged their Viber numbers hence they were known to each other and were in communication as well. Although the complainant in her Viber messages had not specifically mentioned anything about being raped by the accused does not mean that the allegation of the complainant cannot stand or is a made up story. The totality of the evidence has to be considered in this regard.
106. In my considered view the first set of messages sent by the complainant to the accused at 5:31 am namely *seriously can't believe saraga what happened to us last night* and then at 8:37 am *I won't forgive u for what u did to me ... yesterday*. I accept the evidence of the complainant that she had sent the Viber messages to the accused since she was furious about what the accused had done to her that is raping her the night before. This is supported by the tone of the Viber messages sent by the complainant.

107. The accused did not deny the contents of the messages he in fact sought forgiveness for what he had done. In view of the above, there was no need for the complainant to specifically tell the accused that he had raped her (which was obviously known to him). I do not give any weight to the admission by the complainant that implies that there was a need for the complainant to tell the accused that had she been raped by him she would have mentioned this in the Viber messages.
108. During the trial it was observed that the complainant was a shy person who was taking her time to answer questions. This characteristic of the complainant does not mean that she was not telling the truth. The demeanour of the complainant was consistent with her honesty she was not evasive in cross examination and she was unwavering in what the accused had done to her. The evidence given by the complainant is reliable and credible and I have no doubt in my mind that the complainant told the truth in court.
109. I also accept the evidence of Penina Manumanunivalu as reliable and credible, she was able to relay what the complainant had told her. The defence had taken issue in respect of the date and day of the alleged incident mentioned in the police statement of Penina. However, defence exhibit 1 in the form of the Viber messages clearly indicates that something between the complainant and the accused had happened on 19<sup>th</sup> September hence the reaction by the complainant via Viber messages from early morning of the 20<sup>th</sup> (the following day).
110. I accept the evidence of Penina that the day and date of 18<sup>th</sup> September mentioned in her police statement was a mistake. The date and day of the allegation has been confirmed by the complainant. The complainant denied telling Penina that the incident had happened on Saturday 18<sup>th</sup>

September. In any event the above day and date of the incident does not have any bearing on the substantive allegation.

111. There was an inconsistency of evidence between the complainant and Penina about the threat made by the accused to the complainant. The complainant told the court that she did not tell Penina about the accused threatening her but Penina said the complainant had told her the accused had threatened the complainant. This is an obvious inconsistency between the two versions, however, this inconsistency is not a major inconsistency which does not affect the evidence of both the prosecution witnesses.
112. The decisive aspect of recent complaint evidence is to show consistency of the complainant's conduct with her evidence given at trial. In this case the complainant had relayed crucial information to Penina about what the accused had done to her in her room which was consistent with the evidence of the complainant. I also accept the observations of Penina that the complainant looked sad and was crying when she was narrating to Penina about what the accused had done to her.
113. The Supreme Court in *Anand Abhay Raj vs. The State, CAV 0003 of 2013 (20<sup>th</sup> August, 2014)* at paragraph 39 made an important observation about the above as follows:

*The complainant need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct, provided it is capable of supporting the credibility of the complainant's evidence.*

114. I accept the evidence of both the prosecution witnesses the defence has not been able to create a reasonable doubt in the prosecution case and I reject the defence of denial as not plausible.

**CONCLUSION**

115. This court is satisfied beyond reasonable doubt that the accused on 19<sup>th</sup> September, 2021 had penetrated the vagina of the complainant with his penis without her consent. The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

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

117. This is the judgment of the court.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**  
31 July, 2023

**Solicitors**

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

**Messrs Iqbal Khan & Associates for the Accused.**